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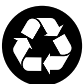

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The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 126

[Docket No. DHS–2022–0039]

RIN 1601–AB09

Procedures of the Transportation Security Oversight Board Review Panel Concerning Federal Aviation Administration Airman Certificates; Correction

AGENCY: Office of the Secretary, DHS.

ACTION: Final rule; correction.

SUMMARY: In a final rule published March 12, 2024, DHS codified the procedures that apply to appeals before the Transportation Security Oversight Board concerning Federal Aviation Administration Airmen Certificates. The rule misstated the editorial action taking place. This document corrects that error.

DATES: This correction is effective May 13, 2024.

FOR FURTHER INFORMATION CONTACT: Randall Kaplan, Attorney, Office of the General Counsel, Department of Homeland Security, Washington, DC 20528–0485. PHONE: 202 282–9822.

SUPPLEMENTARY INFORMATION: In the final rule published March 12, 2024, at 89 FR 17693, DHS amended 6 CFR chapter 1 by revising part 126. However, the words of issuance instructing the amendment erroneously stated the Department is adding part 126. Part 126 already exists, and therefore the instruction should have been that the Department is revising it.

Correction

In FR Rule Doc. No. 2024–05131 appearing on page 17693 in the **Federal Register** of Tuesday, March 12, 2024, the following correction is made:

1. On page 17702, in the third column under the heading ''The Amendments,'' the words of issuance ''For the reasons set forth in the preamble, the Department of Homeland Security adds part 126 to Title 6, Code of Federal Regulations, to read as follows:'' is corrected to read ''For the reasons set forth in the preamble, the Department of Homeland Security revises part 126 to Title 6, Code of Federal Regulations, to read as follows:''.

Christina E. McDonald,

Associate General Counsel for Regulatory Affairs, U.S. Department of Homeland Security.

[FR Doc. 2024–08530 Filed 4–24–24; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 52

[NRC–2024–0019]

Regulatory Guide: Installation Design and Installation of Vented Lead-Acid Storage Batteries for Production and Utilization Facilities

AGENCY: Nuclear Regulatory Commission.

ACTION: Final guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 3 to Regulatory Guide (RG) 1.128, ''Installation Design and Installation of Vented Lead-Acid Storage Batteries for Production and Utilization Facilities.'' This RG describes an approach that is acceptable to the NRC staff to meet regulatory requirements for the installation design and installation of vented lead-acid storage batteries in production and utilization facilities.

DATES: Revision 3 to RG 1.128 is available April 25, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0019 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–2024–0019. 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 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, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

Revision 3 to RG 1.128 and the regulatory analysis may be found in ADAMS under Accession Nos. ML24052A077 and ML23277A279, respectively.

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FOR FURTHER INFORMATION CONTACT: Michael Eudy, Office of Nuclear Regulatory Research, telephone: 301–415–3104, email: *Michael.Eudy@nrc.gov* and Sheila Ray, Office of Nuclear Reactor Regulation, telephone: 301–415–3653, email: *Sheila.Ray@nrc.gov.* Both are staff of the NRC, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC is issuing a revision in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The proposed Revision 3 to RG 1.128 was issued with a temporary

identification of Draft Regulatory Guide, (DG)-1421 (ADAMS Accession No. ML23277A276.) This revision of this guide (Revision 3) describes an approach that is acceptable to the NRC staff to meet the regulatory requirements for installation, inspection, and testing for Class 1E power, instrumentation, and control equipment at production and utilization facilities. RG 1.128, Revision 3 endorses, with clarifications, Institute of Electrical and Electronics Engineers (IEEE) Standard 484–2019, ''IEEE Recommended Practice for Installation Design and Installation of Vented Lead-Acid Batteries for Stationary Applications.''

II. Additional Information

The NRC published a notice of the availability of DG–1421 in the **Federal Register** on January 8, 2024 (89 FR 895) for a 30-day public comment period. The public comment period closed on February 7, 2024. Public comments on DG–1421 and the staff responses to the public comments are available in ADAMS under Accession No. ML24052A078.

As noted in the **Federal Register** on December 9, 2022 (87 FR 75671), this document is being published in the ''Rules'' section of the **Federal Register** to comply with publication requirements under chapter 1 of title 1 of the *Code of Federal Regulations* (CFR).

III. Congressional Review Act

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting, Forward Fitting, and Issue Finality

Issuance of RG 1.128, Revision 3, does not constitute backfitting as that term is defined in 10 CFR 50.109, ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests;'' does not affect the issue finality of an approval issued under 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants;'' and does not constitute forward fitting as that term is defined and described in MD 8.4 because, as explained in RG 1.128, Revision 3, licensees would not be required to comply with the positions set forth in the RG.

V. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html.* Suggestions will be considered in future updates and enhancements to the ''Regulatory Guide'' series.

Dated: April 19, 2024.

For the Nuclear Regulatory Commission.

Meraj Rahimi,

Chief, Regulatory Guide and Programs Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2024–08866 Filed 4–24–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 52

[NRC–2023–0216]

Regulatory Guide: Installation, Inspection, and Testing for Class 1E Power, Instrumentation, and Control Equipment at Production and Utilization Facilities

AGENCY: Nuclear Regulatory Commission.

ACTION: Final guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 1 to Regulatory Guide (RG) 1.30, ''Installation, Inspection, and Testing for Class 1E Power, Instrumentation, and Control Equipment at Production and Utilization Facilities.'' This RG describes an approach that is acceptable to the NRC staff to meet the regulatory requirements for installation, inspection, and testing for Class 1E power, instrumentation, and control equipment at production and utilization facilities.

DATES: Revision 1 to RG 1.30 is available on April 25, 2024.

ADDRESSES: Please refer to Docket ID NRC–2023–0216 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–2023–0216. 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 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, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

Revision 1 to RG 1.30 and the regulatory analysis may be found in ADAMS under Accession Nos. ML24040A161 and ML23235A321, respectively.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Michael Eudy, Office of Nuclear Regulatory Research, telephone: 301–415–3104; email: *Michael.Eudy@nrc.gov* and Darrell Murdock, Office of Nuclear Regulatory Research, telephone: 301–415–1591; email: *Darrell.Murdock@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC is issuing a revision in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The proposed Revision 1 to RG 1.30 was issued with a temporary identification of Draft Regulatory Guide (DG)-1419 (ADAMS Accession No. ML23222A182). This revision of this

guide (Revision 1) describes an approach that is acceptable to the NRC staff to meet the regulatory requirements for installation, inspection, and testing for Class 1E power, instrumentation, and control equipment at production and utilization facilities. RG 1.30, Revision 1 endorses, with a clarification, Institute of Electrical and Electronics Engineers (IEEE) Standard 336–2020, ''IEEE Recommended Practice for Installation, Inspection, and Testing for Class 1E Power, Instrumentation, and Control Equipment at Nuclear Facilities.''

II. Additional Information

The NRC published a notice of the availability of DG–1419 in the **Federal Register** on December 20, 2023 (88 FR 87967) for a 30-day public comment period. The public comment period closed on January 19, 2024. Public comments on DG–1419 and the staff responses to the public comments are available in ADAMS under Accession No. ML24040A165.

As noted in the **Federal Register** on December 9, 2022 (87 FR 75671), this document is being published in the ''Rules'' section of the **Federal Register** to comply with publication requirements under chapter I of title 1 of the *Code of Federal Regulations* (CFR).

III. Congressional Review Act

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting, Forward Fitting, and Issue Finality

Issuance of RG 1.30, Revision 1, does not constitute backfitting as that term is defined in 10 CFR 50.109, ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests''; affect the issue finality of an approval issued under 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants''; or constitute forward fitting as that term is defined and described in MD 8.4 because, as explained in RG 1.30, Revision 1, licensees are not required to comply with the positions set forth in the RG.

V. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html.* Suggestions will be considered in future updates and enhancements to the ''Regulatory Guide'' series.

Dated: April 18, 2024.

For the Nuclear Regulatory Commission.

Meraj Rahimi,

Chief, Regulatory Guide and Programs Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2024–08720 Filed 4–24–24; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2247; Airspace Docket No. 23–ACE–4]

RIN 2120–AA66

Amendment of VOR Federal Airway V–132 and Revocation of VOR Federal Airways V–131, V–307, and V–350 in the Vicinity of Chanute, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Very High Frequency Omnidirectional Range (VOR) Federal Airway V–132 and revokes VOR Federal Airways V–131, V–307, and V–350. The FAA is taking this action due to the planned decommissioning of the VOR portion of the Chanute, KS (CNU), VOR/Distance Measuring Equipment (VOR/DME) navigational aid (NAVAID). The Chanute VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Effective date 0901 UTC, July 11, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the Air Traffic Service (ATS) route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA–2023–2247 in the **Federal Register** (88 FR 78265; November 15, 2023), proposing to amend VOR Federal Airway V–132 and revoke VOR Federal Airways V–131, V–307, and V–350 due to the planned decommissioning of the VOR portion of the Chanute, KS, VOR/DME NAVAID. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

Incorporation by Reference

VOR Federal airways are published in paragraph 6010(a) of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the ADDRESSES section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by amending VOR Federal Airway V–132 and revoking VOR Federal Airways V–131, V–307, and V–350 due to the planned decommissioning of the VOR portion of the Chanute, KS, VOR/DME NAVAID. The airway actions are described below.

V–131: Prior to this final rule, V–131 extended between the Okmulgee, OK, VOR/DME and the Topeka, KS, VOR/Tactical Air Navigation (VORTAC). The airway segment between the Tulsa, OK, VORTAC and the Topeka VORTAC is removed due to the planned decommissioning of the Chanute VOR. Additionally, the airway segment between the Okmulgee VOR/DME and the Tulsa VORTAC is also removed since that airway segment overlaps V–161, which will remain charted and provide navigational guidance between the two NAVAIDs. As a result, the airway is removed in its entirety.

V–132: Prior to this final rule, V–132 extended between the Medicine Bow, WY, VOR/DME and the intersection of the Forney, MO, VOR 086° and Vichy, MO, VOR/DME 156° radials (LENOX Fix), excluding that portion of the airway within restricted areas R–4501A, R–4501B, R–4501C, and R–4501D during their time of activation. The airway segment between the Hutchinson, KS, VOR/DME and the Springfield, MO, VORTAC is removed. Additionally, that portion of the airway within restricted areas R–4501E, R–4501F, and R–4501H is also excluded during the restricted areas times of activation since those restricted areas also fall within 4 nautical miles of the airway. As amended, the airway is changed to now extend between the Medicine Bow VOR/DME and the Hutchinson VOR/DME, and between the Springfield VORTAC and the intersection of the Forney VOR 086° and Vichy VOR/DME 156° radials (LENOX Fix), excluding the portion within all 7 restricted areas of the R–4501 restricted area complex.

V–307: Prior to this final rule, V–307 extended between the Chanute, KS, VOR/DME and the Emporia, KS, VORTAC. The airway is removed in its entirety.

V–350: Prior to this final rule, V–350 extended between the Wichita, KS, VORTAC and the Chanute, KS, VOR/DME. The airway is removed in its entirety.

The NAVAID radials listed in the V–132 description in the regulatory text of this final rule are unchanged and stated in degrees True north.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of amending VOR Federal Airway V–132 and revoking VOR Federal Airways V–131, V–307, and V–350, due to the planned decommissioning of the VOR portion of the Chanute, KS, VOR/DME NAVAID, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5–6.5k, which categorically excludes from further environmental impact review publication of existing air traffic control procedures that do not essentially change existing tracks, create new tracks, change altitude, or change concentration of aircraft on these tracks. As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–131 [Removed]

* * * * *

V–132 [Amended]

From Medicine Bow, WY; INT Medicine Bow 106° and Cheyenne, WY, 330° radials; Cheyenne; Akron, CO; 17 miles, 49 miles, 59 MSL, Goodland, KS; 50 miles, 97 miles, 65 MSL, to Hutchinson, KS. From Springfield, MO; INT Springfield 058° and Forney, MO, 266° radials; Forney; to INT Forney 086° and Vichy, MO, 156° radials, excluding that portion within R–4501A, R–4501B, R–4501C, R–4501D, R–4501E, R–4501F, and R–4501H during their time of activation.

* * * * *

V–307 [Removed]

* * * * *

V–350 [Removed]

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Issued in Washington, DC, on April 18, 2024.

Frank Lias,

Manager, Rules and Regulations Group.

[FR Doc. 2024–08672 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2040; Airspace Docket No. 22–AEA–21]

RIN 2120–AA66

Establishment and Amendment of United States Area Navigation (RNAV) Routes; Eastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes United States Area Navigation (RNAV) Routes T–480, T–482, and T–488, and amends RNAV Routes Q–140, T–206, T–258, T–287, T–295, and T–398 in the eastern United States. These actions support Next Generation Air Transportation System (NextGen) which provides a modern RNAV route structure to improve the efficiency of the National Airspace System (NAS).

DATES: Effective date 0901 UTC, July 11, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the Air Traffic Service (ATS) route structure as necessary to preserve the safe and efficient flow of air traffic within the NAS.

History

The FAA published a NPRM for Docket No. FAA 2023–2040 in the **Federal Register** (88 FR 73268; October 25, 2023), proposing to establish three RNAV routes and amend six RNAV routes in the eastern United States. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Differences From the NPRM

Subsequent to publication of the NPRM, the FAA identified that two route points had been inadvertently omitted from the legal description of RNAV Routes T–287 and T–398. These route points are required to be added to the part 71 description of each route as it represents a turn point of one degree or more. The HAMRR, MD, waypoint (WP) is added between the TOMYD, PA, WP and the DANII, MD, WP in the description of T–287; and the MANGE, VA, Fix is added between the BOUSY, VA, WP and the THHMP, VA, WP in the description of T–398. The addition of the HAMRR WP and the MANGE Fix to their respective routes does not substantively alter the route of T–287 and T–398.

The FAA identified the Bangor, ME (BGR), Very High Frequency Omnidirectional Range/Tactical Air Navigation (VORTAC) was inadvertently omitted from the NPRM's part 71 description of RNAV Route T–295. Prior to this action, the Bangor VORTAC was in the description of RNAV Route T–295 and remains on the route between the BRNNS, ME, Fix and the LAUDS, ME, WP.

In the part 71 description of RNAV Route T–206 the NUROE, NC, WP was removed as intended. In the description of the proposed changes the removal of the NUROE WP was not addressed. The NUROE WP remains charted on T–206 but is removed from the part 71 description as the route segments that it makes up do not contain a turn of one degree or more. In the part 71 description of RNAV Route T–287 the BOUSY, VA, WP was inadvertently listed as the BOUSY, NC, WP. The BOUSY WP is located in the state of Virginia in the National Airspace System Resource (NASR) database and charted as such.

Finally, in the NPRM the FAA incorrectly listed the RUBKI, MI; TOTHH, NY; HAVNS, OA; VYSOR, MD; ACUTE, NC; SVILL, VA; and POORK, VA route points as Fixes. The route points are identified as WPs in the NASR database and charted as WPs accordingly. Additionally, the FAA incorrectly listed YODAA, NY as a WP. YODAA, NY is identified as a Fix in the NASR database and charted as a Fix accordingly. This final rule corrects these errors.

Incorporation by Reference

United States Area Navigation routes (Q-routes) are published in paragraph 2006 and United States Area Navigation (T-routes) are published in paragraph 6011 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by establishing RNAV Routes T–480, T–482, and T–488, and amending RNAV Routes Q–140, T–206, T–258, T–287, T–295, and T–398 in the eastern United States. This action supports NextGen which provides a modern RNAV route structure to improve the efficiency of the NAS. The amendments are described below.

Q–140: Prior to this final rule, Q–140 extended between the WOBED, WA, WP and the YODAA, NY, Fix. The route is amended by moving the RUBKI, Canada, WP 22 feet west of its current position to align with the United States/Canadian border replacing the CFCTJ, MI, Computer Navigation Fix (CNF). Additionally, the RAGIX, NY, Fix is being moved 0.5 nautical miles (NM) east to align with the United States/Canadian border replacing the CFDHX, NY, CNF. The RODYY, NY, WP is being

replaced with the TOTHH, NY, WP due to similar sounding route point names. Finally, the FAA is removing fixes from the route's legal description for segments that are in Canada, and segments that contain turns of less than one degree. The following are the route points that are removed: GETNG, WA, WP; CORDU, ID, Fix; PETIY, MT, WP; CHOTE, MT, Fix; CESNA, WI, WP; WISCN, WI, WP; PEPLA, Canada, WP; SIKBO, Canada, WP; MEDAV, Canada, WP; HANKK, NY, Fix; BEEPS, NY, Fix; EXTOL, NY, Fix; MEMMS, NY, Fix; and KODEY, NY, Fix. As amended, the route continues to extend between the WOBED WP and the YODAA Fix.

T–206: Prior to this final rule, T–206 extended between the ENADE, NC, WP and the ZADEL, NC, WP. The route is extended to the east between the ZADEL WP and the SNOWS, NC, Fix. As amended, the route is changed to now extend between the ENADE, NC, WP and the SNOWS, NC, Fix.

T–258: Prior to this final rule, T–258 extended between the MINIM, AL, Fix and the GMINI, NC, WP. The route is extended to the northeast between the GMINI WP and the BOUSY, VA, WP. Additionally, the FAA removed fixes from the route's legal description for segments that contain turns of less than one degree. The following are the route points that are removed: CAYAP, AL, Fix; ZIVMU, AL, Fix; DAYVS, AL, WP; HEENA, AL, Fix; KYLEE, AL, Fix; CAMPP, AL, Fix; and LANGA, GA, Fix. As amended, the route is changed to now extend between the MINIM Fix and the BOUSY WP.

T–287: Prior to this final rule, T–287 extended between the DENNN, VA, WP and the TOMYD, MD, WP. The route is extended to the southwest between the GMINI, NC, WP and the DENNN WP; and to the northeast between the TOMYD WP and the Kennebunk, ME (ENE), VOR/Distance Measuring Equipment (VOR/DME). The FAA moved the TOMYD, MD, WP 2.8 NM north of its current location. Moving the TOMYD WP allows alignment with future proposed RNAV routes, and results in the WP being in the state of Pennsylvania. The amended route segment of T–287 overlays a portion of VOR Federal Airway V–44 between the PALEO, MD, WP and the WNSTN, NJ, WP; a portion of VOR Federal Airway V–139 between MANTA, NJ, Fix and the Kennebunk VOR/DME; and a portion of VOR Federal Airway V–454 between the SNOWS, NC, Fix and the Lawrenceville, VA (LVL), VORTAC. Additionally, the FAA removed fixes from the route's legal description for segments that contain turns of less than one degree. The following are the waypoints that are removed: DENNN, VA, WP; CAARY, VA, WP; and WILMY, VA, WP. As amended, the route is changed to now extend between the GMINI WP and the Kennebunk VOR/DME.

T–295: Prior to this final rule, T–295 extended between the POORK, VA, WP and the Presque Isle, ME (PQI), VOR/DME. The FAA extended T–295 to the southwest between the DUFFI, NC, Fix and the POORK WP; added the DOGWD, VA, Fix and the RIPKN, MD, WP to the route; and replaced the Wilkes Barre, PA (LVZ), VOR/DME with the WLKES, PA, Fix. Additionally, the FAA removed the Chester, MA (CTR), VOR/DME from the route's legal description as those segments contain turns of less than one degree. As amended, the route is changed to now extend between the DUFFI Fix and the Presque Isle VOR/DME.

T–398: Prior to this final rule, T–398 extended between the RRORY, TX, WP and the GMINI, NC, WP. The FAA extended T–398 to the northeast between the GMINI WP and the TAPPA, VA, Fix. The amended route segment of T–398 overlays a portion of VOR Federal Airway V–155 from the Sandhills, NC (SDZ), VORTAC to the MANGE, VA, Fix. As amended, the route is changed to now extend between the RRORY WP and the TAPPA Fix.

T–480: T–480 is a new route that extends between the Greensboro, NC (GSO), VORTAC and the ZOLMN, NC, Fix. T–480 overlays a portion of VOR Federal Airway V–266 between the Greensboro VORTAC and the South Boston, MA (SBV), VORTAC; from the MAZON, VA, Fix to the Wright Brothers, NC (RBX), VOR/DME; and a portion of Colored Federal Airway Green 13 (G–13) from the MANTEO, NC (MQI), Nondirectional Radio Beacon (NDB) to the ZOLMN Fix.

T–482: T–482 is a new route that extends between the MEYER, NC, Fix and the COUPN, VA, WP. T–482 overlays a portion of VOR Federal Airway V–615 between the MEYER Fix and the DUFFI, NC, Fix.

T–488: T–488 is a new route that extends between the Tar River, NC (TYI), VORTAC and the RTBRO, NC, Fix. T–488 overlays a portion of VOR Federal Airway V–189 from the Tar River VORTAC and the Wright Brothers, NC (RBX), VOR/DME.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of establishing RNAV Routes T–480, T–482, and T–488, and amending RNAV Routes Q–140, T–206, T–258, T–287, T–295, and T–398 in the eastern United States in support of FAA NextGen, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points); and paragraph 5–6.5b, which categorically excludes from further environmental impact review ''Actions regarding establishment of jet routes and Federal airways (see 14 CFR 71.15, *Designation of jet routes and VOR Federal airways*) . . .''. As such, this airspace action is not expected to cause any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. Accordingly, the FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 2006 United States Area Navigation Routes

* * * * *

Q–140 WOBED, WA to YODAA, NY [Amended]

WOBED, WA	WP	(Lat. 48°36′01.07″ N, long. 122°49′46.52″ W)
LEWIT, MT	WP	(Lat. 47°23′00.21″ N, long. 110°08′44.78″ W)
SAYOR, MT	FIX	(Lat. 47°13′58.34″ N, long. 104°58′39.28″ W)
WILTN, ND	FIX	(Lat. 47°04′58.09″ N, long. 100°47′43.84″ W)
TTAIL, MN	WP	(Lat. 46°41′28.00″ N, long. 096°41′09.00″ W)
EEGEE, WI	WP	(Lat. 45°08′53.00″ N, long. 088°45′58.00″ W)
DAYYY, MI	WP	(Lat. 44°10′10.00″ N, long. 084°22′23.00″ W)
RUBKI, MI	WP	(Lat. 44°14′54.81″ N, long. 082°16′08.01″ W)
RAGIX, NY	FIX	(Lat. 43°32′26.95″ N, long. 078°56′47.94″ W)
AHPAH, NY	WP	(Lat. 43°18′19.00″ N, long. 078°07′35.11″ W)
ARRKK, NY	WP	(Lat. 42°03′48.52″ N, long. 075°19′00.41″ W)
TOTHH, NY	WP	(Lat. 41°52′25.85″ N, long. 074°35′49.39″ W)
YODAA, NY	FIX	(Lat. 41°43′21.19″ N, long. 074°01′52.76″ W)

Excluding the airspace within Canada.

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Paragraph 6011 United States Area Navigation Routes

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T–206 ENADE, NC to SNOWS, NC [Amended]

ENADE, NC	WP	(Lat. 35°12′07.91″ N, long. 081°44′40.85″ W)
FADOS, NC	WP	(Lat. 35°28′21.62″ N, long. 081°20′48.70″ W)
GOTHS, NC	WP	(Lat. 35°35′17.41″ N, long. 080°58′25.43″ W)
ZADEL, NC	WP	(Lat. 35°33′46.97″ N, long. 080°01′47.46″ W)
Liberty, NC (LIB)	VORTAC	(Lat. 35°48′41.84″ N, long. 079°36′45.33″ W)
SNOWS, NC	FIX	(Lat. 35°54′33.80″ N, long. 079°19′05.06″ W)

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T–258 MINIM, AL to BOUSY, VA [Amended]

MINIM, AL	FIX	(Lat. 33°32′31.14″ N, long. 088°02′23.62″ W)
CRMSN, AL	WP	(Lat. 33°15′31.80″ N, long. 087°32′12.70″ W)
BRAVS, GA	WP	(Lat. 33°02′56.44″ N, long. 085°12′22.93″ W)
CANER, GA	FIX	(Lat. 32°45′21.48″ N, long. 084°35′51.42″ W)
SINCA, GA	FIX	(Lat. 33°04′52.28″ N, long. 083°36′17.52″ W)
UGAAA, GA	WP	(Lat. 33°56′51.32″ N, long. 083°19′28.42″ W)
HRTWL, SC	WP	(Lat. 34°15′05.33″ N, long. 082°09′15.55″ W)
NATCH, NC	WP	(Lat. 35°01′34.52″ N, long. 080°06′29.28″ W)
GMINI, NC	WP	(Lat. 35°12′23.01″ N, long. 079°34′01.98″ W)
LANHO, NC	FIX	(Lat. 35°31′13.87″ N, long. 078°49′11.96″ W)
ZEBUL, NC	FIX	(Lat. 35°54′44.33″ N, long. 078°23′00.47″ W)
MEYER, NC	FIX	(Lat. 36°12′49.33″ N, long. 078°04′36.13″ W)
BOUSY, VA	WP	(Lat. 36°49′04.41″ N, long. 077°54′05.08″ W)

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T–287 GMINI, NC to Kennebunk, ME (ENE) [Amended]

GMINI, NC	WP	(Lat. 35°12′23.01″ N, long. 079°34′01.98″ W)
MMJAY, NC	WP	(Lat. 35°21′31.36″ N, long. 079°31′57.51″ W)
SNOWS, NC	FIX	(Lat. 35°54′33.80″ N, long. 079°19′05.06″ W)
OXFRD, NC	FIX	(Lat. 36°25′13.02″ N, long. 078°35′20.30″ W)
BOUSY, VA	WP	(Lat. 36°49′04.41″ N, long. 077°54′05.08″ W)
MANGE, VA	FIX	(Lat. 37°01′27.74″ N, long. 077°43′43.08″ W)
Flat Rock, VA (FAK)	VORTAC	(Lat. 37°31′42.63″ N, long. 077°49′41.59″ W)
Gordonsville, VA (GVE)	VORTAC	(Lat. 38°00′48.96″ N, long. 078°09′10.90″ W)
KAIJE, VA	WP	(Lat. 38°44′34.79″ N, long. 078°42′48.47″ W)
BAMMY, WV	WP	(Lat. 39°24′33.13″ N, long. 078°25′45.64″ W)

REEES, PA	WP	(Lat. 39°47′51.75″ N, long. 077°45′56.31″ W)
TOMYD, PA	WP	(Lat. 39°43′39.02″ N, long. 077°07′58.89″ W)
HAMRR, MD	WP	(Lat. 39°30′03.42″ N, long. 076°56′10.84″ W)
DANII, MD	WP	(Lat. 39°17′46.42″ N, long. 076°42′19.36″ W)
VYSOR, MD	WP	(Lat. 39°02′03.86″ N, long. 076°14′59.88″ W)
WNSTN, NJ	WP	(Lat. 39°05′43.81″ N, long. 074°48′01.20″ W)
MANTA, NJ	FIX	(Lat. 39°54′07.01″ N, long. 073°32′31.63″ W)
BEADS, NY	FIX	(Lat. 40°44′04.51″ N, long. 072°32′34.21″ W)
ORCHA, NY	WP	(Lat. 40°54′55.46″ N, long. 072°18′43.64″ W)
PARCH, NY	FIX	(Lat. 41°05′57.22″ N, long. 072°07′14.66″ W)
Providence, RI (PVD)	VOR/DME	(Lat. 41°43′27.63″ N, long. 071°25′46.71″ W)
INNDY, MA	FIX	(Lat. 41°46′19.19″ N, long. 071°05′55.93″ W)
BURDY, MA	FIX	(Lat. 41°57′19.14″ N, long. 070°57′07.45″ W)
HAVNS, OA	WP	(Lat. 42°17′55.00″ N, long. 070°27′42.00″ W)
GRGIO, MA	WP	(Lat. 42°35′09.36″ N, long. 070°33′54.40″ W)
LBSTA, MA	FIX	(Lat. 42°48′00.00″ N, long. 070°36′48.70″ W)
Kennebunk, ME (ENE)	VOR/DME	(Lat. 43°25′32.42″ N, long. 070°36′48.69″ W)

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T–295 DUFFI, NC to Presque Isle, ME (PQI) [Amended]

DUFFI, NC	FIX	(Lat. 36°20′57.87″ N, long. 077°47′29.22″ W)
POORK, VA	WP	(Lat. 36°34′11.34″ N, long. 077°35′21.39″ W)
DOGWD, VA	FIX	(Lat. 36°45′05.57″ N, long. 077°28′53.38″ W)
HOUKY, VA	WP	(Lat. 37°19′55.98″ N, long. 077°07′57.63″ W)
TAPPA, VA	FIX	(Lat. 37°58′12.66″ N, long. 076°50′40.62″ W)
COLIN, VA	FIX	(Lat. 38°05′59.23″ N, long. 076°39′50.85″ W)
SHLBK, MD	WP	(Lat. 38°20′16.21″ N, long. 076°26′10.51″ W)
LOUIE, MD	FIX	(Lat. 38°36′44.33″ N, long. 076°18′04.37″ W)
GRACO, MD	FIX	(Lat. 38°56′29.81″ N, long. 076°11′59.22″ W)
RIPKN, MD	WP	(Lat. 39°10′05.68″ N, long. 076°20′14.13″ W)
BAABS, MD	WP	(Lat. 39°22′01.36″ N, long. 076°27′31.21″ W)
Lancaster, PA (LRP)	VOR/DME	(Lat. 40°07′11.91″ N, long. 076°17′28.66″ W)
WLKES, PA	FIX	(Lat. 41°16′22.57″ N, long. 075°41′21.60″ W)
LAAYK, PA	FIX	(Lat. 41°28′32.64″ N, long. 075°28′57.31″ W)
SAGES, NY	FIX	(Lat. 42°02′46.33″ N, long. 074°19′10.33″ W)
SASHA, MA	FIX	(Lat. 42°07′58.70″ N, long. 073°08′55.39″ W)
KEYNN, NH	WP	(Lat. 42°47′39.99″ N, long. 072°17′30.35″ W)
Concord, NH (CON)	VOR/DME	(Lat. 43°13′11.23″ N, long. 071°34′31.63″ W)
Kennebunk, ME (ENE)	VOR/DME	(Lat. 43°25′32.42″ N, long. 070°36′48.69″ W)
BRNNS, ME	FIX	(Lat. 43°54′08.64″ N, long. 069°56′42.81″ W)
Bangor, ME (BGR)	VORTAC	(Lat. 44°50′30.46″ N, long. 068°52′26.27″ W)
LAUDS, ME	WP	(Lat. 45°25′10.13″ N, long. 068°12′26.96″ W)
HULTN, ME	WP	(Lat. 46°02′22.29″ N, long. 067°50′02.06″ W)
Presque Isle, ME (PQI)	VOR/DME	(Lat. 46°46′27.07″ N, long. 068°05′40.37″ W)

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T–398 RRORY, TX to TAPPA, VA [Amended]

RRORY, TX	WP	(Lat. 33°32′14.95″ N, long. 096°14′03.45″ W)
MERIC, TX	WP	(Lat. 33°11′54.97″ N, long. 095°32′32.66″ W)
SLOTH, TX	WP	(Lat. 33°30′49.99″ N, long. 094°04′24.38″ W)
MUFRE, AR	FIX	(Lat. 34°05′31.32″ N, long. 093°10′43.80″ W)
LITTR, AR	WP	(Lat. 34°40′39.90″ N, long. 092°10′49.26″ W)
EMEEY, AR	WP	(Lat. 34°34′30.29″ N, long. 090°40′27.14″ W)
GOINS, MS	WP	(Lat. 34°46′12.64″ N, long. 089°29′46.81″ W)
HAGIE, AL	WP	(Lat. 34°42′25.87″ N, long. 087°29′29.76″ W)
FILUN, AL	WP	(Lat. 34°47′50.14″ N, long. 086°38′01.14″ W)
JILIS, GA	WP	(Lat. 34°57′23.98″ N, long. 085°08′03.46″ W)
CRAND, GA	WP	(Lat. 34°57′28.88″ N, long. 084°51′20.59″ W)
BALNN, GA	WP	(Lat. 34°56′34.20″ N, long. 083°54′56.42″ W)
BURGG, SC	WP	(Lat. 35°02′00.55″ N, long. 081°55′36.86″ W)
GAFFE, SC	WP	(Lat. 35°05′38.90″ N, long. 081°33′23.92″ W)
CRLNA, NC	WP	(Lat. 35°12′49.48″ N, long. 080°56′57.32″ W)
LOCAS, NC	FIX	(Lat. 35°12′05.18″ N, long. 080°26′44.89″ W)
RELPY, NC	WP	(Lat. 35°12′45.70″ N, long. 079°47′28.76″ W)
GMINI, NC	WP	(Lat. 35°12′23.01″ N, long. 079°34′01.98″ W)
JIMYV, NC	WP	(Lat. 35°24′52.67″ N, long. 079°17′16.76″ W)
ACUTE, NC	WP	(Lat. 35°36′35.10″ N, long. 079°03′53.81″ W)
Raleigh/Durham, NC (RDU)	VORTAC	(Lat. 35°52′21.08″ N, long. 078°47′00.03″ W)
BOUSY, VA	WP	(Lat. 36°49′04.41″ N, long. 077°54′05.08″ W)
MANGE, VA	FIX	(Lat. 37°01′27.74″ N, long. 077°43′43.08″ W)

THHMP, VA	WP	(Lat. 37°29′29.47″ N, long. 077°19′08.75″ W)
SVILL, VA	WP	(Lat. 37°47′11.11″ N, long. 077°01′56.89″ W)
TAPPA, VA	FIX	(Lat. 37°58′12.66″ N, long. 076°50′40.62″ W)

* * * * *

T–480 Greensboro, NC (GSO) to ZOLMN, NC [New]

Greensboro, NC (GSO)	VORTAC	(Lat. 36°02′44.49″ N, long. 079°58′34.94″ W)
MCDON, VA	WP	(Lat. 36°40′29.56″ N, long. 079°00′52.03″ W)
MAZON, VA	FIX	(Lat. 36°45′23.24″ N, long. 077°22′02.91″ W)
COUPN, VA	WP	(Lat. 36°42′50.83″ N, long. 077°00′44.04″ W)
Elizabeth City, NC (ECG)	VOR/DME	(Lat. 36°15′27.26″ N, long. 076°10′32.15″ W)
RTBRO, NC	FIX	(Lat. 35°55′13.85″ N, long. 075°41′49.05″ W)
ZOLMN, NC	FIX	(Lat. 35°38′42.35″ N, long. 075°24′27.41″ W)

T–482 MEYER, NC to COUPN, VA [New]

MEYER, NC	FIX	(Lat. 36°12′49.33″ N, long. 078°04′36.13″ W)
COUPN, VA	WP	(Lat. 36°42′50.83″ N, long. 077°00′44.04″ W)

T–488 TAR RIVER NC (TYI) to RTBRO, NC [New]

Tar River, NC (TYI)	VORTAC	(Lat. 35°58′36.21″ N, long. 077°42′13.43″ W)
RTBRO, NC	FIX	(Lat. 35°55′13.85″ N, long. 075°41′49.05″ W)

* * * * *

Issued in Washington, DC, on April 18, 2024.

Frank Lias,

Manager, Rules and Regulations Group.

[FR Doc. 2024–08665 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 31543; Amdt. No. 578]

IFR Altitudes; Miscellaneous Amendments

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

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: Effective 0901 UTC, May 16, 2024.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg. 26, Room 217, Oklahoma City, OK 73169–6918. Telephone: (405) 954–1139.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC, on March 21, 2024.

Thomas J. Nichols,

Aviation Safety, Flight Standards Service. Manager, Standards Section, Flight Procedures & Airspace Group, Flight Technologies and Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, May 16, 2024.

PART 95—IFR ALTITUDES

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113 and 14 CFR 11.49(b)(2).

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINT

[Amendment 578 effective date May 16, 2024]

From	To	MEA
§ 95.1001 Direct Routes–U.S.		
§ 95.4 Green Federal Airway G4 Is Amended To Delete		
WOOD RIVER, AK NDB	ILIAMNA, AK NDB/DME	*4500
*3000—MOCA		
§ 95.6 Blue Federal Airway B12 Is Amended To Delete		
WOODY ISLAND, AK NDB	ILIAMNA, AK NDB/DME	*10000
*9300—MOCA		

From	To	MEA	MAA
§ 95.3000 Low Altitude RNAV Routes			
§ 95.3303 RNAV Route T303 Is Added To Read			
KINSTON, NC VORTAC	KOHLS, NC WP	1900	17500
KOHLS, NC WP	NORFOLK, VA VORTAC	1800	17500
NORFOLK, VA VORTAC	OUTLA, VA WP	1800	17500
OUTLA, VA WP	JAMIE, VA FIX	1800	17500
JAMIE, VA FIX	MAGGO, MD FIX	1700	17500
MAGGO, MD FIX	TRPOD, MD WP	1800	17500
TRPOD, MD WP	WATERLOO, DE VOR/DME	1900	17500
WATERLOO, DE VOR/DME	LEEAH, NJ FIX	1800	17500
LEEAH, NJ FIX	DIXIE, NJ FIX	1900	17500
DIXIE, NJ FIX	KENNEDY, NY VOR/DME	2000	17500
KENNEDY, NY VOR/DME	DEER PARK, NY VOR/DME	2000	17500
DEER PARK, NY VOR/DME	MADISON, CT VOR/DME	2000	17500
MADISON, CT VOR/DME	WEGOT, CT FIX	2400	17500
WEGOT, CT FIX	HARTFORD, CT VOR/DME	2600	17500
HARTFORD, CT VOR/DME	DVANY, CT FIX	2700	17500
DVANY, CT FIX	GRAYM, MA FIX	3000	17500
GRAYM, MA FIX	GRIPE, MA FIX	*2800	17500
*2300—MOCA			
GRIPE, MA FIX	BOSTON, MA VOR/DME	2600	17500
§ 95.3307 RNAV Route T307 Is Added To Read			
PEARS, NC FIX	SUNNS, NC FIX	1800	17500
SUNNS, NC FIX	NORFOLK, VA VORTAC	2000	17500
NORFOLK, VA VORTAC	OUTLA, VA WP	1800	17500
OUTLA, VA WP	DUNFE, VA FIX	1800	17500
DUNFE, VA FIX	ZJAAY, MD WP	1800	17500
ZJAAY, MD WP	CBEAV, MD FIX	1800	17500
CBEAV, MD FIX	RADDS, DE FIX	1800	17500
RADDS, DE FIX	SEWEL, NJ FIX	2000	17500
SEWEL, NJ FIX	WNSTN, NJ WP	1800	17500
WNSTN, NJ WP	LEEAH, NJ FIX	*2000	17500
*1500—MOCA			
LEEAH, NJ FIX	BRIEF, NJ FIX	1900	17500
BRIEF, NJ FIX	TEBEE, NJ FIX	1800	17500
TEBEE, NJ FIX	CHAZR, DE WP	1900	17500
CHAZR, DE WP	APEER, MD WP	2000	17500
APEER, MD WP	REESY, PA WP	2000	17500
REESY, PA WP	PADRE, PA FIX	2500	17500
PADRE, PA FIX	GEERI, PA FIX	2700	17500
GEERI, PA FIX	ROAST, PA FIX	2600	17500
ROAST, PA FIX	DELRO, PA FIX	2900	17500
DELRO, PA FIX	FAMAV, PA FIX	2900	17500
FAMAV, PA FIX	HARRISBURG, PA VORTAC	3000	17500
HARRISBURG, PA VORTAC	*PYCAT, PA FIX	3100	17500
*4100—MCA PYCAT, PA FIX, NW BND			
PYCAT, PA FIX	MCMAN, PA FIX	4400	17500
MCMAN, PA FIX	RASHE, PA FIX	4600	17500
RASHE, PA FIX	PHILIPSBURG, PA VORTAC	4900	17500
PHILIPSBURG, PA VORTAC	BLAZE, PA FIX	4900	17500
BLAZE, PA FIX	DLMAR, PA WP	4600	17500

From	To	MEA	MAA
DLMAR, PA WP	STUBN, NY WP	4000	17500
STUBN, NY WP	XUCCO, NY FIX	3700	17500
XUCCO, NY FIX	VAFKU, NY FIX	3600	17500
VAFKU, NY FIX	PTAKI, NY FIX	3400	17500
PTAKI, NY FIX	SYRACUSE, NY VORTAC	3300	17500
§ 95.3335	**RNAV Route T335 Is Added To Read**		
ZJAAY, MD WP *1400—MOCA	TRPOD, MD WP	*1800	17500
TRPOD, MD WP	EZIZI, DE FIX	1900	17500
EZIZI, DE FIX	SMYRNA, DE VORTAC	1800	17500
SMYRNA, DE VORTAC	DUPONT, DE VORTAC	1800	17500
DUPONT, DE VORTAC	MARQI, PA WP	2200	17500
MARQI, PA WP	POTTSTOWN, PA VORTAC	2400	17500
POTTSTOWN, PA VORTAC	HIKES, PA	2800	17500
HIKES, PA	EAST TEXAS, PA VOR/DME	2900	17500
EAST TEXAS, PA VOR/DME	SLATT, PA FIX	3300	17500
SLATT, PA FIX	WHITT, PA FIX	3800	17500
WHITT, PA FIX *4600—MCA WLKES, PA WP, N BND	*WLKES, PA WP	4000	17500
WLKES, PA WP *4800—MCA LECOR, PA FIX, S BND	*LECOR, PA FIX	4800	17500
LECOR, PA FIX	BINGHAMTON, NY VOR/DME	3900	17500
BINGHAMTON, NY VOR/DME	CORTA, NY FIX	3800	17500
CORTA, NY FIX *3000—MCA TUMPS, NY FIX, S BND	*TUMPS, NY FIX	3700	17500
TUMPS, NY FIX	SYRACUSE, NY VORTAC	2800	17500
§ 95.3340	**RNAV Route T340 Is Added To Read**		
NORBY, HI WP *2200—MOCA	HLONO, HI WP	*2800	17500
HLONO, HI WP *2200—MOCA	AARES, HI WP	*2800	17500
AARES, HI WP *5000—MCA CHAIN, HI FIX, NE BND	*CHAIN, HI FIX	3800	17500
CHAIN, HI FIX	WYLUA, HI WP	5500	17500
WYLUA, HI WP *8000—MCA BARBY, HI FIX, SE BND	*BARBY, HI FIX	4000	17500
BARBY, HI FIX *8000—MCA LONOH, HI WP, NW BND **4100—MOCA	*LONOH, HI WP	**8000	17500
LONOH, HI WP *3800—MCA PLACK, HI WP, SE BND	*PLACK, HI WP	1700	17500
PLACK, HI WP	WAPIO, HI FIX	4700	17500
WAPIO, HI FIX	VELLA, HI FIX	4700	17500
VELLA, HI FIX	ARBOR, HI FIX	4000	17500
ARBOR, HI FIX	HILO, HI VORTAC	3800	17500
§ 95.3342	**RNAV Route T342 Is Added To Read**		
KUHIO, HI WP	KOKO HEAD, HI VORTAC	4800	17500
KOKO HEAD, HI VORTAC *4100—MOCA	ALAEY, HI WP	*4700	17500
ALAEY, HI WP *1300—MOCA	DAKKL, HI FIX	*4700	17500
DAKKL, HI FIX	PLUMB, HI FIX	5900	17500
PLUMB, HI FIX *1300—MOCA	WYLUA, HI WP	*4400	17500
WYLUA, HI WP *7200—MCA MAUI, HI VORTAC, S BND	*MAUI, HI VORTAC	4400	17500
MAUI, HI VORTAC *8200—MCA MAKEN, HI FIX, N BND	*MAKEN, HI FIX	8600	17500
MAKEN, HI FIX *5000—MCA KOHAU, HI WP, NW BND	*KOHAU, HI WP	5700	17500
KOHAU, HI WP *2500—MCA TAMMI, HI FIX, S BND **1300—MOCA	*TAMMI, HI FIX	**2000	17500
TAMMI, HI FIX	KONA, HI VORTAC	5300	17500
§ 95.3344	**RNAV Route T344 Is Added To Read**		
NAPUA, HI FIX	KEOLA, HI FIX	1700	17500

From	To	MEA	MAA
KEOLA, HI FIX	GECKO, HI FIX	1700	17500
GECKO, HI FIX	JULLE, HI FIX	1700	17500
JULLE, HI FIX *1800—MOCA	AHNAE, HI WP	*2400	17500
AHNAE, HI WP *2500—MOCA	ZUKAH, HI WP	*3100	17500
ZUKAH, HI WP	KONA, HI VORTAC	5700	17500

§ 95.3346 RNAV Route T346 Is Added To Read

From	To	MEA	MAA
LIHUE, HI VORTAC *3900—MOCA	KPIPI, HI WP	*4500	17500
KPIPI, HI WP *1800—MOCA	KIKKI, HI WP	*3400	17500
KIKKI, HI WP	SHIGI, HI FIX	4100	17500
SHIGI, HI FIX	KUHIO, HI WP	4100	17500
KUHIO, HI WP	NORBY, HI WP	3900	17500
NORBY, HI WP *5200—MCA KHILI, HI WP, E BND **3600—MOCA	*KHILI, HI WP	**4200	17500
KHILI, HI WP *5200—MCA NAHUL, HI WP, W BND **5600—MOCA	*NAHUL, HI WP	**6500	17500
NAHUL, HI WP *1300—MOCA	EELIO, HI WP	*4400	17500
EELIO, HI WP *5900—MCA KEAHO, HI WP, E BND **2700—MOCA	*KEAHO, HI WP	**4100	17500
KEAHO, HI WP	MAKEN, HI FIX	6500	17500
MAKEN, HI FIX *5000—MCA NOWRA, HI WP, W BND	*NOWRA, HI WP	6500	17500
NOWRA, HI WP *1300—MOCA	PLACK, HI WP	*1900	17500

§ 95.3432 RNAV Route T432 Is Added To Read

From	To	MEA	MAA
STUBN, NY WP	TIVUC, PA FIX	3600	17500
TIVUC, PA FIX	OKZUS, PA FIX	3400	17500
OKZUS, PA FIX	DOMVY, PA FIX	3500	17500
DOMVY, PA FIX	BNELE, PA WP	3600	17500
BNELE, PA WP	HAWLY, PA FIX	4400	17500
HAWLY, PA FIX	HOPCE, NJ FIX	3400	17500
HOPCE, NJ FIX	NEION, NJ FIX	3500	17500

§ 95.3675 RNAV Route T675 Is Added To Read

From	To	MEA	MAA
SAULT STE MARIE, MI VOR/DME	U.S. CANADIAN BORDER	2600	17500
U.S. CANADIAN BORDER	U.S. CANADIAN BORDER	8000	17500

§ 95.3705 RNAV Route T705 Is Amended By Adding

From	To	MEA	MAA
NANTUCKET, MA VOR/DME	CLAMY, MA FIX	1800	17500
CLAMY, MA FIX *1300—MOCA	LIBBE, NY FIX	*2500	17500
LIBBE, NY FIX *1600—MOCA	ORCHA, NY WP	*2500	17500
ORCHA, NY WP	CALVERTON, NY VOR/DME	2000	17500
CALVERTON, NY VOR/DME	BELTT, NY FIX	2000	17500
BELTT, NY FIX	BRIDGEPORT, CT VOR/DME	1800	17500
BRIDGEPORT, CT VOR/DME	DENNA, CT FIX	2100	17500
DENNA, CT FIX	FZOOL, CT FIX	2400	17500
FZOOL, CT FIX	LOVES, CT FIX	3000	17500
LOVES, CT FIX	DEEDE, NY FIX	3000	17500
DEEDE, NY FIX	PAWLN, NY WP	3100	17500
PAWLN, NY WP	TRESA, NY FIX	3400	17500
TRESA, NY FIX	CYPER, NY FIX	6100	17500
CYPER, NY FIX	PETER, NY FIX	6100	17500
PETER, NY FIX	CODDI, NY FIX	5800	17500

Is Amended To Delete

From	To	MEA	MAA
DANZI, NY WP	CODDI, NY FIX	4400	17500

From	To	MEA	MAA
Is Amended To Read in Part			
CODDI, NY FIX	MILID, NY WP	4600	17500

§ 95.4000 High Altitude RNAV Routes
§ 95.4033 RNAV Route Q33 Is Amended By Adding

From	To	MEA	MAA
HUMBLE, TX VORTAC * 18000—GNSS MEA * DME/DME/IRU MEA	DAISETTA, TX VORTAC	* 18000	45000
DAISETTA, TX VORTAC * 18000—GNSS MEA * DME/DME/IRU MEA	SAWMILL, LA VOR/DME	* 18000	45000
SAWMILL, LA VOR/DME * 18000—GNSS MEA * DME/DME/IRU MEA	LITTR, AR WP	* 18000	45000
LITTR, AR WP * 18000—GNSS MEA * DME/DME/IRU MEA	PROWL, MO WP	* 18000	45000
Is Amended To Delete			
DHART, AR FIX * 18000—GNSS MEA * DME/DME/IRU MEA	LITTLE ROCK, AR VORTAC	* 20000	45000
LITTLE ROCK, AR VORTAC * 18000—GNSS MEA * DME/DME/IRU MEA	PROWL, MO WP	* 20000	45000

§ 95.4066 RNAV Route Q66 Is Amended By Adding

From	To	MEA	MAA
LITTR, AR WP * 18000—GNSS MEA * DME/DME/IRU MEA	METWO, TN WP	* 18000	45000
METWO, TN WP * 18000—GNSS MEA * DME/DME/IRU MEA	ALEAN, VA WP	* 18000	45000
Is Amended To Delete			
LITTLE ROCK, AR VORTAC * 18000—GNSS MEA * DME/DME/IRU MEA	CIVKI, AR WP	* 18000	45000
CIVKI, AR WP * 18000—GNSS MEA * DME/DME/IRU MEA	RICKX, AR WP	* 18000	45000
RICKX, AR WP * 18000—GNSS MEA * DME/DME/IRU MEA	TROVE, TN WP	* 18000	45000
TROVE, TN WP * 18000—GNSS MEA * DME/DME/IRU MEA	BAZOO, TN WP	* 18000	45000
BAZOO, TN WP * 18000—GNSS MEA * DME/DME/IRU MEA	METWO, TN WP	* 18000	45000
METWO, TN WP * 18000—GNSS MEA * DME/DME/IRU MEA	MXEEN, TN WP	* 18000	45000
MXEEN, TN WP * 18000—GNSS MEA * DME/DME/IRU MEA	ALEAN, VA WP	* 18000	45000

§ 95.4097 RNAV ROUTE Q97 Is Amended To Read in Part

From	To	MEA	MAA
ZJAAY, MD WP * 18000—GNSS MEA * DME/DME/IRU MEA	BYSEL, MD WP	* 18000	45000
BYSEL, MD WP * 18000—GNSS MEA * DME/DME/IRU MEA	BRIGS, NJ FIX	* 18000	45000

§ 95.4232 RNAV Route Q232 Is Added To Read

From	To	MEA	MAA
STUBN, NY WP * 18000—GNSS MEA	CORDS, PA FIX	* 18000	45000

From	To	MEA	MAA
* DME/DME/IRU MEA CORDS, PA FIX * 18000—GNSS MEA * DME/DME/IRU MEA	NEION, NJ FIX	* 18000	45000

From	To	MEA
§ 95.6001 Victor Routes–U.S. **§ 95.6009 VOR Federal Airway V9 Is Amended By Adding**		
MARVELL, AR VOR/DME * 6000—MRA * 4000—MCA HILLE, AR FIX, N BND ** 1600—MOCA	* HILLE, AR FIX	** 3000
HILLE, AR FIX * 3100—MOCA	WALNUT RIDGE, AR VORTAC	* 4000
WALNUT RIDGE, AR VORTAC	FARMINGTON, MO VORTAC	4000
§ 95.6026 VOR Federal Airway V26 Is Amended To Read in Part		
REDWOOD FALLS, MN VOR/DME * 2600—MOCA	LYDIA, MN FIX	* 5500
§ 95.6036 VOR FEDERAL AIRWAY V36 Is Amended To Delete		
U.S. CANADIAN BORDER * 3000—MOCA	U.S. CANADIAN BORDER	* 8000
U.S. CANADIAN BORDER * 3100—MOCA	SAULT STE MARIE, MI VOR/DME	* 4600
§ 95.6069 VOR Federal Airway V69 Is Amended To Read in Part		
HILLE, AR FIX * 3100—MOCA	WALNUT RIDGE, AR VORTAC	* 4000
WALNUT RIDGE, AR VORTAC	FARMINGTON, MO VORTAC	4000
§ 95.6078 VOR Federal Airway V78 Is Amended To Delete		
DARWIN, MN VORTAC	GOPHER, MN VORTAC	3000
§ 95.6148 VOR Federal Airway V148 Is Amended To Read in Part		
REDWOOD FALLS, MN VOR/DME	GOPHER, MN VORTAC	3000
§ 95.6171 VOR Federal Airway V171 Is Amended To Delete		
FARMINGTON, MN VORTAC * 2500—MOCA ** 3000—GNSS MEA	JONNA, MN WP	** 3500
JONNA, MN WP	DARWIN, MN VORTAC	2900
DARWIN, MN VORTAC	ALEXANDRIA, MN VOR/DME	3000
Is Amended To Read in Part		
LEXINGTON, KY VOR/DME * 9000—MRA * 9000—MCA MCFEE, KY FIX, NW BND	* MCFEE, KY FIX	3000
MCFEE, KY FIX	LOUISVILLE, KY VORTAC	9000
§ 95.6178 VOR Federal Airway V178 Is Amended To Read in Part		
NEW HOPE, KY VOR/DME * 7000—MRA	* HERMS, KY FIX	2700
HERMS, KY FIX * 9000—MRA	* MAUDD, KY FIX	2800
MAUDD, KY FIX * 9000—MRA	* MCFEE, KY FIX	5000
§ 95.6333 Alaska VOR Federal Airway V333 Is Amended To Delete		
NOME, AK VOR/DME	GAITS, AK WP.	
	N BND	10000
	S BND	4000
GAITS, AK WP	SHISHMAREF, AK NDB	* 10000

From	To	MEA
*6700—MOCA		
§ 95.6401 ALASKA VOR FEDERAL AIRWAY V401 Is Amended To Delete		
AMBLER, AK NDB *4700—MOCA	FARME, AK FIX	*5500
FARME, AK FIX	KOTZEBUE, AK VOR/DME	2000
KOTZEBUE, AK VOR/DME *2000—MOCA	SHISHMAREF, AK NDB	*2500

Airway Segment		Changeover Points	
From	To	Distance	From
§ 95.8003 VOR Federal Airway Changeover Point Alaska V333 Is Amended To Delete Changeover Point			
NOME, AK VOR/DME	SHISHMAREF, AK NDB	65	NOME.
Alaska V401 Is Amended To Delete Changeover Point			
AMBLER, AK NDB	KOTZEBUE, AK VOR/DME	40	AMBLER.
KOTZEBUE, AK VOR/DME	SHISHMAREF, AK NDB	60	KOTZEBUE.

[FR Doc. 2024–08863 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31541; Amdt. No. 4109]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPS) and associated Takeoff Minimums and Obstacle Departure procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective April 25, 2024. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 25, 2024.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30. 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.
2. The FAA Air Traffic Organization Service Area in which the affected airport is located;
3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,
4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg. 26, Room 217, Oklahoma City, OK 73099. Telephone (405) 954–1139.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The applicable FAA Forms are 8260–3, 8260–4, 8260–5, 8260–15A, 8260–15B, when required by an entry on 8260–15A, and 8260–15C.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, pilots do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers or aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPS, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies

the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Air Missions (NOTAM) as an emergency action of immediate flights safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Lists of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on April 12, 2024.

Thomas J. Nichols,

Aviation Safety, Flight Standards Service, Manager, Standards Section, Flight Procedures & Airspace Group, Flight Technologies & Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 16 May 2024

Salinas, CA, SNS, ILS RWY 31, Amdt 7
Salinas, CA, SNS, LOC RWY 31, Amdt 6
Salinas, CA, SNS, RNAV (GPS) RWY 13, Amdt 2
Salinas, CA, SNS, RNAV (GPS) Y RWY 31, Amdt 2
Salinas, CA, SNS, RNAV (GPS) Z RWY 31, Amdt 2
Salinas, CA, SNS, VOR RWY 13, Admt 13
San Bernardino, CA, KSBD, RNAV (RNP) RWY 24, Orig
San Bernardino, CA, KSBD, RNAV (RNP) X RWY 6, Orig
San Diego, CA, KSAN, Takeoff Minimums and Obstacle DP, Amdt 9A
Hayden, CO, HDN, VOR–B, Amdt 2
Washington, DC, IAD, ILS OR LOC RWY 19C, ILS RWY 19C (CAT II), ILS RWY 19C (CAT III), Amdt 26
Washington, DC, IAD, ILS OR LOC RWY 19L, ILS RWY 19L (SA CAT II), Amdt 16
Washington, DC, IAD, ILS OR LOC RWY 19R, ILS RWY 19R (CAT II), ILS RWY 19R (CAT III), Amdt 2
Washington, DC, IAD, RNAV (GPS) Y RWY 19C, Amdt 4
Washington, DC, IAD, RNAV (GPS) Y RWY 19L, Amdt 3
Washington, DC, IAD, RNAV (GPS) Y RWY 19R, Amdt 1
Honolulu, HI, HNL/PHNL, ILS RWY 8L, Amdt 25
Honolulu, HI, HNL/PHNL, LOC RWY 8L, Amdt 2
Honolulu, HI, HNL/PHNL, RNAV (GPS) Y RWY 8L, Amdt 4
Indianapolis, IN, EYE, LOC RWY 21, Amdt 4B
Indianapolis, IN, EYE, RNAV (GPS) RWY 21, Amdt 1C
La Porte, IN, PPO, RNAV (GPS) RWY 2, Amdt 1D
Peru, IN, I76, RNAV (GPS) RWY 1, Amdt 1
Boston, MA, BOS, ILS OR LOC RWY 4R, ILS RWY 4R (SA CAT I), ILS RWY 4R (CAT II), ILS RWY 4R (CAT III), Amdt 11B
Madison, MN, DXX, RNAV (GPS) RWY 32, Orig-D
Maryville, MO, EVU, RNAV (GPS) RWY 14, Amdt 2
Maryville, MO, EVU, RNAV (GPS) RWY 32, Amdt 2
Maryville, MO, KEVU, Takeoff Minimums and Obstacle DP, Amdt 5
West Union, OH, KAMT, Takeoff Minimums and Obstacle DP, Amdt 2
Wilmington, OH, ILN, ILS OR LOC RWY 4L, Amdt 5
Charlotte Amalie, VI, STT/TIST, RNAV (GPS) RWY 10, Amdt 2A

[FR Doc. 2024–08750 Filed 4–24–24; 8:45 am]
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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31542; Amdt. No. 4110]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective April 25, 2024. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 25, 2024.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001;
2. The FAA Air Traffic Organization Service Area in which the affected airport is located;
3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,
4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg. 26, Room 217, Oklahoma City, OK 73099. Telephone: (405) 954–1139.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Air Missions (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, pilots do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary. This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on April 12, 2024.

Thomas J. Nichols,

Aviation Safety, Flight Standards Service, Manager, Standards Section, Flight Procedures & Airspace Group, Flight Technologies & Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * *Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC date	Procedure name
16–May–24	NC	Edenton	Northeastern Rgnl	4/7817	3/15/2024	This NOTAM, published in Docket No. 31540, Amdt No. 4108, TL 24–11, (89 FR 24369, April 08, 2024) is hereby rescinded in its entirety.
16–May–24	TN	Clarksville	Outlaw Fld	4/0038	3/22/2024	LOC RWY 35, Amdt 6A.
16–May–24	MO	Fredericktown	A Paul Vance Fredericktown Rgnl.	4/2850	3/28/2024	RNAV (GPS) RWY 1, Amdt 1A.
16–May–24	MO	Fredericktown	A Paul Vance Fredericktown Rgnl.	4/2852	3/28/2024	VOR/DME RWY 1, Amdt 3B.
16–May–24	LA	Rayville	John H Hooks Jr Meml	4/3522	3/28/2024	Takeoff Minimums and Obstacle DP, Orig.
16–May–24	MO	Cape Girardeau	Cape Girardeau Rgnl	4/3630	3/28/2024	ILS OR LOC RWY 10, Amdt 12B.
16–May–24	CO	Eagle	Eagle County Rgnl	4/4026	2/12/2024	RNAV (GPS) Y RWY 25, Orig.
16–May–24	CO	Eagle	Eagle County Rgnl	4/4029	2/12/2024	RNAV (RNP) X RWY 25, Orig.
16–May–24	CO	Eagle	Eagle County Rgnl	4/4030	2/12/2024	RNAV (RNP) Z RWY 25, Orig.
16–May–24	NJ	Toms River	Ocean County	4/4131	3/29/2024	ILS OR LOC RWY 6, Amdt 2C.
16–May–24	NJ	Toms River	Ocean County	4/4132	3/29/2024	RNAV (GPS) RWY 24, Amdt 1A.
16–May–24	NJ	Toms River	Ocean County	4/4134	3/29/2024	RNAV (GPS) RWY 6, Orig-C.
16–May–24	NJ	Toms River	Ocean County	4/4135	3/29/2024	VOR RWY 6, Amdt 7C.
16–May–24	PA	Philipsburg	Mid-State	4/4192	3/29/2024	VOR RWY 24, Amdt 16D.
16–May–24	PA	Lock Haven	William T Piper Meml	4/4872	4/1/2024	RNAV (GPS)–A, Orig-B.
16–May–24	IA	Iowa Falls	Iowa Falls Muni	4/5333	4/2/2024	RNAV (GPS) RWY 31, Amdt 2A.
16–May–24	PR	Ponce	Mercedita	4/5424	4/2/2024	RNAV (GPS) RWY 30, Orig-C.
16–May–24	TX	Longview	East Texas Rgnl	4/5578	4/2/2024	VOR/DME OR TACAN RWY 31, Amdt 7B.
16–May–24	TX	Longview	East Texas Rgnl	4/5581	4/2/2024	RNAV (GPS) RWY 18, Amdt 2B.
16–May–24	NC	Edenton	Northeastern Rgnl	4/7059	4/5/2024	RNAV (GPS) RWY 19, Amdt 2C.
16–May–24	TN	Clarksville	Outlaw Fld	4/7062	4/5/2024	RNAV (GPS) RWY 35, Amdt 1A.
16–May–24	TN	Clarksville	Outlaw Fld	4/7266	3/22/2024	VOR RWY 35, Amdt 15H.
16–May–24	NE	Lincoln	Lincoln	4/7349	3/18/2024	ILS Y OR LOC Y RWY 18, Amdt 7C.
16–May–24	NY	Ogdensburg	Ogdensburg Intl	4/7854	3/18/2024	RNAV (GPS) RWY 27, Amdt 2.
16–May–24	NY	Ogdensburg	Ogdensburg Intl	4/7856	3/18/2024	RNAV (GPS) RWY 9, Amdt 1A.
16–May–24	FL	Jacksonville	Jacksonville Intl	4/8317	3/18/2024	ILS Y OR LOC Y RWY 14, Amdt 7C.
16–May–24	FL	Jacksonville	Jacksonville Intl	4/8336	3/18/2024	RNAV (GPS) Z RWY 8, Amdt 2C.
16–May–24	FL	Jacksonville	Jacksonville Intl	4/8359	3/18/2024	RNAV (GPS) Z RWY 14, Amdt 2C.
16–May–24	FL	Jacksonville	Jacksonville Intl	4/8367	3/18/24	RNAV (GPS) Z RWY 26, Amdt 2D.
16–May–24	FL	Jacksonville	Jacksonville Intl	4/8377	3/18/24	VOR/DME RWY 32, Amdt 2C.
16–May–24	FL	Jacksonville	Jacksonville Intl	4/8395	3/18/24	RNAV (GPS) Z RWY 32, Amdt 2E.
16–May–24	MO	Mountain View	Mountain View	4/9019	3/22/2024	RNAV (GPS) RWY 28, Amdt 1.
16–May–24	AR	Stuttgart	Stuttgart Muni Carl Humphrey Fld.	4/9034	3/20/2024	ILS OR LOC RWY 36, Orig-E.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9992]

RIN 1545–BQ36

Guidance on the Definition of Domestically Controlled Qualified Investment Entities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that address the determination of whether a qualified investment entity is domestically controlled, including the treatment of qualified foreign pension funds for this purpose. In particular, these final regulations provide guidance as to when foreign persons are considered to hold directly or indirectly stock in a qualified investment entity. The final regulations primarily affect foreign persons that own stock in a qualified investment entity that would be a United States real property interest if the qualified investment entity were not domestically controlled.

DATES:

Effective date: These regulations are effective on *April 25, 2024.*

Applicability date: For the date of applicability, *see* §§ 1.897–1(a)(2) and 1.1445–2(e).

FOR FURTHER INFORMATION CONTACT: Milton Cahn at (202) 317–4934 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 29, 2022, the Treasury Department and the IRS published proposed regulations (REG–100442–22), relating to the treatment of certain entities, including qualified foreign pension funds (''QFPFs''), for purposes of the exemption from taxation afforded to foreign governments under section

892 of the Internal Revenue Code (the ''Code''), and the determination of whether a qualified investment entity (''QIE'') is domestically controlled under section 897(h)(4)(B) of the Code, in the **Federal Register** (87 FR 80097) (the ''proposed regulations''). This Treasury decision finalizes the proposed regulations, other than those portions addressing the section 892 exemption (which will be addressed in a separate rulemaking), after taking into account and addressing comments with respect to the proposed regulations. Terms used but not defined in this preamble have the meaning provided in the final regulations.

Comments outside the scope of this rulemaking are generally not addressed but may be considered in connection with future regulations. All written comments received in response to the proposed regulations are available at *www.regulations.gov* or upon request. A public hearing on the proposed regulations was not held because there were no requests to speak.

Summary of Comments and Explanation of Revisions

The final regulations retain the general approach and structure of the proposed regulations, with certain revisions. This section of the preamble discusses the comments received in response to the proposed regulations and explains the revisions reflected in the final regulations.

I. Domestic Corporation Look-Through Rule

A. Background

The proposed regulations set forth proposed rules for determining whether stock of a QIE is considered ''held directly or indirectly'' by foreign persons for purposes of defining a domestically controlled QIE under section 897(h)(4)(B). The proposed regulations defined stock in a QIE that is held ''indirectly'' by taking into account stock of the QIE held through certain entities under a limited ''look-through'' approach. As described in the preamble to the proposed regulations, this approach gives effect to both the policy of the exception for domestically controlled QIEs in section 897(h)(2) (''DC–QIE exception''), which is limited to QIEs controlled by United States persons, and the requirement in section 897(h)(4)(B) to take into account ''indirect'' ownership of QIE stock by foreign persons in determining whether a QIE is domestically controlled. 87 FR 80100. The preamble to the proposed regulations also explained that this approach prevents the use of intermediary entities to achieve results contrary to the purposes of the DC–QIE exception. *Id.* at 80100–01.

The proposed regulations addressed the meaning of direct or indirect ownership by setting forth two categories of potential QIE owners, ''look-through persons'' and ''non-look-through persons.'' Proposed § 1.897–1(c)(3)(ii). The proposed regulations generally treated a ''domestic C corporation,'' defined as any domestic corporation other than a regulated investment company (''RIC'') under section 851, a real estate investment trust (''REIT'') under section 856, or an S corporation under section 1361, as a non-look-through person. Proposed § 1.897–1(c)(3)(v)(A) and (D). However, the proposed regulations treated non-publicly traded domestic C corporations as look-through persons if foreign persons hold a 25 percent or greater interest (by value) in the stock of the corporation (the ''domestic corporation look-through rule''). Proposed § 1.897–1(c)(3)(iii)(B) and (c)(3)(v)(B).

Comments generally did not raise concerns with the general look-through approach for determining domestic control of a QIE as it applied to most entities (for example, the treatment of partnerships) but asserted that the domestic corporation look-through rule raises significant issues and should be withdrawn or, if retained, modified to reduce its scope. These comments are addressed in turn in parts I.B. and I.C. of this Summary of Comments and Explanation of Revisions.

B. Comments Recommending Withdrawal of the Domestic Corporation Look-Through Rule

Comments generally recommended that the domestic corporation look-through rule be withdrawn on three related grounds: first, that the rule is based on an incorrect reading of the Code, which for this purpose does not permit look-through treatment for domestic C corporations, including because there are no explicit rules providing for constructive ownership (such as those in section 318) under section 897(h)(4)(B); second, that the enactment of other related legislation (or consideration of legislation) demonstrates the rule is inconsistent with congressional intent; and third, that the rule is not necessary because domestic C corporations are subject to U.S. tax. Certain comments also based their recommendation to withdraw the domestic corporation look-through rule on the contention that the rule would negatively impact the U.S. real estate market or otherwise harm the broader U.S. economy.

The Treasury Department and the IRS have determined that it is necessary and appropriate to provide guidance regarding the meaning of ''indirect'' for determining whether foreign persons are considered to hold less than 50 percent of the value of the stock of a QIE. Every word in a statute must be given effect, and both the proposed and final regulations give effect to the term ''indirectly'' as used in section 897(h)(4)(B) by adopting a limited look-through approach that includes the domestic corporation look-through rule (as modified in the final regulations). The domestic corporation look-through rule does not apply specific constructive ownership rules like those in section 318. Rather, the guidance gives meaning to indirect ownership under section 897(h)(4)(B) in light of the purpose of the DC–QIE exception. Because the final regulations carry out the statute's mandate to determine indirect ownership rather than constructive ownership, the fact that other parts of section 897 refer to section 318 is irrelevant to the determination of whether a QIE is domestically controlled.

The Treasury Department and the IRS do not agree that the enactment of section 897(h)(4)(E) in section 322(b)(1)(A) of the Protecting Americans from Tax Hikes Act of 2015, Public Law 114–113, div. Q (the ''PATH Act''), informs whether the domestic corporation look-through rule should be applied under section 897(h)(4)(B). The rules added in section 897(h)(4)(E) do not prescribe how to interpret the meaning of ''indirectly'' in section 897(h)(4)(B), nor do they suggest that Congress intended for that provision to set out the only rules for QIE stock held by domestic corporations. Although section 897(h)(4)(E) provides certain rules for looking through QIE stock held by another QIE for purposes of the DC–QIE exception, the absence of other specific rules in the statute on whether domestic C corporations (or any other type of entity) should be looked through does not mean that all other entities should be non-look-through persons.

The Treasury Department and the IRS also disagree with the observation in comments that Congress sanctioned the approach taken by a 2009 private letter ruling (the ''2009 PLR'') that treated QIE stock held by a domestic C corporation as owned by a domestic person.[1] The brief citation to that ruling in a report by the Joint Committee on Taxation is neutral and merely restates the holding in the ruling in its description of the then current law. *See* STAFF OF THE

[1] PLR 200923001 (February 26, 2009).

JOINT COMM. ON TAX'N, General Explanation of Tax Legislation Enacted in 2015 (JCS–1–16) 279 (2016) (the ''JCT Report'').[2] The JCT Report did not express any view regarding the effect of the 2009 PLR or indicate that Congress endorsed a rule that precludes looking through domestic C corporations in all cases, and it caveated that a private letter ruling may only be relied on by the specific taxpayer to which it was issued and only provided ''some indication of administrative practice.'' *See* section 6110(k)(3). This is in contrast to other instances where Congress has explicitly endorsed an approach taken by the IRS. *See, for example,* H.R. Rep. No. 103–111, at 727–29 (1993) (in enacting section 7701(l), citing Rev. Rul. 84–152, 1984–2 C.B. 381, Rev. Rul. 84–153 1984–2 C.B. 1, and Rev. Rul. 87–89, 1987–2 C.B. 195, in stating the ''committee believes that the above-cited IRS rulings appropriately ignore conduit entities and properly recharacterize the transactions described therein.''); S. Rep. No. 95–762, at 8 (1978) (stating that the IRS's ''ruling position is correct'' in enacting rules consistent with private letter rulings indicating that certain income earned by exempt organizations was not taxable as debt-financed income). Accordingly, the Treasury Department and the IRS have concluded that the JCT Report's reference to the 2009 PLR does not affect the application of the domestic corporation look-through rule.

Likewise, the Treasury Department and the IRS disagree with comments that emphasized the discussion draft released by the Senate Committee on Finance in 2013 (the ''2013 Discussion Draft'') and the absence of any related changes to section 897 in the PATH Act. The relevant provision in the 2013 Discussion Draft would have replaced the ''held directly or indirectly'' language in section 897(h)(4)(B) with specific constructive ownership rules in section 318 (not just those applicable to corporations) to address uncertainty in the determination of indirect ownership. *See* STAFF OF THE JOINT COMM. ON TAX'N, Technical Explanation of the Senate Committee on Finance Chairman's Staff Discussion Draft of Provisions to Reform International Business Taxation (JCX–15–13) 84 (2013). The 2013 Discussion Draft, however, is not authoritative and has no relevance because it was neither introduced as a bill nor enacted into law. Moreover, Congress did not provide any explanation as to why constructive ownership rules under section 318, as proposed in the 2013 Discussion Draft, were not adopted in the PATH Act nor did it provide any indication as to its interpretation of ''indirectly'' under the statute, and nothing in the legislative history of the PATH Act or otherwise suggests draft legislation from more than two years earlier during a different Congress informed what was ultimately enacted in the PATH Act. *See United States* v. *Wise,* 370 U.S. 405, 411 (1962) (''[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here.'').

The Treasury Department and the IRS also disagree with one comment's assertion that the legislative re-enactment doctrine bears on whether to issue the domestic corporation look-through rule. *See Helvering* v. *Reynolds,* 313 U.S. 428, 432 (1941) (''[The doctrine of legislative reenactment] does not mean that the prior construction has become so imbedded in the law that only Congress can effect a change.'').[3] Accordingly, the Treasury Department and the IRS have determined that no changes to section 897 made in, or contemplated in connection with, the PATH Act, or any explanation of those changes, preclude, or otherwise affect, adoption of the domestic corporation look-through rule.

Finally, the Treasury Department and the IRS have determined that the domestic corporation look-through rule is the appropriate interpretation of the term ''indirectly'' in section 897(h)(4)(B) irrespective of whether the domestic C corporation is subject to U.S. tax on income derived from its QIE stock. As expressed through the statutory text, the policy underlying the DC–QIE exception looks to whether control of the QIE is held directly or indirectly by United States or foreign persons, which does not depend on whether United States persons are subject to U.S. tax with respect to income derived from their QIE stock. The determination of domestic control is likewise not affected by whether a foreign shareholder of the domestic C corporation is subject to tax on a disposition of its stock in the corporation under section 897. The purpose of the inquiry is to determine control, and the status of an entity as taxable is not determinative for this purpose.

Accordingly, the Treasury Department and the IRS do not adopt the recommendation to withdraw the domestic corporation look-through rule. However, the final regulations modify the domestic corporation look-through rule as discussed in part I.C of this Summary of Comments and Explanation of Revisions.

C. Comments Recommending Modifications to the Domestic Corporation Look-Through Rule; Explanation of Revision

Comments recommended that, if the final regulations retain a rule similar to the domestic corporation look-through rule, then the approach should be narrowed from what was proposed so that the final rule more directly addresses potentially inappropriate planning and is easier to comply with and administer.

One comment suggested a variety of potential approaches to narrow the domestic corporation look-through rule. Under one such approach, a non-public domestic C corporation that owns 10 percent or less of a QIE (determined after applying constructive ownership rules under section 318, so as to prevent circumvention of the threshold) would be treated as a non-look-through person. The comment asserted that this approach would be less burdensome on taxpayers and the IRS than the proposed regulations and is premised on the view that a foreign person would not structure an investment through a taxable domestic C corporation so that an unrelated foreign person may apply the DC–QIE exception. The comment described an alternative approach, also intended to reduce compliance and administrative burdens, that would treat a non-public domestic C corporation as a look-through person only if there is at least one foreign person that is a non-look-through person that holds, directly or indirectly (using constructive ownership rules under section 318), 25 percent or more of the value of the corporation's stock. Under this alternative, look-through treatment would also apply only as to those foreign non-look-through persons. As another alternative, the comment

[2] *See also* STAFF OF THE JOINT COMM. ON TAX'N, Technical Explanation of the Revenue Provisions of the Protecting Americans from Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to H.R. 2029 (JCX–144–15) 186–87 (2015). As noted in the JCT Report, a Senate Committee on Finance report on an earlier, separate bill referenced the 2009 PLR in the same manner in describing provisions similar to those in section 322 of the PATH Act. *See* JCT Report at 277, note 943; S. Rep. No. 114–25, 6 (2015).

[3] *See also Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90, 100 (1939) (holding that the legislative reenactment doctrine applies where ''it does not appear that the rule or practice has been changed by the administrative agency through exercise of its continuing rule-making power''); *McCoy* v. *United States,* 802 F.2d 762 (4th Cir. 1986); *Interstate Drop Forge Co.* v. *Comm'r,* 326 F2d 743 (7th Cir. 1964).

suggested a look-through rule that would apply only if a foreign person or a foreign related party holds both a direct interest in the QIE and a substantial indirect interest in the QIE through a non-public domestic C corporation.

A different comment also recommended an approach that focused on commonality of substantial ownership by a foreign person of the QIE and the domestic C corporation. Specifically, a domestic C corporation would be treated as a foreign person for purposes of section 897(h)(4)(B) (but not for section 897(h)(4)(C)), if more than 50 percent of its stock is owned, by voting power or value, by foreign persons that also hold stock of the QIE directly, or indirectly through one or more partnerships, grantor trusts, or QIEs. Under this comment's recommended approach, a foreign person would be included in the more than 50 percent control test if the domestic C corporation had actual knowledge that the foreign person has cross-ownership of the QIE after inquiry with any person that is at least a 5-percent shareholder of the domestic C corporation (after applying the rules of section 318(a)). The comment reasoned that foreign investors should be considered incidental and thus should not be counted when measuring direct or indirect foreign control of the QIE when they invest through a domestic C corporation and do not have cross-ownership of the QIE directly or through related parties, or do hold interests in both entities but do not individually or collectively control the domestic C corporation.

Finally, one comment advocated that a look-through approach to a domestic C corporation should not apply when that corporation has material business activities unrelated to its investment in a QIE's stock with potential safe harbors such as where the corporation is registered as an investment adviser under the Investment Company Act of 1940 or the foreign owner of the domestic C corporation is actively traded on an established securities market outside of the United States. The comment reasoned that such cases are unlikely to be structured transactions of the type identified by the proposed regulations. Similarly, another comment also proposed that the look-through approach should not apply if a domestic C corporation would be treated as engaged in a U.S. trade or business if it had been a foreign corporation (such that the corporation is not a mere shell), and this exception could be further limited by ensuring that the value of the QIE stock held by the domestic C corporation is less than a certain threshold of the affiliated group's total assets.

The final regulations do not adopt any of the recommended modifications to the domestic corporation look-through rule. Several suggested modifications would limit the application of the rule to situations that indicate that foreign persons are using a domestic C corporation to establish domestic control of a QIE so that their direct investments in the QIE benefit from the DC–QIE exception. However, as discussed in part I.A of this Summary of Comments and Explanation of Revisions, the proposed and final regulations serve a broader purpose by interpreting the meaning of ''indirect'' ownership under section 897(h)(4)(B) to effectuate the policy of the DC–QIE exception by ensuring that the exception is available only when a QIE is controlled by United States persons. The comments also proposed various modifications intended to limit or alter the application of the rule; the Treasury Department and the IRS are of the view that these would introduce additional complexity, such as requiring an examination of the business activities of a domestic C corporation. Furthermore, a modification that would treat domestic C corporations that own less than 10 percent of a QIE as a non-look-through person would not alleviate concerns regarding the ability to identify shareholders through multiple tiers of ownership, and could result in disparate and inconsistent results as to which foreign owners are taken into account in measuring domestic control of a QIE (for example, a foreign non-look-through person that wholly owns a domestic C corporation that owns 9 percent of a QIE would not be taken into account, while a foreign non-look-through person that owns 50 percent of a domestic C corporation that owns 10 percent of the QIE would be taken into account). The Treasury Department and the IRS also do not agree that the domestic corporation look-through rule should only apply if 25 percent or more of the corporation's stock is owned by a single foreign non-look-through person (taking into account section 318 constructive ownership rules), as the DC–QIE exception looks to any measure of foreign ownership of a QIE and such a high threshold would inappropriately exempt foreign persons owning significant indirect interests in QIEs from look-through treatment.

Although the final regulations do not adopt any of the specific recommendations to the domestic corporation look-through rule, the Treasury Department and the IRS agree that the scope of the rule should be narrowed to address compliance concerns and to ensure the rule is more appropriately limited to situations where significant indirect ownership by foreign persons indicative of foreign control is present. After considering the various suggestions raised in comments, the Treasury Department and the IRS have determined that this is best achieved by increasing the amount of foreign ownership required to look through a non-public domestic C corporation from 25 percent or more to more than 50 percent. Increasing the threshold to more than 50 percent significantly narrows the scope of look-through treatment to non-public domestic C corporations that are controlled by foreign persons, and is consistent with the measurement of control for purposes of the domestically controlled QIE test. This change is also consistent with the policy of the DC–QIE exception and other provisions in section 897 that are based on a 50-percent threshold. *See, for example,* section 897(c)(2) (providing that a corporation is a United States real property holding corporation if the fair market value of its United States real property interests (''USRPIs'') meets a 50 percent or greater threshold). Thus, rather than a ''foreign-owned domestic corporation,'' the final regulations apply look-through treatment with respect to a ''foreign-controlled domestic corporation,'' which is defined as any non-public domestic C corporation if foreign persons hold directly or indirectly more than 50 percent of the fair market value of that corporation's outstanding stock (the ''final domestic corporation look-through rule''). § 1.897–1(c)(3)(v)(B). In addition, the final regulations adopt a transition rule for existing QIE structures, as discussed in part IV of this Summary of Comments and Explanation of Revisions.

II. Effect of Section 897(l) on the DC–QIE Exception

A. Background on Section 897(l) and Interaction With the DC–QIE Exception

Section 897(l) provides an exception to the application of section 897(a) for certain foreign pension funds and their wholly owned subsidiaries. As originally enacted in the PATH Act, section 897(l)(1) provided that section 897 does not apply to any USRPI held directly (or indirectly through one or more partnerships) by, or to any distribution received from a REIT by, a QFPF or any entity all of the interests of which are held by a QFPF. Congress later made several technical amendments to section 897(l) in section

101(q) of the Tax Technical Corrections Act of 2018, Public Law 115–141, div. U (the ''2018 technical correction''). As amended by the 2018 technical correction, section 897(l) provides that neither a QFPF nor an entity all the interests of which are held by a QFPF is treated as a nonresident alien individual or foreign corporation for purposes of section 897.

The proposed regulations addressed uncertainty as to whether QFPFs and entities wholly owned by one or more QFPFs (''QCEs''), which are treated as not ''nonresident alien individuals or foreign corporations'' for purposes of section 897, are treated as foreign persons for purposes of the DC–QIE exception. Specifically, proposed § 1.897–1(c)(3)(iv)(A) provided that a QFPF, including any part of a QFPF, or a QCE is a foreign person for purposes of the DC–QIE exception (the ''QFPF DC–QIE rule'').

B. Comments Regarding Authority To Issue the QFPF DC–QIE Rule

Although one comment stated that it was generally in agreement with the QFPF DC–QIE rule, other comments recommended that the rule be withdrawn because it is an incorrect reading of the statute and contrary to congressional intent. One comment contended that the preamble to the proposed regulations failed to consider the existing definition of ''foreign person'' in § 1.897–9T(c) (which includes a foreign corporation, a foreign partnership, a foreign trust, or a nonresident alien individual) and noted that Congress is presumed to have knowledge of that regulatory definition. The comment also contended that the text of section 897(l) is clear and that, without any textual ambiguity, the Treasury Department and the IRS lack the authority to issue the QPFF DC–QIE rule.

Another comment submitted that the legislative history and policy of section 897, including the DC–QIE exception and the section 897(l) exception for QFPFs, indicate that 50 percent or more ownership of a QIE by a QFPF results in the DC–QIE exception being available to other foreign investors. The comment's overall recommendation was to clarify the definition of foreign person in section 897(h)(4)(B) and (C) to have the same meaning as ''a nonresident alien individual or a foreign corporation'' in section 897(a). The comment included several reasons for its recommendation. First, section 897(l) refers generally to section 897, rather than solely to section 897(a), which the comment argued indicates that section 897(l) is intended to be given effect for all purposes under section 897. According to the comment, the effect of section 897(l) on the DC–QIE exception can be analogized to a special election in section 897(i) for a foreign corporation to be treated as a domestic corporation for purposes of section 897 because, when that election applies, it has effect for all of section 897 and can benefit other investors in QIEs even though they are not party to the election. The comment also noted that the 2018 technical correction should be presumed to be a more accurate reflection of the original intent of Congress, which was to align QFPFs with exempt U.S. pension funds. Finally, the comment noted that because a QFPF is not taxed under section 897(h)(1), there is no policy reason to treat it as a foreign person for other rules such as the DC–QIE exception, the foreign ownership percentage rule in section 897(h)(3) or the wash sale rule in section 897(h)(5).

The Treasury Department and the IRS have determined that the QFPF DC–QIE rule reflects the proper interpretation of the statute and congressional intent. The term ''nonresident alien individuals or foreign corporations'' in section 897(l) (introduced only in the 2018 technical correction) differs from ''foreign persons'' in section 897(h)(4)(B), and the purposes of the two provisions also differ. Congress provided no indication that it intended for the definition of foreign person in § 1.897–9T(c) to apply to confer non-foreign person status on QFPFs for purposes of the DC–QIE exception. Instead, the term ''nonresident alien individuals or foreign corporations'' appears in section 897(a) and similar provisions to refer to the persons that are directly subject to tax under FIRPTA. The Treasury Department and the IRS also do not agree that a QFPF is analogous to a foreign corporation that has elected to be treated as a domestic corporation under section 897(i) because that election explicitly treats a foreign corporation as a domestic corporation and therefore not a foreign person. In contrast, section 897(l) treats a QFPF as not a nonresident alien individual or a foreign corporation but does not address whether a QFPF is also not a foreign person.

The Treasury Department and the IRS agree that it is reasonable to presume that the changes made in the 2018 technical correction are a more accurate reflection of original congressional intent, which the preamble to the proposed regulations described (allowing a QFPF and QCE to jointly own a USRPI and qualify for section 897(l) with respect to their partial USRPI interests, as well as clarifying that the section 897(l) exception applies to distributions from all QIEs and not just REITs). 87 FR 80100. However, the Treasury Department and the IRS disagree with the assertion that the 2018 technical correction should be interpreted to bestow the benefit of the DC–QIE exception on foreign investors that cannot claim the section 897(l) exception. Such an interpretation would be inconsistent with the intent of section 897(l) as originally enacted in the PATH Act, which was to provide an exception from section 897 to QFPFs (and QCEs). Where possible, as in this case, the technical correction should be viewed in a manner consistent with a core principle of the original legislation. *See Fed. Nat'l Mortgage Assoc.* v. *United States,* 56 Fed. Cl. 228, 234, 237 (2003), *rev'd and remanded on other grounds,* 379 F.3d 1303 (Fed. Cir. 2004) (''Congress turns to technical corrections when it wishes to clarify existing law or repair a scrivener's error, rather than to change the substantive meaning of the statute. . . . [A] technical correction that merely restores the rule Congress intended to enact cannot be construed as a fundamental change in the operation of the statute.''); STAFF OF THE JOINT COMM. ON TAX'N, Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on Taxation (JCX–1–05) 33 (2005) (describing a technical correction as ''legislation that is designed to correct errors in existing law in order to fully implement the intended policies of previously enacted legislation'' and a change that ''conforms to and does not alter the intent'' of the underlying legislation).

The comment discussed above asserts that there is no policy reason to treat a QFPF as a foreign person for other provisions in section 897(h) such as the DC–QIE exception, given that the QFPF is not taxed under section 897(h)(1). The Treasury Department and the IRS disagree based on the statute and its policy. As described earlier in this preamble, the policy of the DC–QIE exception looks to foreign control, not control by taxable persons. The presence or absence of taxation of the controlling persons is not determinative. Additionally, Congress expressed in section 897(l) an intent to provide a tax benefit specifically for QFPFs, and not for other owners of a DC–QIE that would benefit from the QFPF's treatment. Therefore, the Treasury Department and the IRS have determined that the appropriate interpretation of the statute is one that

only gives effect to the purpose of section 897(l) to provide an exception from section 897 for QFPFs, rather than a construction that would give non-QFPF investors the ability to rely on section 897(l) to benefit under the DC–QIE exception. The DC–QIE exception is a separate provision with underlying policies that focus on foreign control rather than taxability of controlling persons, and these policies are inconsistent with treating a QFPF as a United States person for purposes of the DC–QIE exception. Accordingly, the final regulations do not adopt the comments' recommendations.

III. Other Comments and Revisions

A. Certain Registered Investment Vehicles

One comment noted that there are a large number of investment vehicles that are publicly registered with the Securities and Exchange Commission (''SEC'') that own QIEs but are not regularly traded and asserted that the final regulations should treat these investment vehicles offered to retail investors (for example, non-traded publicly registered REITs, non-traded publicly registered RICs, or publicly registered open-ended funds) as non-look-through persons. The comment noted that the same reasoning for applying non-look-through treatment to public domestic C corporations and publicly traded partnerships—that is, difficulty in looking through to the entity's owners and the unlikelihood for use as an intermediary entity to establish domestic control—applied equally to those investment vehicles.

The final regulations do not adopt this comment with respect to registered investment vehicles that are QIEs because section 897(h)(4)(E) already provides specific rules with respect to QIE ownership by other QIEs that are incorporated in the final regulations. In particular, under section 897(h)(4)(E)(ii), stock in a QIE held by certain public QIEs is treated as held by a foreign or United States person based on whether the public QIE is itself domestically controlled. § 1.897–1(c)(3)(iii)(C). Section 897(h)(4)(E)(iii) provides that stock of a QIE held by a QIE that is not a public QIE is only treated as held by a United States person in proportion to the stock of the non-public QIE that is held by a United States person. Section 897(h)(4)(E)(iii) thus contemplates look-through treatment for non-public QIEs, even if such QIEs are publicly registered with the SEC, and this treatment is reflected in the final regulations. § 1.897–1(c)(3)(v)(C).

However, the Treasury Department and the IRS are of the view that the treatment of certain RICs that are not QIEs should be aligned with the treatment of other publicly held entities that are not QIEs. The proposed regulations provided that any RIC that is not a QIE, and thus not subject to the rules that apply to public QIEs, is treated as a look-through person. With respect to RICs whose shares are publicly traded or otherwise widely held, this treatment may be viewed as inconsistent with the treatment of publicly traded partnerships and public domestic C corporations, neither of which is subject to look-through treatment under the proposed regulations primarily due to compliance and administrability concerns. The final regulations therefore provide that a public RIC, generally defined as a RIC that is not a QIE and whose shares are (i) regularly traded on an established securities market or (ii) common stock that is continuously offered pursuant to a public offering and held by at least 500 shareholders, is generally treated as a non-look-through person. § 1.897–1(c)(3)(v)(D) and (I). However, for reasons similar to those discussed in part I.C of this Summary of Comments and Explanation of Revisions (regarding foreign-controlled domestic corporations, which are treated as look-through persons), a RIC will not be a public RIC, and thus will be a look-through person, if the QIE being tested for domestically controlled status under § 1.897–1(c)(3) has actual knowledge that the RIC is foreign controlled, which is determined by treating the RIC as a non-public domestic C corporation and applying § 1.897–1(c)(3)(v)(B). § 1.897–1(c)(3)(v)(I).

B. Public Entities

The proposed regulations provided that a person holding less than five percent of U.S. publicly traded stock of a QIE at all times during the testing period, determined without regard to proposed § 1.897–1(c)(3)(ii)(A), is treated as a United States person that is a non-look-through person with respect to that stock, unless the QIE has actual knowledge that such person is not a United States person. Section 897(h)(4)(E)(i); proposed § 1.897–1(c)(3)(iii)(A). To prevent the avoidance of the actual knowledge exception to this rule, the final regulations modify the rule to provide that it will also not apply if the QIE has actual knowledge that such person is foreign controlled (treating any person that is not a non-public domestic C corporation as a non-public domestic C corporation for this purpose). § 1.897–1(c)(3)(iii)(A).

The proposed regulations also provided non-look-through treatment for public domestic C corporations and publicly traded partnerships, which were generally defined to include entities with a class of stock or interests regularly traded on an established securities market. Proposed § 1.897–1(c)(3)(v)(D), (G) and (I). In the final regulations, these definitions exclude domestic entities that are known to be foreign controlled. Thus, consistent with the treatment of public RICs and for reasons similar to those discussed in part I.C of this Summary of Comments and Explanation of Revisions (regarding foreign-controlled domestic corporations, which are treated as look-through persons), a domestic C corporation or a domestic partnership will not be a public domestic C corporation or a publicly traded partnership, respectively, if the QIE being tested for domestically controlled status under § 1.897–1(c)(3) has actual knowledge that the corporation or partnership is foreign controlled (treating the entity as a non-public domestic C corporation for this purpose). § 1.897–1(c)(3)(v)(G) and (J). In such case, the domestic C corporation or domestic partnership will therefore be a look-through person. § 1.897–1(c)(3)(v)(B) through (E).

C. Certification by Domestic C Corporation

One comment recommended that the final regulations provide guidance on how a domestic C corporation may certify to a QIE that it is not a foreign-owned domestic corporation. The comment suggested that the regulations provide a model certification to confirm that a domestic C corporation is not foreign owned, such as a revised Form W–9.

The final regulations do not provide guidance regarding the procedures for determining whether a domestic C corporation is a foreign-controlled domestic corporation, nor do they provide any procedures generally for a QIE to identify its non-look-through person owners for purposes of determining whether the QIE is domestically controlled. A QIE must take appropriate measures to determine the identity of its direct and indirect shareholders in determining whether it is domestically controlled, and the final regulations do not prescribe a specific form or method as to how it solicits or receives information from its shareholders. Guidance with respect to the manner in which a QIE determines the identity of its relevant shareholders for purposes of establishing domestic control is beyond the scope of this

rulemaking but may be considered in a separate guidance project.

D. Section 1445 Withholding on Dispositions of USRPI

Current regulations under section 1445 (imposing withholding of tax on dispositions of USRPI) provide the circumstances under which a transferee of property can ascertain that there is no duty to withhold under section 1445(a) because the transferor is not a foreign person, the property acquired is not a USRPI, or an exception to withholding applies. § 1.1445–2. Section 1.1445–2(c)(3) provides that no withholding is required with respect to an acquisition of an interest in a domestic corporation if the transferor provides the transferee with a copy of a statement, issued by the corporation pursuant to § 1.897–2(h), certifying that the interest in the corporation is not a USRPI. The transferor must request the statement before the transfer, which may be relied on if the statement is dated not more than 30 days before the date of the transfer. A transferee may also rely on a corporation's statement that is voluntarily provided by the domestic corporation in response to a request from the transferee, if that statement otherwise complies with the requirements of §§ 1.1445–2(c)(3) and 1.897–2(h).

Under § 1.897–2(h)(1), a foreign person holding an interest in a domestic corporation may request that the corporation inform the person whether the interest constitutes a USRPI, which the corporation is required to provide within a reasonable period after receipt of such a request. A statement must be provided by the domestic corporation to the foreign person indicating the corporation's determination, and notice must be provided to the IRS in accordance with § 1.897–2(h)(2). Section 1.897–2(h)(3), however, provides that the requirements of § 1.897–2(h) do not apply to ''domestically-controlled REITs, as defined in section 897(h)(4)(B),'' although a corporation not otherwise required to comply with the requirements of § 1.897–2(h) may voluntarily choose to comply with the requirements of § 1.897–2(h)(4) and attach a statement to its income tax return informing the IRS that it is not a United States real property holding corporation.

The availability of the procedures in § 1.1445–2(c)(3) to holders of stock in a domestically controlled QIE is unclear given its reference to a statement provided under § 1.897–2(h), which is explicitly inapplicable to domestically controlled QIEs under § 1.897–2(h)(3). Although § 1.897–2(h) generally does not apply to domestically controlled QIEs pursuant to § 1.897–2(h)(3) (and, therefore, the corporation is not *required,* upon request, to provide a statement to a person holding an interest in the corporation), this should not preclude the availability of the rules in § 1.1445–2(c)(3) to transferors of interests seeking to avoid withholding under section 1445 when the corporation *voluntarily* provides a statement to an interest holder that otherwise complies with § 1.897–2(h). Absent the availability of these procedures, the transferor would not be able to establish that it is transferring an interest in a domestically controlled QIE and is thus not subject to withholding under section 1445(a). The final regulations thus revise the rules in §§ 1.897–2(h)(3) and 1.1445–2(c)(3) to clarify the procedures available to a transferor to certify to a transferee that no withholding is required because the DC–QIE exception applies. As revised, the final regulations confirm that a domestic corporation may voluntarily provide a statement in response to a request from a transferor certifying that an interest in the corporation is not a USRPI because the corporation is a domestically controlled QIE, which the transferor may furnish to the transferee, provided the statement issued by the corporation otherwise complies with the requirements of § 1.897–2(h).

E. Revisions to Examples

A comment observed that proposed § 1.897–1(c)(3)(vi)(D) (*Example 4*) contained a mathematical error. The final version of this example corrects that error, which does not otherwise affect the overall conclusion that the entity at issue does not qualify as a domestically controlled QIE. § 1.897–1(c)(3)(vii)(D) (*Example 4*). The final regulations make other revisions to the examples in proposed § 1.897–1(c)(3)(vi) to clarify the operation of certain rules, but which are not intended to alter the conclusions or substance of those examples.

IV. Applicability Date and Transition Rules

The proposed regulations generally were proposed to apply to transactions occurring on or after the date that those regulations are published as final regulations in the **Federal Register** (''the finalization date''). The preamble to the proposed regulations noted, however, that the rules applicable for determining whether a QIE is domestically controlled may be relevant for determining QIE ownership during periods before the finalization date to the extent the testing period related to a transaction that occurs on or after the finalization date includes periods before that date.

Comments raised concerns with the proposed applicability date; in particular, they noted that it would have a retroactive effect because of the testing period element of the DC–QIE exception and argued that, if adopted, the domestic corporation look-through rule should apply on a fully prospective basis with no application to any portion of a testing period before the finalization date. Further, these comments characterized the proposed regulations as a change from existing law and asserted that applying the rules to existing structures would be inappropriate because restructuring to comply with the rules would be difficult and costly, and buyers may be less inclined to invest in a structure that may be ''tainted'' as failing to qualify for the DC–QIE exception.

Comments generally advocated for the following types of transition relief: (i) for QIEs in existence on the date the proposed regulations were issued, provide an exception (subject to termination rules like those in § 301.7701–2(d)) such that a foreign-owned domestic corporation is not treated as a look-through person; (ii) exempt foreign investors in existing QIEs from the domestic corporation look-through rule to the extent of existing ownership and capital commitments as of the date the proposed regulations were issued; (iii) only apply the domestic corporation look-through rule to QIE stock acquired by a foreign-owned domestic corporation after the finalization date; or (iv) delay application of the domestic corporation look-through rule to existing QIEs for some period ranging from at least 120 days after the finalization date to tax years beginning on or after January 1, 2028 (drawing from the general five-year testing period standard).

The final regulations do not adopt the suggestion to delay application of the final domestic corporation look-through rule, which would exempt both existing and new QIE structures from the rule. However, the Treasury Department and the IRS have determined that, although the final domestic corporation look-through rule represents the appropriate application of section 897(h)(4)(B), its effect should be limited with respect to investors that may have entered into structures with the expectation that domestic control of a QIE would be determined without regard to that rule. Thus, consistent with the first three types of comments noted above, the final regulations include a transition

rule that, for a ten-year period, exempts existing structures from the final domestic corporation look-through rule, provided they meet certain requirements. § 1.897–1(c)(3)(vi). These requirements are intended to ensure that the final domestic corporation look-through rule does not apply to preexisting business arrangements, but only to the extent the QIE does not acquire a significant amount of new USRPIs and does not undergo a significant change in its ownership (subject to an exception for acquisitions of a USRPI or QIE interest pursuant to a previous binding commitment). § 1.897–1(c)(3)(vi)(A) and (E). If either of these two thresholds is exceeded, the QIE at that time becomes subject to the final domestic corporation look-through rule like any other QIE. § 1.897–1(c)(3)(vi)(B).

A QIE is considered to have acquired a significant amount of new USRPIs if the total fair market value of the USRPIs it acquires directly and indirectly exceeds 20 percent of the fair market value of the USRPIs held directly and indirectly by the QIE as of April 24, 2024. § 1.897–1(c)(3)(vi)(A)(*2*). The final regulations provide that the value of the USRPIs held directly and indirectly by a QIE on April 24, 2024 is determined as of that date and that, for this purpose, taxpayers may use the most recently calculated amounts under the quarterly tests described in section 851(b)(3) or 856(c)(4), as applicable. § 1.897–1(c)(3)(vi)(D). By using these existing rules the final regulations minimize the need to make additional or complex valuations.

In determining whether there has been a significant change in the ownership of a QIE, the final regulations consider whether the direct or indirect ownership of the QIE by non-look-through persons (determined by applying the final domestic corporation look-through rule) has increased by more than 50 percentage points in the aggregate relative to the QIE stock owned by such non-look-through persons on April 24, 2024. § 1.897–1(c)(3)(vi)(A)(*3*). Because this rule applies on a percentage basis, a non-pro-rata issuance or redemption of stock is counted towards the 50 percentage point amount. To simplify the determination of changes in ownership of stock of a QIE that is publicly traded, the final regulations disregard transfers by any person (regardless of whether they are a non-look-through person) that owns a less than five-percent interest in the stock of the QIE, unless the QIE has actual knowledge of that person's ownership. § 1.897–1(c)(3)(vi)(G).

The transition rule applies until April 24, 2034, or, if earlier, until the requirements precluding significant acquisitions of USRPIs and changes in ownership are not met, at which time the final domestic corporation look-through rule applies in determining whether a QIE is domestically controlled. § 1.897–1(c)(3)(vi)(B). The ten-year period is intended to provide sufficient time to mitigate the impact of the final domestic corporation look-through rule on existing QIEs and their investors, but ensures that all QIEs are eventually subject to the same rules. However, even after the transition rule no longer applies, the final domestic corporation look-through rule is prospective only and thus does not apply to any portion of a testing period during which the transition rule applied to a QIE. § 1.897–1(c)(3)(vi)(C). Thus, for example, if the transition rule ceases to apply to a QIE due to a change in its ownership but, at such time, the QIE is a domestically controlled QIE notwithstanding the final domestic corporation look-through rule, the determination of domestic control for the testing period of a subsequent disposition of QIE stock may disregard the final domestic corporation look-through rule to the extent the transition rule applied.

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) generally requires that a Federal agency obtain the approval of the OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. The collection of information in § 1.1445–2(c)(3) is a statement provided by a domestic corporation that certifies that an interest in such corporation is not a U.S. real property interest. Section 1.1445–2(c)(3) clarifies that the existing procedure may also be used by a domestic corporation to certify that it is a domestically controlled QIE (as determined under § 1.897–1(c)(3)), as long as the certification is voluntarily issued and otherwise complies with the existing requirements in § 1.897–2(h).

This modification to § 1.1445–2(c)(3) clarifies the existing scope of the collection of information. For purposes of the PRA, the reporting burden associated with the collections of information in § 1.1445–2(c)(3) will be reflected in the Paperwork Reduction Act Submissions associated with the section 1445 regulations (OMB control number 1545–0902).

III. Regulatory Flexibility Act

A. Succinct Statement of the Need for, and Objectives of, the Final Regulations

As discussed in the preamble to the proposed regulations, there may be some uncertainty as to whether QFPFs and QCEs, which are treated as not ''nonresident alien individuals or foreign corporations'' for purposes of section 897, are treated as foreign persons for purposes of the DC–QIE exception. Treating QFPFs and QCEs as non-foreign investors for purposes of the DC–QIE exception has the potential to expand the effect of section 897(l) to foreign investors who are neither QFPFs nor QCEs (by exempting such investors from tax under section 897(a)). These regulations eliminate any uncertainty that taxpayers may have as to the proper classification of QFPFs and QCEs for purposes of the DC–QIE exception by providing that QFPFs and QCEs are treated as foreign persons for purposes of the DC–QIE exception.

Also as discussed in the preamble to the proposed regulations, there is uncertainty regarding the determination of whether stock of a QIE is held ''directly or indirectly'' by foreign persons for purposes of the DC–QIE exception. These regulations provide rules to clarify this determination.

Because there was a possibility of significant economic impact on a substantial number of small entities as a result of the rules relating to the treatment of QFPFs and QCEs for purposes of the DC–QIE exception and the definition of a domestically controlled QIE, the proposed regulations provided an initial regulatory flexibility analysis and requested comments from the public on the number of small entities that may be impacted and whether that impact will be economically significant. No comments were received.

B. Small Entities to Which These Regulations Will Apply

The regulation relating to the treatment of QFPFs and QCEs for purposes of the DC–QIE exception affects other foreign investors in QIEs.

The regulation defining a domestically controlled QIE also affects foreign investors in QIEs. Because an estimate of the number of small businesses affected is not currently feasible, this final regulatory flexibility analysis assumes that a substantial number of small businesses will be affected. The Treasury Department and the IRS do not expect that these regulations will affect a substantial number of small nonprofit organizations or small governmental jurisdictions.

C. Projected Reporting, Recordkeeping, and Other Compliance Requirements

These regulations do not impose additional reporting or recordkeeping obligations. However, see Part II of this Special Analysis describing certain voluntary reporting that these regulations clarify is available in § 1.1445–2(c)(3) by a domestic corporation to certify that it is a domestically controlled QIE.

D. Steps Taken To Minimize Significant Economic Impact, Legal Reasons, and Alternatives Considered

The final regulations address potential uncertainty under current law and do not impose an additional economic burden. Consequently, the rules represent the approach with the least economic impact.

These regulations clarify the treatment of QFPFs and QCEs for purposes of the DC–QIE exception. The rules are intended to ensure that the exemption under section 897(l) does not inappropriately inure to non-QFPFs or non-QCEs by treating QFPFs and QCEs as domestic investors for purposes of the DC–QIE exception. These regulations also clarify whether stock of a QIE is held ‘‘directly or indirectly’’ by foreign persons in determining whether the DC–QIE exception applies. The legal basis for these regulations is contained in sections 897(l) and 7805.

Section 897(a) applies to nonresident alien individuals and foreign corporations, and neither the statute nor prior regulations establish different rules for small entities. Moreover, the DC–QIE exception is measured based on the ownership interests in a QIE, regardless of the size of the investor. Because the DC–QIE exception takes into account all investors, regardless of size, the Treasury Department and the IRS have concluded that the DC–QIE exception should apply uniformly to large and small business entities. The Treasury Department and the IRS did not consider any significant alternative to the rule that provides for the treatment of QFPFs and QCEs under the DC–QIE exception.

The Treasury Department and the IRS did consider alternatives for the rule that defines a domestically controlled QIE, including one alternative that generally would treat all domestic C corporations as non-look-through persons (that is, without the special rule for foreign-controlled domestic corporations discussed in part I of the Summary of Comments and Explanation of Revisions section of this preamble). However, the Treasury Department and the IRS concluded that the look-through approach in the final regulations best serves the purposes of the DC–QIE exception while also taking into account ‘‘indirect’’ ownership of QIE stock by foreign persons in determining whether a QIE is domestically controlled under section 897(h)(4)(B).

IV. Section 7805(f)

Pursuant to section 7805(f) of the Code, the proposed regulations (REG–100442–22) preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact on small businesses and no comments were received.

V. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. The final regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

VI. Executive Order 13132: Federalism

Executive Order 13132 (entitled ‘‘Federalism’’) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. The final regulations do not have federalism implications, do not impose substantial direct compliance costs on State and local governments, and do not preempt State law within the meaning of the Executive order.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices, and other guidance cited in this document are published in the Internal Revenue Bulletin or Cumulative Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *www.irs.gov.*

Drafting Information

The principal author of these final regulations is Arielle Borsos, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order for §§ 1.897–1, 1.897–2, and 1.1445–2 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 1.897–1 also issued under 26 U.S.C. 897 and 897(l)(3).

Section 1.897–2 also issued under 26 U.S.C. 897.

* * * * *

Section 1.1445–2 also issued under 26 U.S.C. 1445.

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■ **Par. 2.** Section 1.897–1 is amended by:

■ 1. Revising paragraph (a)(2);

■ 2. Removing and reserving paragraph (c)(2)(i);

■ 3. Adding paragraphs (c)(3) and (4) and (k);

■ 4. Revising and republishing paragraph (l); and

■ 5. Adding paragraph (n).

The revisions and additions read as follows:

§ 1.897–1 Taxation of foreign investment in United States real property interests, definition of terms.

(a) * * *

(2) *Applicability date.* Except as otherwise provided in this paragraph (a)(2), the regulations set forth in this section and §§ 1.897–2 through 1.897–4 apply to transactions occurring after June 18, 1980. Except as otherwise

provided in paragraph (c)(3)(vi) of this section, paragraphs (c)(3) and (4), (k), and (l) of this section apply to transactions occurring on or after April 25, 2024, and transactions occurring before April 25, 2024, resulting from an entity classification election under § 301.7701–3 of this chapter that was effective on or before April 25, 2024, but was filed on or after April 25, 2024. For transactions occurring before April 25, 2024, *see* paragraphs (c)(2)(i) and (l) of this section and § 1.897–9T(c) contained in 26 CFR part 1, as revised April 1, 2024.

* * * * *

(c) * * *

(3) *Domestically controlled QIE*—(i) *In general.* An interest in a domestically controlled qualified investment entity (QIE) is not a United States real property interest. A QIE is domestically controlled if foreign persons hold directly or indirectly less than 50 percent of the fair market value of the QIE's outstanding stock at all times during the testing period. For rules that apply to distributions by a QIE (including a domestically controlled QIE) attributable to gain from the sale or exchange of a United States real property interest, *see* section 897(h)(1).

(ii) *Look-through approach for determining QIE stock held directly or indirectly.* The following rules apply for purposes of determining whether a QIE is domestically controlled:

(A) *Non-look-through persons considered holders.* Only a non-look-through person is considered to hold directly or indirectly stock of the QIE.

(B) *Attribution from look-through persons.* Stock of a QIE that, but for the application of paragraph (c)(3)(ii)(A) of this section, would be considered directly or indirectly held by a look-through person, is instead considered held directly or indirectly by the look-through person's shareholders, partners, or beneficiaries, as applicable, that are non-look-through persons based on the non-look-through person's proportionate interest in the look-through person. To the extent the shareholders, partners, or beneficiaries, as applicable, of the look-through person are also look-through persons, this paragraph (c)(3)(ii)(B) applies to such shareholders, partners, or beneficiaries as if they directly or indirectly held, but for the application of paragraph (c)(3)(ii)(A) of this section, their proportionate share of the stock of the QIE.

(C) *No attribution from non-look-through persons.* Stock of a QIE considered held directly or indirectly by a non-look-through person is not considered held directly or indirectly by any other person.

(iii) *Special rules for applying look-through approach.* The following additional special rules apply for purposes of determining whether a QIE is domestically controlled:

(A) *Certain holders of U.S. publicly traded QIE stock.* Notwithstanding any other provision of this paragraph (c)(3), a person holding less than five percent of U.S. publicly traded stock of a QIE at all times during the testing period, determined without regard to paragraph (c)(3)(ii)(A) of this section, is treated as a United States person that is a non-look-through person with respect to that stock, unless the QIE has actual knowledge that such person is not a United States person or has actual knowledge that such person is foreign controlled as determined under paragraph (c)(3)(v)(B) of this section (treating any person that is not a non-public domestic C corporation as if it were a non-public domestic C corporation for this purpose). For an example illustrating the application of this paragraph (c)(3)(iii)(A), *see* paragraph (c)(3)(vii)(C) of this section (*Example 3*).

(B) *Certain foreign-controlled domestic C corporations.* A non-public domestic C corporation is treated as a look-through-person if it is a foreign-controlled domestic corporation. For an example illustrating the application of this paragraph (c)(3)(iii)(B), *see* paragraph (c)(3)(vii)(B) of this section (*Example 2*).

(C) *Public QIEs.* A public QIE is treated as a foreign person that is a non-look-through person. The preceding sentence does not apply, however, if the public QIE is a domestically controlled QIE as defined in this paragraph (c)(3), determined after the application of this paragraph (c)(3)(iii), in which case the public QIE is treated as a United States person that is a non-look-through person. For an example illustrating the application of this paragraph (c)(3)(iii)(C), *see* paragraph (c)(3)(vii)(C) of this section (*Example 3*).

(iv) *Treatment of certain persons as foreign persons*—(A) *Qualified foreign pension fund or qualified controlled entity.* For purposes of this paragraph (c)(3), a qualified foreign pension fund (including any part of a qualified foreign pension fund) or a qualified controlled entity is treated as a foreign person, irrespective of whether the fund or entity qualifies for the exception from section 897 provided in § 1.897(l)–1(b)(1). For an example illustrating the application of this paragraph (c)(3)(iv)(A), *see* paragraph (c)(3)(vii)(A) of this section (*Example 1*). *See also* paragraph (k) of this section for a definition of foreign person that applies for purposes of sections 897, 1445, and 6039C.

(B) *International organization.* For purposes of this paragraph (c)(3), an international organization (as defined in section 7701(a)(18)) is treated as a foreign person. *See* § 1.897–9T(e) (regarding the treatment of international organizations under sections 897, 1445, and 6039C), which provides that an international organization is not a foreign person with respect to United States real property interests, and is not subject to sections 897, 1445, and 6039C on the disposition of a United States real property interest.

(v) *Definitions.* The following definitions apply for purposes of this paragraph (c)(3):

(A) A *domestic C corporation* is any domestic corporation other than a regulated investment company (RIC) as defined in section 851, a real estate investment trust (REIT) as defined in section 856, or an S corporation as defined in section 1361.

(B) A *foreign-controlled domestic corporation* is any non-public domestic C corporation if foreign persons hold directly or indirectly more than 50 percent of the fair market value of the non-public domestic C corporation's outstanding stock. For purposes of determining whether a non-public domestic C corporation is a foreign-controlled domestic corporation, the rules of paragraphs (c)(3)(ii)(A) through (C) and (c)(3)(iii)(C) of this section apply with the following modifications—

(*1*) In paragraphs (c)(3)(ii)(A) through (C) of this section, treating references to *QIE* as references to *non-public domestic C corporation;* and

(*2*) A non-public domestic C corporation that is a foreign-controlled domestic corporation under this paragraph (c)(3)(v)(B) is treated as a look-through person for purposes of determining whether any other non-public domestic C corporation is a foreign-controlled domestic corporation.

(C) A *look-through person* is any person other than a non-look-through person. Thus, for example, a look-through person includes a REIT that is not a public QIE, an S corporation, a partnership (domestic or foreign) that is not a publicly traded partnership, a RIC that is not a public RIC, and a trust (domestic or foreign, whether or not the trust is described in sections 671 through 679). For a special rule that treats certain non-public domestic C corporations as look-through persons, *see* paragraph (c)(3)(iii)(B) of this section.

(D) A *non-look-through person* is an individual, a domestic C corporation (other than a foreign-controlled domestic corporation), a nontaxable holder, a foreign corporation (including a foreign government pursuant to section 892(a)(3)), a publicly traded partnership (domestic or foreign), a public RIC, an estate (domestic or foreign), an international organization (as defined in section 7701(a)(18)), a qualified foreign pension fund (including any part of a qualified foreign pension fund), or a qualified controlled entity. For special rules that treat certain holders of QIE stock as non-look-through persons, *see* paragraphs (c)(3)(iii)(A) and (C) of this section.

(E) A *non-public domestic C corporation* is any domestic C corporation that is not a public domestic C corporation.

(F) A *nontaxable holder* is—

(*1*) Any organization that is exempt from taxation by reason of section 501(a);

(*2*) The United States, any State (as defined in section 7701(a)(10)), any territory of the United States, or a political subdivision of any State or any territory of the United States; or

(*3*) Any Indian Tribal government (as defined in section 7701(a)(40)) or its subdivision (determined in accordance with section 7871(d)).

(G) A *public domestic C corporation* is a domestic C corporation any class of stock of which is regularly traded on an established securities market within the meaning of §§ 1.897–1(m) and 1.897–9T(d). A domestic C corporation is not a public domestic C corporation, however, if the QIE whose status as domestically controlled is being determined under this paragraph (c)(3) has actual knowledge that the domestic C corporation is foreign controlled as determined under paragraph (c)(3)(v)(B) of this section (treating the domestic C corporation for this purpose as if it were a non-public domestic C corporation).

(H) A *public QIE* is a QIE any class of stock of which is regularly traded on an established securities market within the meaning of §§ 1.897–1(m) and 1.897–9T(d), or that is a RIC that issues redeemable securities within the meaning of section 2 of the Investment Company Act of 1940.

(I) A *public RIC* is a RIC that is not a QIE and any class of stock of which is either regularly traded on an established securities market within the meaning of §§ 1.897–1(m) and 1.897–9T(d), or common stock that is continuously offered pursuant to a public offering (within the meaning of section 4 of the Securities Act of 1933, as amended (15 U.S.C. 77a to 77aa)) and held by or for no fewer than 500 persons. A RIC is not a public RIC, however, if the QIE whose status as domestically controlled is being determined under this paragraph (c)(3) has actual knowledge that the RIC is foreign controlled as determined under paragraph (c)(3)(v)(B) of this section (treating the RIC for this purpose as if it were a non-public domestic C corporation).

(J) A *publicly traded partnership* is a partnership any class of interest of which is regularly traded on an established securities market within the meaning of §§ 1.897–1(m) and 1.897–9T(d). A domestic partnership is not a publicly traded partnership, however, if the QIE whose status as domestically controlled is being determined under this paragraph (c)(3) has actual knowledge that the domestic partnership is foreign controlled as determined under paragraph (c)(3)(v)(B) of this section (treating the partnership for this purpose as if it were a non-public domestic C corporation).

(K) A *qualified controlled entity* has the meaning set forth in § 1.897(l)–1(e)(9).

(L) A *qualified foreign pension fund* has the meaning set forth in § 1.897(l)–1(c).

(M) A *QIE* is a qualified investment entity, as defined in section 897(h)(4)(A).

(N) *Testing period* has the meaning set forth in section 897(h)(4)(D).

(O) *U.S. publicly traded QIE stock* is any class of stock of a QIE that is regularly traded on an established securities market within the meaning of §§ 1.897–1(m) and 1.897–9T(d), but only if the established securities market is in the United States.

(vi) *Transition rule for certain QIEs owned by foreign-controlled domestic corporations*—(A) *General rule.* Except as provided in paragraph (c)(3)(vi)(B) of this section, paragraph (c)(3)(iii)(B) of this section does not apply with respect to a QIE that is in existence as April 24, 2024, and satisfies the following requirements at all times on and after April 24, 2024—

(*1*) The QIE is domestically controlled (as determined under this paragraph (c)(3), but without regard to paragraph (c)(3)(iii)(B) of this section);

(*2*) The aggregate fair market value of any United States real property interests acquired by the QIE directly and indirectly after April 24, 2024, is no more than 20 percent of the aggregate fair market value of the United States real property interests held directly and indirectly by the QIE as of April 24, 2024 (determined in accordance with paragraph (c)(3)(vi)(D) of this section); and

(*3*) The percentage of the stock of the QIE held directly or indirectly by one or more non-look-through persons (determined based on fair market value and under the rules of paragraphs (c)(3)(ii) through (v) of this section and this paragraph (c)(3)(vi), including paragraph (c)(3)(iii)(B) of this section) does not increase by more than 50 percentage points in the aggregate over the percentage of stock of the QIE owned directly or indirectly by such non-look-through persons on April 24, 2024.

(B) *Termination of transition rule.* The transition rule described in paragraph (c)(3)(vi)(A) of this section will cease to apply, and the rule in paragraph (c)(3)(iii)(B) of this section will apply for purposes of determining whether a QIE is domestically controlled, with respect to transactions occurring on or after the earlier of:

(*1*) The date immediately following the date on which the QIE fails to meet any of the requirements described in paragraph (c)(3)(vi)(A) of this section; and

(*2*) April 24, 2034. For an example illustrating the application of paragraph (c)(3)(vi)(A) of this section and this paragraph (c)(3)(vi)(B), *see* paragraph (c)(3)(vii)(E) of this section (*Example 5*).

(C) *Effect of transition rule on testing period.* If the transition rule described in paragraph (c)(3)(vi)(A) of this section ceases to apply to a QIE under paragraph (c)(3)(vi)(B) of this section, the rule in paragraph (c)(3)(iii)(B) of this section will not apply to the QIE with respect to the portion of any testing period during which the transition rule in this paragraph (c)(3)(vi) applied.

(D) *Determination of fair market value of United States real property interests.* For purposes of paragraph (c)(3)(vi)(A)(*2*) of this section, the fair market value of the United States real property interests held directly and indirectly by a QIE on April 24, 2024, is the value of such property interests as calculated under section 851(b)(3) or 856(c)(4) as of the close of the most recent quarter of the QIE's taxable year before April 24, 2024. For purposes of paragraph (c)(3)(vi)(A)(*2*) of this section, the fair market value of any property acquired after the close of the most recent quarter of the QIE's taxable year before April 24, 2024, whether acquired before or after April 24, 2024, is determined on the date of such acquisition using a reasonable method, provided the QIE consistently uses the same method with respect to all of its United States real property interests when applying this paragraph (c)(3)(vi).

(E) *Binding commitments.* For purposes of paragraphs (c)(3)(vi)(A)(*2*) and (*3*) of this section, a direct or indirect acquisition of a United States real property interest, or of stock of a QIE pursuant to a written agreement that was (subject to customary conditions) binding before April 24, 2024, and all times thereafter, or pursuant to a tender offer announced before April 24, 2024, that is subject to section 14(e) of the Securities and Exchange Act of 1934 (15 U.S.C. 78n(e)) and 17 CFR 240.14e–1 through 240.14e–8 (Regulation 14E), is treated as occurring on April 24, 2024.

(F) *Ownership by certain successors under section 368(a)(1)(F).* For purposes of paragraph (c)(3)(vi)(A)(*3*) of this section, the transferor corporation and the resulting corporation (as defined in § 1.368–2(m)(1)) in a reorganization described under section 368(a)(1)(F) (whether engaged in by the QIE or by another corporation) are treated as the same corporation.

(G) *Ownership by less than five-percent public shareholders.* For purposes of paragraph (c)(3)(vi)(A)(*3*) of this section, in the case of any class of stock of a QIE that is regularly traded on an established securities market within the meaning of §§ 1.897–1(m) and 1.897–9T(d), all such stock owned by persons holding less than 5 percent of that class of stock, determined without regard to paragraph (c)(3)(ii)(A) of this section, is treated as stock owned by a single non-look-through person except to the extent that the QIE has actual knowledge regarding the ownership of any person.

(vii) *Examples.* The rules of this paragraph (c)(3) are illustrated by the following examples. It is assumed that each entity has a single class of stock or other ownership interests, that the ownership described existed throughout the relevant testing period and that, unless otherwise stated, a QIE is not a public QIE as defined under paragraph (c)(3)(v)(H) of this section.

(A) *Example 1: QIE stock held by public domestic C corporation*—(*1*) *Facts.* USR is a REIT, 51 percent of the stock of which is held by X, a public domestic C corporation as defined in paragraph (c)(3)(v)(G) of this section, and 49 percent of the stock of which is held by nonresident alien individuals, which are foreign persons as defined in paragraph (k) of this section.

(*2*) *Analysis.* Under paragraph (c)(3)(v)(M) of this section, USR is a QIE. Because X is a public domestic C corporation, it cannot be a foreign-controlled domestic corporation and, therefore, is a non-look-through person as defined under paragraph (c)(3)(v)(D) of this section. Thus, under paragraph (c)(3)(ii)(A) of this section X is considered as holding directly or indirectly stock of USR for purposes of determining whether USR is a domestically controlled QIE. Under paragraph (c)(3)(ii)(C) of this section, the USR stock held directly or indirectly by X is not considered held directly or indirectly by any other person, including the shareholders of X. Because X is not a foreign person as defined in paragraph (k) of this section and holds directly or indirectly 51 percent of the single class of outstanding stock of USR, foreign persons hold directly or indirectly less than 50 percent of the fair market value of the stock of USR, and USR therefore is a domestically controlled QIE under paragraph (c)(3)(i) of this section.

(*3*) *Alternative facts: QIE stock held by domestic partnership.* The facts are the same as in paragraph (c)(3)(vii)(A)(*1*) of this section (*Example 1*), except that, instead of being a public domestic C corporation, X is a domestic partnership that is not a publicly traded partnership as defined in paragraph (c)(3)(v)(J) of this section. In addition, FC1, a foreign corporation, holds a 50 percent interest in X, and the remaining interests in X are held by U.S. citizens. X is not a non-look-through person as defined in paragraph (c)(3)(v)(D) of this section and, therefore, is a look-through person as defined in paragraph (c)(3)(v)(C) of this section. Accordingly, under paragraph (c)(3)(ii)(A) of this section, X is not considered as holding directly or indirectly stock of USR for purposes of determining whether USR is a domestically controlled QIE. Under paragraph (c)(3)(ii)(B) of this section, the stock of USR that, but for paragraph (c)(3)(ii)(A) of this section, is considered held by X, a look-through person, is instead considered held proportionately by X's partners that are non-look-through persons. Accordingly, because FC1 and the U.S. citizen partners in X are non-look-through persons as defined in paragraph (c)(3)(v)(D) of this section, 25.5 percent of the stock of USR is considered as held directly or indirectly by FC1 (50% x 51%), a foreign person as defined in paragraph (k) of this section, and 25.5 percent (in the aggregate) of the stock of USR is considered as held directly or indirectly by the U.S. citizen partners in X (50% x 51%), who are not foreign persons as defined in paragraph (k) of this section. Foreign persons therefore hold directly or indirectly 74.5 percent of the stock of USR (49 percent of the stock of USR held directly or indirectly by nonresident alien individuals, who are non-look-through persons as defined in paragraph (c)(3)(v)(D) of this section, plus the 25.5 percent held directly or indirectly by FC1), and USR is not a domestically controlled QIE under paragraph (c)(3)(i) of this section. The result described in this paragraph (c)(3)(vii)(A)(*3*) would be the same if, instead of being a domestic partnership, X were a foreign partnership.

(*4*) *Alternative facts: QIE stock held by a qualified foreign pension fund.* The facts are the same as in paragraph (c)(3)(vii)(A)(*3*) of this section (*Example 1*), except that, instead of being a foreign corporation, FC1 is a qualified foreign pension fund. The analysis is the same as in paragraph (c)(3)(vii)(A)(*3*) (*Example 1*) regarding the treatment of X as a look-through person as defined in paragraph (c)(3)(v)(C) of this section. In addition, FC1, a foreign person under paragraph (c)(3)(iv)(A) of this section, is a non-look-through person as defined in paragraph (c)(3)(v)(D) of this section. Because FC1 and the U.S. citizen partners in X are non-look-through persons, 25.5 percent of the stock of USR is considered as held directly or indirectly by FC1 (50% x 51%), and 25.5 percent (in the aggregate) of the stock of USR is considered as held directly or indirectly by the U.S. citizen partners in X (50% x 51%). Thus, for the same reasons described in paragraph (c)(3)(vii)(A)(*3*) (*Example 1*), foreign persons hold directly or indirectly 74.5 percent of the stock of USR, and USR is not a domestically controlled QIE under paragraph (c)(3)(i) of this section.

(B) *Example 2: QIE stock held by non-public domestic C corporation that is a foreign-controlled domestic corporation*—(*1*) *Facts.* USR is a REIT, 51 percent of the stock of which is held by X, a non-public domestic C corporation as defined in paragraph (c)(3)(v)(E) of this section, and 49 percent of the stock of which is held by nonresident alien individuals, which are foreign persons as defined in paragraph (k) of this section. FC1, a foreign corporation, holds 40 percent of the stock of X, and Y, a nonresident alien individual, holds 15 percent of the stock of X. The remaining 45 percent of the stock of X is held by U.S. citizens.

(*2*) *Analysis.* Under paragraph (c)(3)(v)(M) of this section, USR is a QIE. X, a non-public domestic C corporation, is a non-look-through person as defined under paragraph (c)(3)(v)(D) of this section, unless paragraph (c)(3)(iii)(B) of this section applies to treat X as a look-through person because X is a foreign-controlled domestic corporation. FC1, Y, and the U.S. citizen shareholders of X are non-look-through persons as defined under paragraph (c)(3)(v)(D).

Under paragraph (c)(3)(v)(B)(*1*) of this section, FC1, Y, and the U.S. citizen shareholders are all considered as holding directly or indirectly stock of X for purposes of determining whether X is a foreign-controlled domestic corporation. Under paragraph (c)(3)(v)(B)(*1*) of this section, the stock held directly or indirectly by FC1, Y, and the U.S. citizen shareholders is not considered held directly or indirectly by any other person. Because FC1 and Y, both foreign persons as defined in paragraph (k) of this section, hold directly or indirectly 40 percent and 15 percent of the stock of X, respectively, foreign persons hold directly or indirectly more than 50 percent of the fair market value of the stock of X, and X is a foreign-controlled domestic corporation under paragraph (c)(3)(v)(B) of this section. Accordingly, under paragraph (c)(3)(iii)(B) of this section, X is a look-through person as defined in paragraph (c)(3)(v)(C) of this section and, therefore, under paragraph (c)(3)(ii)(A) of this section is not considered as holding directly or indirectly stock of USR for purposes of determining whether USR is a domestically controlled QIE. Under paragraph (c)(3)(ii)(B) of this section, the stock of USR that, but for paragraph (c)(3)(ii)(A), is considered held by X, a look-through person, is instead considered held proportionately by X's shareholders that are non-look-through persons. Accordingly, because FC1, Y, and the U.S. citizen shareholders of X are non-look-through persons, 20.4 percent of the stock of USR is considered as held directly or indirectly by FC1 (40% x 51%), 7.65 percent of the stock of USR is considered as held directly or indirectly by Y (15% x 51%), and 22.95 percent (in the aggregate) of the stock of USR is considered as held directly or indirectly by the U.S. citizen shareholders (45% x 51%). Foreign persons therefore hold directly or indirectly 77.05 percent of the stock of USR (49 percent of the stock of USR held directly by nonresident alien individuals, who are foreign persons and non-look-through persons as defined in paragraph (c)(3)(v)(D), plus the 20.4 percent and 7.65 percent held indirectly by FC1 and Y, respectively), and USR is not a domestically controlled QIE under paragraph (c)(3)(i) of this section. The result described in this paragraph (c)(3)(vii)(B)(*2*) would be different if Y were a U.S. citizen instead of a nonresident alien individual, in which case X would be a non-look-through person because it is not a foreign-controlled domestic corporation under paragraph (c)(3)(v)(B) (the only foreign non-look-through person to hold directly or indirectly stock in X is FC1, which holds a 40-percent interest). Consequently, USR would be a domestically controlled QIE under paragraph (c)(3)(i) of this section because foreign persons hold directly or indirectly less than 50 percent of the stock of USR.

(C) *Example 3: QIE stock held by public QIE that is a domestically controlled QIE*—(*1*) *Facts.* USR2 is a REIT, 51 percent of the stock of which is held by USR1, a REIT that is a public QIE as defined in paragraph (c)(3)(v)(H) of this section, and 49 percent of the stock of which is held by nonresident alien individuals, which are foreign persons as defined in paragraph (k) of this section. The stock of USR1 is U.S. publicly traded QIE stock as defined in paragraph (c)(3)(v)(O) of this section. FC1 and FC2, both foreign corporations, each hold 20 percent of the stock of USR1. The remaining 60 percent of the stock of USR1 is held by persons that each hold less than 5 percent of the stock of USR1 and with respect to which USR1 has no actual knowledge that such person is not a United States person or is foreign controlled (as determined under paragraph (c)(3)(v)(B) of this section by treating any person that is not a non-public domestic C corporation as if it were a non-public domestic C corporation for this purpose) (USR1 less than five-percent public shareholders).

(*2*) *Analysis.* Under paragraph (c)(3)(v)(M) of this section, USR2 and USR1 are QIEs. Under paragraph (c)(3)(iii)(A) of this section, each of the USR1 less than five-percent public shareholders is treated as a United States person that is a non-look-through person. Consequently, under paragraph (c)(3)(i) of this section USR1 is a domestically controlled QIE because FC1 and FC2, each a foreign person as defined in paragraph (k) of this section that is a non-look-through person under paragraph (c)(3)(v)(D) of this section, together hold directly or indirectly only 40 percent of the stock of USR1 and, thus, foreign persons hold directly or indirectly less than 50 percent of the fair market value of the stock of USR1. In addition, the USR2 stock held by USR1 is treated as held directly or indirectly by a United States person that is a non-look-through person under paragraph (c)(3)(iii)(C) of this section. Because USR1 holds directly or indirectly 51 percent of the stock of USR2, foreign persons hold directly or indirectly less than 50 percent of the fair market value of the stock of USR2, and USR2 is a domestically controlled QIE under paragraph (c)(3)(i) of this section.

(*3*) *Alternative facts: QIE stock held by public QIE that is not a domestically controlled QIE.* The facts are the same as in paragraph (c)(3)(vii)(C)(*1*) of this section (*Example 3*), except that 25 percent of the stock of USR1 is held by each of FC1 and FC2, with the remaining 50 percent of the stock of USR1 held by the USR1 less than five-percent public shareholders. Regardless of the treatment of the USR1 less than five-percent public shareholders, USR1 is not a domestically controlled QIE under paragraph (c)(3)(i) of this section because FC1 and FC2, each a foreign person as defined in paragraph (k) of this section that is a non-look-through person under paragraph (c)(3)(v)(D) of this section, together hold directly or indirectly 50 percent of the stock of USR1 and, thus, foreign persons do not hold directly or indirectly less than 50 percent of the fair market value of the stock of USR1. In addition, the USR2 stock held by USR1 is treated as held by a foreign person that is a non-look-through person under paragraph (c)(3)(iii)(C) of this section. Because USR1 holds directly or indirectly 51 percent of the stock of USR2, foreign persons do not hold directly or indirectly less than 50 percent of the fair market value of the stock of USR2, and USR2 is not a domestically controlled QIE under paragraph (c)(3)(i) of this section.

(D) *Example 4: QIE stock held by non-public QIE*—(*1*) *Facts.* USR2 is a REIT, 49 percent of the stock of which is held by nonresident alien individuals, and 51 percent of the stock of which is held by USR1, a REIT. USR1 is not a public QIE as defined in paragraph (c)(3)(v)(H) of this section. U.S. citizens hold 50 percent of the stock of USR1. The remaining 50 percent of the stock of USR1 is held by PRS, a domestic partnership, 50 percent of the interests in which are held by DC, a public domestic C corporation as defined in paragraph (c)(3)(v)(G) of this section, and 50 percent of the interests in which are held by nonresident alien individuals.

(*2*) *Analysis.* Under paragraph (c)(3)(v)(M) of this section, USR2 and USR1 are QIEs. USR1 is not treated as a non-look-through person under paragraph (c)(3)(iii)(C) of this section because USR1 is not a public QIE as defined in paragraph (c)(3)(v)(H) of this section. Each of USR1 and PRS is a look-through person as defined in paragraph (c)(3)(v)(C) of this section that is not treated as holding directly or indirectly stock in USR2 for purposes of determining whether USR2 is a domestically controlled QIE under paragraph (c)(3)(ii)(A) of this section.

Because the U.S. citizens who hold USR1 stock are non-look-through persons as defined in paragraph (c)(3)(v)(D) of this section, those U.S. citizens are treated under paragraph (c)(3)(ii)(B) of this section as holding directly or indirectly 25.5 percent of the stock of USR2 through their USR1 stock interest (50% x 51%) in accordance with paragraph (c)(3)(ii)(A) of this section. Similarly, because DC and the nonresident alien partners in PRS are non-look-through persons, each is treated under paragraph (c)(3)(ii)(B) of this section as holding directly or indirectly the stock of USR2 through its interest in PRS and PRS's interest in USR1. Thus, DC is treated as holding directly or indirectly 12.75 percent of the stock of USR2 (50% × 50% × 51%) and the nonresident alien individual partners, which are foreign persons as defined in paragraph (k) of this section, are treated as directly or indirectly holding a 12.75 percent aggregate interest in the stock of USR2 (50% × 50% × 51%). Foreign persons therefore hold directly or indirectly 61.75 percent of the stock of USR2 (the 49 percent stock in USR2 directly held by nonresident alien individuals, who are foreign persons and non-look-through persons as defined in paragraph (c)(3)(v)(D), plus the 12.75 percent in stock indirectly held by the nonresident alien individual partners in PRS), and USR2 is not a domestically controlled QIE under paragraph (c)(3)(i) of this section.

(E) *Example 5: Transition rule asset requirement*—(*1*) *Facts.* USR is a REIT formed on January 1, 2018. From formation, 51 percent of the stock of USR is held by X, a non-public domestic C corporation as defined in paragraph (c)(3)(v)(E) of this section, 25 percent of the stock of USR is held by FC1, a foreign corporation, and 24 percent of the stock of USR is held by nonresident alien individuals. FC2, a foreign corporation, and FC3, also a foreign corporation, each hold 50 percent of the stock of X. On April 24, 2024, USR's only property is Asset 1, a United States real property interest. The value of Asset 1, calculated under section 856(c)(4) as of the most recent quarter of USR's taxable year before 24, is $100x. On January 1, 2026, USR borrows $30x and acquires Asset 2, a United States real property interest, for $30x.

(*2*) *Analysis.* As of April 24, 2024, USR is a domestically controlled QIE under paragraph (c)(3)(i) of this section, because, as determined without regard to paragraph (c)(3)(iii)(B) of this section, X is a non-look-through person and, consequently, foreign persons hold directly or indirectly less than 50 percent of the stock of USR. Accordingly, USR satisfies the requirement under paragraph (c)(3)(vi)(A)(*1*) of this section. USR also satisfies the requirements under paragraphs (c)(3)(vi)(A)(*2*) and (*3*) of this section, respectively, as of such date, because USR has not acquired directly or indirectly any United States real property interests, and the ownership of stock of USR has not changed. Thus, as of April 24, 2024, USR qualifies for the transition relief under paragraph (c)(3)(vi)(A) of this section. However, on January 1, 2026, USR no longer meets the requirement for transition relief in paragraph (c)(3)(vi)(A)(*2*) of this section because the fair market value of Asset 2, $30x, is 30 percent (which is more than 20 percent) of $100x, which (as calculated in accordance with paragraphs (c)(3)(vi)(A)(*2*) and (c)(3)(vi)(D) of this section) is the fair market value of USR's United States real property interests, namely Asset 1, as of April 24, 2024. Therefore, under paragraph (c)(3)(vi)(B)(*1*) of this section the transition rule ceases to apply to USR and, thus, paragraph (c)(3)(iii)(B) applies for purposes of determining whether USR is domestically controlled with respect to transactions occurring after January 1, 2026. Because FC2 and FC3 are non-look-through persons that hold more than 50 percent of the stock of X, X is a foreign-controlled domestic corporation under paragraph (c)(3)(iii)(B), and USR will not be a domestically controlled QIE under paragraph (c)(3)(i) of this section as of January 2, 2026, because foreign non-look-through persons (FC1, 25 percent, FC2, 25.5 percent, FC3, 25.5 percent, and the nonresident alien individuals, 24 percent) directly or indirectly hold more than 50 percent of the stock of USR.

(*3*) *Alternative facts: transition rule ownership requirement.* The facts are the same as in paragraph (c)(3)(vii)(E)(*1*) of this section (*Example 5*), except that instead of USR borrowing funds and acquiring Asset 2, FC3 sells its 50-percent stock interest in X to FC2 on June 1, 2024, and, on January 1, 2026, FC1 sells its 25-percent stock interest in USR to FC4, a foreign corporation. Following FC3's sale of its X stock to FC2 on June 1, 2024, FC2's stock interest in USR has increased by 25.5 percentage points, from 25.5 percent on April 24, 2024 (which is 50 percent of 51 percent), to 51 percent. Following FC1's sale of its USR stock to FC4 on January 1, 2026, FC4's stock interest in USR has increased by 25 percentage points, from zero percent on April 24, 2024, to 25 percent. Accordingly, in the aggregate, non-look-through persons have increased their ownership in USR by 50.5 percentage points (25.5 percent and 25 percent for FC2 and FC4, respectively), and USR no longer meets the requirement for transition relief in paragraph (c)(3)(vi)(A)(*3*) of this section as of January 1, 2026. Therefore, under paragraph (c)(3)(vi)(B)(*1*) of this section the transition rule ceases to apply to USR and, thus, paragraph (c)(3)(iii)(B) of this section applies for purposes of determining whether USR is domestically controlled with respect to transactions occurring after January 1, 2026. Because FC2, a non-look-through person, holds more than 50 percent of the stock of X, X is a foreign-controlled domestic corporation under paragraph (c)(3)(iii)(B) of this section, and USR will not be a domestically controlled QIE under paragraph (c)(3)(i) of this section because foreign non-look-through persons (FC2, 51 percent, FC4, 25 percent, and the nonresident alien individuals, 24 percent) directly or indirectly hold more than 50 percent of the stock of USR.

(4) *Foreign ownership percentage.* For purposes of calculating the foreign ownership percentage under section 897(h)(4)(C), the determination of the QIE stock that was held directly or indirectly by foreign persons is made under the rules of paragraphs (c)(3)(ii) through (vii) of this section.

* * * * *

(k) *Foreign person.* The term *foreign person* means a nonresident alien individual (including an individual subject to the provisions of section 877), a foreign corporation as defined in paragraph (l) of this section, a foreign partnership, a foreign trust or a foreign estate, as such persons are defined by section 7701 and the regulations in this chapter under section 7701. A resident alien individual, including a nonresident alien individual with respect to whom there is in effect an election under section 6013(g) or (h) to be treated as United States resident, is not a foreign person. With respect to the status of foreign governments and international organizations, *see* § 1.897–9T(e). *See* paragraph (c)(3)(iv)(A) of this section regarding the treatment of qualified foreign pension funds and qualified controlled entities as foreign persons for purposes of section 897(h)(4)(B).

(l) *Foreign corporation.* The term *foreign corporation* has the meaning ascribed to such term in section 7701(a)(3) and (5) and § 301.7701–5. For purposes of sections 897 and 6039C, however, the term does not include a foreign corporation with respect to

which there is in effect an election under section 897(i) and § 1.897–3 to be treated as a domestic corporation. For purposes of section 897, the term does not include a qualified holder described in § 1.897(l)-1(d); *see* paragraph (c)(3)(iv)(A) of this section regarding the treatment of qualified foreign pension funds and qualified controlled entities as foreign persons for purposes of section 897(h)(4)(B).

* * * * *

(n) *Regularly traded cross-reference. See* § 1.897–9T(d) for a definition of regularly traded for purposes of sections 897, 1445, and 6039C.

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■ **Par. 3.** Section 1.897–2 is amended by revising paragraph (h)(3) to read as follows:

§ 1.897–2 United States real property holding corporations.

* * * * *

(h) * * *

(3) *Requirements not applicable.* The requirements of this paragraph (h) do not apply to domestically-controlled qualified investment entities, as defined in section 897(h)(4)(B). *But see* § 1.1445–2(c)(3) for rules providing that no withholding is required under section 1445(a) in certain cases when a statement is voluntarily issued by the corporation and otherwise complies with the requirements of this paragraph (h). The requirements of this paragraph (h) also do not apply to a corporation any class of stock in which is regularly traded on an established securities market at any time during the calendar year. However, such a corporation may voluntarily choose to comply with the requirements of paragraph (h)(4) of this section.

* * * * *

■ **Par. 4.** Section 1.897–9T is amended by:

■ 1. Removing and reserving paragraph (c); and

■ 2. Revising and republishing paragraph (e).

The revision reads as follows:

§ 1.897–9T Treatment of certain interest in publicly traded corporations, definition of foreign person, and foreign governments and international organizations (temporary).

* * * * *

(e) *Foreign governments and international organizations.* A foreign government shall be treated as a foreign person with respect to U.S. real property interests, and shall be subject to sections 897, 1445, and 6039C on the disposition of a U.S. real property interest except to the extent specifically otherwise provided in the regulations in this chapter issued under section 892. An international organization (as defined in section 7701(a)(18)) is not a foreign person with respect to U.S. real property interests, and is not subject to sections 897, 1445, and 6039C on the disposition of a U.S. real property interest. *See* § 1.897–1(c)(3)(iv)(B) regarding the treatment of international organizations as foreign persons for purposes of section 897(h)(4)(B). Buildings or parts of buildings and the land ancillary thereto (including the residence of the head of the diplomatic mission) used by the foreign government for a diplomatic mission shall not be a U.S. real property interest in the hands of the respective foreign government.

* * * * *

■ **Par. 5.** Section 1.1445–2 is amended by:

■ 1. Revising paragraph (c)(3)(i); and

■ 2. Adding two sentences at the end of paragraph (e).

The revision and additions read as follows:

§ 1.1445–2 Situations in which withholding is not required under section 1445(a).

* * * * *

(c) * * *

(3) * * *

(i) *In general.* No withholding is required under section 1445(a) upon the acquisition of an interest in a domestic corporation, if the transferor provides the transferee with a copy of a statement, issued by the corporation pursuant to § 1.897–2(h), certifying that the interest is not a U.S. real property interest, or if the transferor provides the transferee with a statement certifying that the corporation is a domestically controlled qualified investment entity (as determined under § 1.897–1(c)(3)) that is voluntarily issued by the corporation but otherwise complies with the requirements of § 1.897–2(h). In general, a corporation may issue such a statement only if the corporation was not a U.S. real property holding corporation at any time during the previous five years (or the period in which the interest was held by its present holder, if shorter), the corporation is a domestically controlled qualified investment entity (as determined under § 1.897–1(c)(3)), or if interests in the corporation ceased to be United States real property interests under section 897(c)(1)(B). (A corporation may not provide such a statement based on its determination that the interest in question is an interest solely as a creditor.) *See* § 1.897–2(f) and (h). The corporation may provide such a statement directly to the transferee at the transferor's request. The transferor must request such a statement before the transfer, and shall, to the extent possible, specify the anticipated date of the transfer. A corporation's statement may be relied upon for purposes of this paragraph (c)(3) only if the statement is dated not more than 30 days before the date of the transfer. A transferee may also rely upon a corporation's statement that is voluntarily provided by the corporation in response to a request from the transferee, if that statement otherwise complies with the requirements of this paragraph (c)(3) and § 1.897–2(h).

* * * * *

(e) * * * Paragraph (c)(3)(i) of this section applies with respect to dispositions of U.S. real property interests, and distributions described in section 897(h), occurring on or after April 25, 2024. For dispositions of U.S. real property interests, and distributions described in section 897(h), occurring before April 25, 2024, *see* § 1.1445–2(c)(3)(i), as contained in 26 CFR part 1, revised as of April 1, 2024.

Douglas W. O'Donnell,

Deputy Commissioner.

Approved: April 2, 2024.

Aviva Aron-Dine,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2024–08267 Filed 4–24–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2022–0008; T.D. TTB–193; Ref: Notice No. 214]

RIN 1513–AC85

Establishment of the Yucaipa Valley Viticultural Area

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) establishes the 36,467-acre ''Yucaipa Valley'' American viticultural area (AVA) in San Bernardino County, California. The Yucaipa Valley viticultural area is not located within, nor does it contain, any other established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: This final rule is effective May 28, 2024.

FOR FURTHER INFORMATION CONTACT: Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; phone 202–453–1039, ext. 175.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated the functions and duties in the administration and enforcement of these provisions to the TTB Administrator through Treasury Order 120–01, dated December 10, 2013.

Part 4 of the TTB regulations (27 CFR part 4) authorizes TTB to establish definitive viticultural areas and regulate the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) sets forth standards for the preparation and submission to TTB of petitions for the establishment or modification of American viticultural areas (AVAs) and lists the approved AVAs.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features as described in part 9 of the regulations and, once approved, a name and a delineated boundary codified in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to the wine's geographic origin. The establishment of AVAs allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of an AVA is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations (27 CFR 4.25(e)(2)) outlines the procedure for proposing an AVA and allows any interested party to petition TTB to establish a grape-growing region as an AVA. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions to establish or modify AVAs. Petitions to establish an AVA must include the following:

- Evidence that the area within the proposed AVA boundary is nationally or locally known by the AVA name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed AVA;
- A narrative description of the features of the proposed AVA affecting viticulture, such as climate, geology, soils, physical features, and elevation, that make the proposed AVA distinctive and distinguish it from adjacent areas outside the proposed AVA boundary;
- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed AVA, with the boundary of the proposed AVA clearly drawn thereon; and
- A detailed narrative description of the proposed AVA boundary based on USGS map markings.

Yucaipa Valley AVA Petition

TTB received a petition from the Yucaipa Valley Wine Alliance, proposing establishment of the "Yucaipa Valley" AVA. The proposed AVA is in San Bernardino County, California, and is not within any established AVA. The proposed AVA covers 36,467 acres and includes approximately 23 vineyards and two wineries. The petition identifies the distinguishing features of the proposed Yucaipa Valley AVA as its elevation and climate.

The proposed Yucaipa Valley AVA is a region of rolling hills in the foothills of the San Bernardino Mountains and includes the incorporated municipalities of Yucaipa and Calimesa and the unincorporated area of Oak Glen. Elevations within the proposed Yucaipa Valley AVA range from 2,000 to 4,600 feet. According to the petition, sunlight becomes more concentrated at high elevations. As a result, grapes receive a "tan," which results in thicker skin than the same varietals grown at lower elevations. The petition states that thick skins contribute to the color and tannin levels of the resulting wine and protect developing grapes from the dramatic climate shifts that can occur in high altitude vineyards.

By contrast, Yucaipa Ridge, which is located to the immediate north and northeast of the proposed Yucaipa Valley AVA, is a mountain range of steep slopes with elevations up to 2,000 feet higher than the proposed AVA. The region east of the proposed AVA has elevations similar to those within the proposed AVA but is not included in the proposed AVA because it is largely uninhabited and undeveloped, has few roads, is largely covered by a national forest that is not available for commercial viticulture, and does not have historical ties to the region known as the Yucaipa Valley. Cherry Valley and Beaumont are communities which extend from the southeast to the south of the proposed AVA and have elevations similar to those in the lower portions of the proposed AVA. However, these areas do not have the rolling hills found in the Yucaipa Valley. The San Timoteo Canyon extends from the southwest to the south of the proposed AVA and has elevations that are lower than those in the proposed AVA, ranging from 1,600 to 2,000 feet. To the west of the proposed AVA is the Redlands Valley, which also has lower elevations ranging from 1,100 to 2,000 feet.

The petition described the climate of the proposed Yucaipa Valley AVA as a hot, dry climate suitable for growing grape varietals such as Cabernet Sauvignon, Merlot, Zinfandel, Syrah, Malbec, Nebbiolo, Barbera, and Petite Sirah. Within the city of Yucaipa, the average high temperature is 78.3 degrees Fahrenheit (F), and the average low temperature is 48.7 degrees F. August is typically the warmest month, with an average high of 97 degrees F, and December is typically the coolest month, with an average minimum temperature of 40 degrees F. The record high temperature in the city of Yucaipa is 114 degrees F, while the record low temperature is 11 degrees F. The city of Yucaipa receives an average cumulative rainfall of 4.14 inches during the growing season of April through October. The average amount of precipitation for the city of Yucaipa during the winter months, November through March, is substantially greater, 15.35 inches, with an average of one inch being snow.

By contrast, the region to the west of the proposed AVA, is slightly warmer and drier, while the region to the north and northeast is cooler. The average high temperature in the city of Redlands, located west of the proposed AVA, is 79.6 degrees F, and the average

low temperature is 50.5 degrees F. August is typically the warmest month in Redlands, with an average high of 96 degrees F, and December is typically the coolest month, with an average minimum temperature of 40 degrees F. The record high temperature in Redlands is 118 degrees F, and the record low temperature is 18 degrees F. Redlands receives an average of 10.86 inches of winter precipitation, but seldom receives snow due to its warmer winter temperatures. In the community of Forest Falls, located to the north and northeast of the proposed AVA, the average high temperature is 61.5 degrees F, and the average low temperature is 40.9 degrees F. August is typically the warmest month in Forest Falls, with an average high of 81 degrees F. The record high temperature is 106 degrees F, and the record low temperature is 5 degrees F. The petition did not include temperature data from the regions to the northwest, east, and south of the proposed Yucaipa Valley AVA but did note that the city of Beaumont, located south and southeast of the proposed AVA, receives an average winter precipitation amount very similar to that of the proposed AVA, although it seldom has any snow.

Notice of Proposed Rulemaking and Comments Received

TTB published Notice No. 214 in the **Federal Register** on September 21, 2022 (87 FR 57657), proposing to establish the Yucaipa Valley AVA. In the notice, TTB summarized the evidence from the petition regarding the name, boundary, and distinguishing features for the proposed AVA. The notice also included information from the petition comparing the distinguishing features of the proposed AVA to the surrounding areas. For a detailed description of the evidence relating to the name, boundary, and distinguishing features of the proposed AVA, and for a detailed comparison of the distinguishing features of the proposed AVA to the surrounding areas, see Notice No. 214. In Notice No. 214, TTB solicited comments on the accuracy of the name, boundary, and other required information submitted in support of the petition. The comment period closed on November 21, 2022.

Comments Received

In response to Notice No. 214, TTB received twelve comments. Eight of the comments fully support the proposed AVA (comments 1, 2, 3, 4, 6, 7, 8, and 10). The comments state that, among other things, the proposed AVA could increase consumer awareness of wines from the area and promote economic development in the city of Yucaipa and in the other communities within and near the proposed AVA.

Two comments (comments 11 and 12) agree that the petition fulfilled TTB's requirements for the establishment of an AVA. These commenters, however, believe that before deciding to establish the AVA, TTB should conduct studies on the effects the AVA may have. Comment 11 believes TTB should study the effect of a potential AVA on ''property values, displaced ownership, or general effects on the market'' for occupants of the area, regardless of whether they are involved in the wine industry. Comment 12 suggests that TTB study the effects an AVA may have on water consumption because an AVA may promote increased agricultural activities and, therefore, increase water consumption in a region that has limited water resources.

Two comments (comments 5 and 9) oppose the proposed Yucaipa Valley AVA. Comment 5 states that the region is ''too small for such a venture,'' that the proposed vineyards are close to an earthquake fault line, that citizens do not want the vineyards depleting the ''already low'' local water table, and that establishing an AVA could increase traffic on small streets and raise the risk of drunk drivers. Comment 9 also opposes the proposed AVA due to the potential for increased traffic and drunk driving that could ''pose a serious threat to local drivers, pedestrians, and children in the community.'' Additionally, the commenter expresses concern that an AVA designation could raise property values and property taxes if the increased tourism also leads to a rise in the purchase of vacation homes in the area. The commenter also believes that small vineyards in the proposed AVA ''may have to restructure their winemaking processes to comply with this 85 percent standard required to attach the AVA label to their wines.'' The commenter asserts that such a move could be costly because it ''will require winemakers to develop new formulas, increase grape production, and adapt their facilities to accommodate the changes.''

TTB Response

TTB establishes AVAs to allow winemakers to better describe, in labeling and advertising, the origins of their wines and to allow consumers to better identify wines they may purchase. TTB reviews any petition submitted to it to establish an AVA and determines if the petition meets the regulatory criteria. Labeling and advertising of wines using an AVA is voluntary, and approving an AVA does not apply any new requirements on grape growers or winemakers in the region other than any addressed in the section ''Impact on Current Wine Labels.'' Any potential impacts on such things as economic growth or an increase in tourism would be because of the efforts of businesses or other interests in using the AVA name in promoting the region or the wines and because of consumer acceptance of wines from that area.

With respect to concerns about increased financial burdens for local wine industry members, as noted above, the use of an AVA name on a wine label is completely voluntary. Winemakers who believe it would be costly for them to comply with the 85 percent requirement for use of the AVA name can choose not to use the AVA name and can continue to operate their businesses as usual. Therefore, any additional costs incurred from the use of an AVA name on a wine label would be the result of the decisions of the individual winemaker and not the direct result of the rulemaking.

Finally, when establishing an AVA to allow winemakers to better describe the origins of their wines, TTB is not required to determine the possible effects of this administrative regulatory action on property values or the environment. Furthermore, TTB notes that comment 10, submitted by the Third District Supervisor of the San Bernardino County Board of Supervisors in support of the proposed AVA, acknowledges the importance of protecting water resources in the county and states that vineyards have little impact on the water reserves as they require far less water than other agricultural crops.

TTB Determination

After careful review of the petition and comments, TTB finds that the evidence provided by the petitioner supports the establishment of the Yucaipa Valley AVA. Accordingly, under the authority of the FAA Act, section 1111(d) of the Homeland Security Act of 2002, and parts 4 and 9 of the TTB regulations, TTB establishes the ''Yucaipa Valley'' AVA in San Bernardino County, California, effective 30 days from the publication date of this document.

Boundary Description

See the narrative description of the boundary of the Yucaipa Valley AVA in the regulatory text published at the end of this final rule.

Maps

The petitioner provided the required maps, and they are listed below in the regulatory text. The Yucaipa Valley AVA boundary may also be viewed on the AVA Map Explorer on the TTB website, at *https://www.ttb.gov/wine/ava-map-explorer.*

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. For a wine to be labeled with an AVA name or with a brand name that includes an AVA name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible for labeling with an AVA name and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the AVA name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label. Different rules apply if a wine has a brand name containing an AVA name that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

With the establishment of the Yucaipa Valley AVA, its name, ''Yucaipa Valley,'' will be recognized as a name of viticultural significance under § 4.39(i)(3) of the TTB regulations (27 CFR 4.39(i)(3)). The text of the regulations clarifies this point. Consequently, wine bottlers using the name ''Yucaipa Valley'' in a brand name, including a trademark, or in another label reference to the origin of the wine, will have to ensure that the product is eligible to use the AVA name as an appellation of origin.

The establishment of the Yucaipa Valley AVA will not affect any existing AVA. The establishment of the Yucaipa Valley AVA will allow vintners to use ''Yucaipa Valley'' as an appellation of origin for wines made primarily from grapes grown within the Yucaipa Valley AVA if the wines meet the eligibility requirements for the appellation.

Regulatory Flexibility Act

TTB certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of an AVA name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

It has been determined that this final rule is not a significant regulatory action as defined by Executive Order 12866 of September 30, 1993, as amended. Therefore, no regulatory assessment is required.

Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this final rule.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

For the reasons discussed in the preamble, TTB amends title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Add § 9.293 to read as follows:

§ 9.293 Yucaipa Valley AVA.

(a) *Name.* The name of the viticultural area described in this section is ''Yucaipa Valley''. For purposes of part 4 of this chapter, ''Yucaipa Valley'' is a term of viticultural significance.

(b) *Approved maps.* The 4 United States Geological Survey (USGS) 1:24,000 scale topographic maps used to determine the boundary of the Yucaipa Valley viticultural area are:

(1) Yucaipa, CA, 1996;

(2) Forest Falls, CA, 1996;

(3) Beaumont, CA, 1996; and

(4) El Casco, CA, 1967; photorevised 1979.

(c) *Boundary.* The Yucaipa Valley viticultural area is located in San Bernardino County, California. The boundary of the Yucaipa Valley viticultural area is as described as follows:

(1) The boundary begins on the Yucaipa map at the intersection of Highway 38/Mill Creek Road and the western boundary of section 13, T1S/R2W. From the beginning point, proceed northeast along Highway 38/Mill Creek Road to the 2,924-foot benchmark in section 13; then

(2) Proceed east in a straight line to the 3,800-foot elevation contour in section 18, T1S/R1W; then

(3) Proceed east-southeasterly along the 3,800-foot elevation contour, crossing onto the Forest Falls map, and continuing along the 3,800-foot elevation contour to its intersection with Wilson Creek along the eastern boundary of section 21, T1S/R1W; then

(4) Proceed northerly along Wilson Creek to its intersection with the 4,400-foot elevation contour in section 22, T1S/R1W; then

(5) Proceed south-southeasterly along the 4,400-foot elevation contour to its intersection with Birch Creek in section 26, T1S/RR1W; then

(6) Proceed northeasterly along Birch Creek to its intersection with the 5,200-foot elevation contour in section 23, T1S/R1W; then

(7) Proceed south-southeasterly along the 5,200-foot elevation contour to its intersection with the eastern branch of Little San Gorgonio Creek along the San Bernardino National Forest boundary in section 31, T1S/R1E; then

(8) Proceed southwesterly along the eastern branch of Little San Gorgonio Creek to its confluence with the main channel of Little San Gorgonio Creek near the gaging station in section 1, R1W/T2S; then

(9) Proceed southwesterly along the main channel of Little San Gorgonio Creek, crossing onto the Beaumont map, and continuing along the creek to its intersection with Orchard Avenue in section 22, T2S/R1W; then

(10) Proceed west along Orchard Street to the point where the road makes a sharp turn south and becomes locally known as Taylor Street along the western boundary of section 28, T2S/R1W; then

(11) Proceed south along Taylor Street to its intersection with Vineland Avenue in section 28, T2S/R1W; then

(12) Proceed west along Vineland Avenue to its intersection with an unnamed road known locally as Union Street along the western edge of the Beaumont map in section 29, T2S/R1W; then

(13) Proceed south along Union Street to its intersection with Woodland Avenue in section 29, T2S/R1W; then

(14) Proceed west along Woodland Avenue, crossing onto the El Casco map, where the road becomes known as Cherry Valley Boulevard, and continue west along Cherry Valley Boulevard to its intersection with Interstate 10 in the Tract Between San Jacinto and San Gorgonio, T2S/R2W; then

(15) Proceed southeasterly along Interstate 10 to its intersection with the

first unnamed, intermittent stream in section 32, T2S/R1W; then

(16) Proceed west in a straight line to the western boundary of section 31, T2S/R1W; then

(17) Proceed north along the western boundary of section 31 to the southernmost transmission line at the northwest corner of section 31, T2S/R1W; then

(18) Proceed northwesterly along the transmission line to its intersection with San Timoteo Canyon Road in the Tract Between San Jacinto and San Gorgonio, T2S/R2W; then

(19) Proceed northwesterly along San Timoteo Canyon Road to its intersection with the western boundary of the Tract Between San Jacinto and San Gorgonio, T2S/R2W; then

(20) Proceed north, then northeasterly along the boundary of the tract to its intersection with the southwestern corner of section 22, T2S/R2W; then

(21) Proceed north along the western boundary of section 22 to its intersection with the southeastern corner of section 16, T2S/R2W; then

(22) Proceed west along the southern boundaries of sections 16 and 17 to the southwestern corner of section 17, T2S/R2W; then

(23) Proceed north along the western boundary of section 17, crossing onto the Yucaipa map and continuing along the western boundary of section 17 to its intersection with the Riverside–San Bernardino County line along the northern boundary of section 17, T2S/R2W; then

(24) Proceed east along the Riverside–San Bernardino County line to its intersection with the eastern boundary of section 17, T2S/R2W; then

(25) Proceed north in a straight line to the boundary of the San Bernardino Land Grant, T2S/R2W; then

(26) Proceed west along the land grant boundary to its intersection with the eastern boundary of section 8, T2S/R2W; then

(27) Proceed north along the eastern boundaries of sections 8 and 5 to the intersection of the northeast corner of section 5 and an unnamed road known locally as Highview Drive, T2S/R2W; then

(28) Proceed northwest in a straight line to its intersection with Interstate 10 west of an unnamed light-duty road known locally as Knoll Road in the San Bernardino Land Grant, T2S/R2W; then

(29) Proceed northeast in a straight line to the northeast corner of section 32, T1S/R2W; then

(30) Proceed east along the northern boundaries of sections 33, 34, and 35 to the southwestern corner of section 25, T1S/R2W; then

(31) Proceed north along the western boundaries of sections 25, 24, and 13 to the intersection of the western boundary of section 13 and Highway 38/Mill Creek Road, T1S/R2W, which is the beginning point.

Signed: April 19, 2024.

Mary G. Ryan,

Administrator.

Approved: April 20, 2024.

Aviva R. Aron-Dine,

Acting Assistant Secretary (Tax Policy).

[FR Doc. 2024–08868 Filed 4–24–24; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 38 and 39

RIN 2900–AS06

Expansion of Prohibition of Interment or Memorialization of Persons Who Committed Certain Crimes

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations that prohibit interment or memorialization of persons who committed Federal or State capital crimes or certain sex offenses. This action is necessary to implement statutory amendments enacted on January 5, 2023. VA is required to prohibit interment or memorialization of a person who is found to have committed a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act but has not been convicted of such crime due to death or flight to avoid prosecution. This final rule also implements the statutory amendment to the sex offender prohibition to apply in conviction cases in which the person was sentenced to a term of 99 years or more. This final rule also makes corresponding amendments to the regulations that govern VA grant-funded cemeteries. The intended effect of this final rule is to comport the regulations with the amendments to the statutory bar to entitled benefits for individuals who commit certain criminal acts and to uphold the dignity and solemnity of VA national cemeteries as national shrines.

DATES: This rule is effective April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Artis Parker, Executive Director, Office of Field Programs, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Telephone: (314) 416–6304 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: This final rule amends three sections in 38 CFR parts 38 and 39 to implement statutory requirements enacted in section 6 of Public Law 117–355, the ''National Cemeteries Preservation and Protection Act of 2022'' (the Act), which amended 38 U.S.C. 2411 to expand the prohibition of memorialization or interment in a cemetery in the National Cemetery Administration (NCA) or Arlington National Cemetery of persons who committed certain crimes. Specifically, the amendment adds a new category of ''persons prohibited'' in sec. 2411(b)(5) to include a person who is found to have committed a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*) but has not been convicted of such crime because they were not available for trial due to death or flight to avoid prosecution. The Act also amended sec. 2411(b)(4)(B) to bar interment or memorialization of a person convicted of a Federal or State crime causing the person to be a tier III sex offender who for such crime was sentenced to a period of 99 years or more, whereas the statute previously only included individuals sentenced to a minimum of life imprisonment.

To implement the new statutory requirements, VA is amending 38 CFR 38.617, 38.618, and 39.10. These sections include references to the statutory authority to bar eligible individuals who by their criminal acts are prohibited from receiving memorialization benefits and interment in VA national and VA grant-funded cemeteries. Specific amendments to §§ 38.617, 38.618, and 39.10 are as follows.

VA is amending 38 CFR 38.617(a)(4) by inserting the words ''or to a period of 99 years or more'' after ''life imprisonment'' and adding new paragraph (a)(5) to implement the new category of persons to be barred under 38 U.S.C. 2411(b)(5). Implementing this change will not affect VA's current adjudication or appeals processes for interment and memorialization requests.

VA is also making a couple of technical corrections in § 38.617. First, VA is revising the section heading from ''Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes or certain sex offenses'' to ''Prohibition of interment or

memorialization of persons who committed certain Federal or State crimes'' to capture those persons who committed certain Federal or State crimes but avoided conviction due to death or flight to avoid prosecution. Second, VA is amending paragraph (b) to clarify that the prohibition referred to in newly added paragraph (a)(5), which applies to a person found to have committed a Federal or State crime that would cause the person to be a tier III sex offender but avoided conviction due to death or flight to avoid prosecution, is not contingent on receipt by the Secretary of Veterans Affairs or any other VA official of notice from any Federal or State official.

VA is revising § 38.618 by revising the heading to include the words ''or certain sex offenses''. Section 38.618 amendments revise paragraphs (a) through (c), (e) and (f) by adding the words ''or a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*)'' to include the new category of prohibited persons. Implementing this additional basis for the statutory bar to apply to interment and memorialization requests will not result in a change to VA's adjudication or appeals processes.

VA is also making a technical correction updating the reference to ''VA regional counsel'' to ''VA district counsel'' in § 38.618(a).

Finally, changes in sec. 2411 affect the application of that statute for cemeteries that receive a grant under 38 U.S.C. 2408. Specifically, sec. 2408(e) conditions any grant on the grantee's prohibition of interment or memorialization of a person described in sec. 2411(b). As a result, VA will amend § 39.10(b)(4) by inserting the words ''or to a period of 99 years or more'' after ''life imprisonment,'' and VA will add new paragraph (b)(5) to implement the new category of persons to be barred under 38 U.S.C. 2411(b)(5). These amendments implementing new statutory requirements that affect VA grant-funded cemeteries will not affect the cemetery grant process. VA defers to State officials to establish procedures for applying the statutory bar to benefits under sec. 2411(b), in accordance with sec. 2408(e).

Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause under the provisions of 5 U.S.C. 553(b)(B) to publish this rule without prior opportunity for public comment and dispense with the 30-day delay for the effective date of a rule under 5 U.S.C. 553(d)(3). Pursuant to sec. 553(b)(B) of the Administrative Procedure Act, general notice and opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Pursuant to sec. 553(d)(3), an agency may ''for good cause found'' dispense with the 30-day delay in the effective date of a rule.

Public comment is unnecessary for this rulemaking because this final rule merely incorporates the statutory text enacted by Congress, which is already in effect, and makes no other changes to existing processes for applying the bar to interment and memorialization requests. *See Hadson Gas Sys.* v. *FERC,* 75 F.3d 680, 684–85 (D.C. Cir. 1996) (holding that notice and public comment were not necessary when an agency removed regulations which had been rendered obsolete by statutory changes). For the same reason, VA concludes that there is good cause for the rule to be effective immediately under 5 U.S.C. 553(d)(3).

Executive Orders 12866, 13563 and 14094

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

Regulatory Flexibility Act

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

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies, before promulgating any general notice of proposed rulemaking, prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This requirement is not applicable to this rulemaking because a general notice of proposed rulemaking is not required. *See* 2 U.S.C. 1532.

Paperwork Reduction Act

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

Congressional Review Act

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

List of Subjects

38 CFR Part 38

Administrative practice and procedure, Cemeteries, Claims, Crime, Veterans.

38 CFR Part 39

Cemeteries, Grant programs-veterans, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on April 10, 2024, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

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

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR parts 38 and 39 as set forth below:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

■ 1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2400, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

■ 2. Amend § 38.617 by:
■ a. Revising the section heading;
■ b. Revising paragraph (a)(4);
■ c. Adding paragraph (a)(5); and
■ d. Revising paragraph (b).

The revisions and addition read as follows:

§ 38.617 Prohibition of interment or memorialization of persons who committed certain Federal or State crimes.

(a) * * *

(4) A person identified to the Secretary of Veterans Affairs, by the United States Attorney General, in the case of a Federal crime, or by an appropriate State official, in the case of a State crime, as an individual who has been convicted of a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901, *et seq.*); who, for such crime, is sentenced to a minimum of life imprisonment or to a period of 99 years or more; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State).

(5) A person found, under procedures specified in § 38.618, to have committed a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*) but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

(b) *Notice.* The prohibition referred to in paragraphs (a)(3) and (5) of this section is not contingent on receipt by the Secretary of Veterans Affairs or any other VA official of notice from any Federal or State official.

* * * * *

■ 3. Amend § 38.618 by revising the section heading, paragraphs (a), (b)(1), (c)(1), (e)(1) and (2), and (f) to read as follows:

§ 38.618 Findings concerning commission of a capital crime or certain sex offenses where a person has not been convicted due to death or flight to avoid prosecution.

(a) *Inquiry.* With respect to a request for interment or memorialization, if a cemetery director has reason to believe that a deceased individual who is otherwise eligible for interment or memorialization may have committed a Federal or State capital crime or a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*), but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director, with the assistance of the VA district counsel, as necessary, will initiate an inquiry seeking information from Federal, State, or local law enforcement officials, or other sources of potentially relevant information. After completion of this inquiry and any further measures required under paragraphs (c) through (f) of this section, the cemetery director will make a decision on the request for interment or memorialization in accordance with paragraph (b), (e), or (g) of this section.

(b) * * *

(1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there is no clear and convincing evidence that the deceased committed a Federal or State capital crime or a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*) of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving the interment or memorialization.

* * * * *

(c) * * *

(1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there appears to be clear and convincing evidence that the deceased has committed a Federal or State capital crime or a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*) of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director will provide the personal representative of the deceased with a written summary of the evidence of record and a written notice of procedural options.

* * * * *

(e) * * *

(1) If the cemetery director determines that it has not been established by clear and convincing evidence that the deceased committed a Federal or State capital crime or a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*) of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving interment or memorialization; or

(2) If the cemetery director believes that there is clear and convincing evidence that the deceased committed a Federal or State capital crime or a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*) of which he or she was not convicted due to death or flight to avoid prosecution, the cemetery director will forward a request for a finding on that issue, together with the cemetery director's recommendation and a copy of the record to the Under Secretary for Memorial Affairs.

(f) *Finding by the Under Secretary for Memorial Affairs.* Upon receipt of a request from the cemetery director under paragraph (e) of this section, the Under Secretary for Memorial Affairs will make a finding concerning whether the deceased committed a Federal or State capital crime or a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*) of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution. The finding will be based on consideration of the cemetery director's recommendation and the record supplied by the cemetery director.

* * * * *

PART 39—AID FOR THE ESTABLISHMENT, EXPANSION, AND IMPROVEMENT, OR OPERATION AND MAINTENANCE, OF VETERANS CEMETERIES

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

Authority: 38 U.S.C. 101, 501, 2408, 2411, 3765.

■ 5. Amend § 39.10 by revising paragraph (b)(4) and adding paragraph (b)(5) to read as follows:

§ 39.10 Cemetery requirements and prohibitions and recapture provisions.

* * * * *

(b) * * *

(4) Who has been convicted of a Federal or State crime causing the

person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901, *et seq.*); who, for such crime, is sentenced to a minimum of life imprisonment or to a period of 99 years or more; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State).

(5) Who has been found by an appropriate State official, as defined in § 38.600(a) of this part, under procedures to be established by the State, to have committed a Federal or State crime that would cause the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901 *et seq.*) but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

* * * * *

[FR Doc. 2024–08023 Filed 4–24–24; 8:45 am]

BILLING CODE 8320–01–P

POSTAL SERVICE

39 CFR Part 111

Electronic Verification System Migrated to USPS Ship

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to require the use of USPS Ship™ (aka Package Platform) for the acceptance and payment of all commercial domestic and international parcel mailings and discontinue the use of the Electronic Verification System (eVS®).

DATES: *Effective Date:* February 1, 2025.

FOR FURTHER INFORMATION CONTACT: Diane Smith at (202) 268–8091, Vicki Bosch (202) 268–4978 or Garry Rodriguez at (202) 268–7281.

SUPPLEMENTARY INFORMATION: On November 28, 2023, the Postal Service published a notice of proposed rulemaking (88 FR 83056–83062) to require the use of USPS Ship. In response to the proposed rule, the Postal Service received two responses containing multiple comments, as follows:

Comment: One commenter recommended the final rule clarify that USPS Ship will replace only eVS and that all other payment and acceptance channels including Click-N-Ship, ePostage, PC Postage, IBI postage meters, non-eVS (BMEU entered and permit imprint) will be unaffected unless specifically addressed.

Response: All commercial packages will be verified through USPS Ship.

Comment: One commenter recommended the final rule clarify that for purposes of the migration from eVS to USPS Ship, negotiated service agreement (NSA) provisions governing payment and acceptance processes will not be changed, rather USPS Ship will be deemed a successor system to eVS, and that the migration will not otherwise modify preexisting contractual payment and acceptance processes.

Response: In Terms of NSAs, customers are expected to transition to the successor system which is USPS Ship.

Comment: One commenter recommended the final rule clarify any planned changes in the refund and disputes processes to ensure quality control and quality assurance for fee assessment in connection with the migration to USPS Ship.

Response: The Postal Service has the USPS Ship User Guide, which will be available on PostalPro at *https://postalpro.usps.com,* and mailers should reference the document for all information regarding USPS Ship including questions for refunds and disputes.

Comment: Two commenters expressed concern over the implementation date. One commenter stated they appreciate the need to identify an aggressive target implementation date, in this case February 1, 2025. However, past experiences with comparable payment systems migrations underscore the countervailing importance of setting and measuring incremental progress against intermediate benchmarks. This is especially important for competitive package products offered in a highly competitive marketplace. Another commenter stated that there are concerns that the planned schedule will not allow sufficient time for the Postal Service's systems to stabilize or for shippers to make necessary system changes in response.

Response: While the Postal Service works with the industry toward meeting the target implementation date, we will consider if any extensions to the date are needed.

The Postal Service is requiring the use of USPS Ship for the acceptance and payment of all commercial domestic and international parcel mailings. USPS Ship combines the attributes captured from scan data and manifested attributes to ensure customers are charged accurate postage. For consolidators, if there are adjustments to inaccurate original postage, those individual package costs can be provided to the mail owners.

USPS Ship offers online enrollment, individual package pricing, automated adjustments, online reports, and data feeds via IV–MTR. The automated capture enables individual package attributes to be compared to manifest data to validate accurate postage. Shortpaid (postage due) or overpaid (refunds) will be assessed upon package delivery and applied to the Enterprise Payment Account (EPA) on file.

Requirements to participate in USPS Ship are as follows:

- Customers must enroll in USPS Ship and be assigned a unique Mailer Identifier (MID) for use on packages.
- Customers must submit valid rate ingredients for payment for each package within their shipment.
- Customers must upload manifests to USPS using the Parcel Data Exchange or Electronic Interchange (SFTP or AS2) for payment as noted in eVS Pub 205.
- Customers must pay postage through an Enterprise Payment Account.
- Packages must include a Tracking Number that is unique for 120 days.
- Customers must ship the following products:
  - Domestic Products—Priority Mail Express®, Priority Mail®, USPS Ground Advantage™ (formerly First-Class Package® Service), Bound Printed Matter, Media Mail®, Library Mail, USPS Marketing Mail® parcels, USPS Marking Mail Nonprofit parcels, Parcel Select® Destination Entry, USPS Connect™ Local, USPS Connect Local Mail, and USPS Returns®.
  - International Products—Global Express Guaranteed®, Priority Mail Express International®, Priority Mail International®, and First-Class Package International Service®.

Manifest Mailing Operations in USPS Ship

Mailers and shippers who meet program requirements must ship parcels using the following procedure:

1. The mailer/parcel shipper transmits an electronic manifest to the Postal Service detailing all USPS Ship parcels to be deposited into the mailstream on or before the date of mailing.
2. USPS Ship will validate the electronic manifest and calculate postage based on rate ingredients.
3. Postage is charged to the EPA on the day that the manifest was submitted and processed. Transactions and manifest summary information can be

accessed through the online reports or data feeds.

4. The mailer/parcel shipper transports and enters the mail at the appropriate origin or destination entry (NDC/RP&DC, SCF/RP&DC, DHub, DDU or S&DC) Postal Service facility.

5. As parcels are deposited at the origin entry facilities, packages are run across Mail Processing Equipment (MPE) and captured attributes (weight, dimensions, entry, packaging) are transmitted to USPS Ship. The captured attributes are compared to manifested attributes to ensure the correct postage has been paid. If there are discrepancies, shortpaid/overpaid will be applied to the EPA.

6. As parcels are deposited at the DDU or DS&DC facilities, packages are sampled, and the sampled attributes are compared to the manifested attributes. A Statistical Quality Assessment is performed, and additional postage will be charged to the EPA.

7. Assessment details can be accessed through the online reports or data feeds.

Postage Assessments

USPS Ship will collect postage daily based on the electronic manifest(s) received that day from mailers. In addition, postage will be calculated and assessed for the following types of errors when detected:

- *Census Verification* occurs for packages that are automatically captured while packages are processed on MPE. The individual package information captured may include the weight, dimensions, USPS packaging, ZIP Code of scan, and destination ZIP Code. The captured information will be compared to the manifest information after the delivery scan for the package. The correct postage will be assessed, additional postage will be charged or refunded to reflect the accurate postage for the individual packages.
  - *Misshipped* is include in the Census Verification. The manifest is matched to a scan and the Destination ZIP Code and Destination Rate Indicator of the is compared to the Mail Direction File (MDF) to determine the correct Dropship location. The ZIP Code of the first scan event is compared to the expected Dropship location indicated in the MDF. If the ZIP Code of the first scan event does not match the expected Dropship location, then a Misshipped error is logged, and additional postage will be charged.
- *Unmanifested packages* are identified by scanned packages without a manifest for payment in USPS Ship.
- *Duplicate packages* are identified by scanned packages with duplicate barcodes without a payment for each package in USPS Ship.
- *IMpb noncompliance* is measured using the same evaluation and established thresholds for the month period as previously required by eVS.
- *Presort* is measured by the 24-hour period to meet presort minimums by mail class as previously required by eVS.
- *Statistical Quality Assessment (SQA)* occurs for Parcel Select, Bound Printed Matter, USPS Marketing Mail packages that are entered and claimed at Destination Delivery Unit (DDU) prices. This verification is similar to the Postage Adjustment Factor (PAF), but is limited to DDU or DS&DC entered packages. If the postage for the packages that are sampled at a DDU or DS&DC compared to the manifested data, exceeds 1.5% underpayment, the percentage in error will be multiplied by the total postage for the mail class for the month and this calculated additional postage charge will be assessed. Only packages that are prompted for sampling will be part of this verification, any non- prompted samples will be part of the Census Verification.
- Content Audit is measured using the same business rules as previously required by eVS.

Postage Payment

Commercial shippers entering at a Business Mail Entry Unit (BMEU) with small quantities may use Click-N-Ship or USPS Ship to enter their parcels. Otherwise, payment applies as follows:

- Parcel shippers/consolidators and mailers using permit imprint as the payment method and claiming Commercial or NSA prices that are not using Click-N-Ship are required to use USPS Ship for postage manifesting and payment.
- Parcel shippers/consolidators and mailers who use USPS APIs to create labels and submit their manifest files are also required to enroll in USPS Ship.

Postage Payment Schedule

- Daily—Postage for manifest files is charged the day of the manifest receipt/processing. The census verification is charged/refunded the day of delivery.
- Monthly—Unmanifested, duplicates, IMpb, presort, content audit and SQA are assessed monthly and charged on the 15th of the following month.

Retrieving Data

USPS Ship enables customers to view manifest and assessment data by accessing online reports or subscribing to IV–MTR data feeds.

- *Accessing Online Reports*—The Online Dashboard provides summary details for manifests that were charged and package level details for postage adjustments. Customers should complete the following to access the USPS Ship Reports:

- Login to the Business Customer Gateway (BCG)
- Click ''Go to Service'' button on the USPS Ship Report service within Manage Services menu
- Click ''Summary Dashboard''
- Monthly Activity Report will be displayed
- Click ''Reports'' dropdown menu to view and select from the list of available reports
  - Reports can be filtered, sorted, and exported in Excel and CSV formats

- Subscribing to IV–MTR Data Feeds—IV–MTR allows customer to customize to select and organize fields to be included, chose frequency, choose file format, and choose delivery location. Customers should complete the following to setup IV–MTR subscriptions:

- Login to BCG
- Click ''Go to Service'' button on the Informed Visibility service within Manage Services Menu
- Click ''Create and Manage Data Feeds''
- Select Data Feed Type
- Select File Format
- Select Server for Data Feed Delivery
- Select Frequency of Data Feed Delivery
- Define Data Fields of Data Feed
  - Detailed Instructions for accessing IV–MTR can be found under Applying for Access to Informed Visibility Mail Tracking and Reporting on PostalPro. Detailed instructions for customizing data feeds can be found under 'Orientation Training for Informed Visibility Mail Tracking and Reporting' on PostalPro

eVS Discontinued

Due to the ability to automatically capture package attributes, and the new system infrastructure, the Postal Service will discontinue eVS.

We believe the proposed revisions will provide customers with a more efficient mailing experience.

The Postal Service adopts the described changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the *Code of Federal Regulations.*

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401–404, 414, 416, 3001–3018, 3201–3220, 3401–3406, 3621, 3622, 3626, 3629, 3631–3633, 3641, 3681–3685, and 5001.

■ 2. Revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

200 Commercial Mail Letters, Flats, and Parcels

* * * * *

202 Elements on the Face of a Mailpiece

* * * * *

3.0 Placement and Content of Mail Markings

* * * * *

3.8 Exceptions to Markings

Exceptions are as follows:

* * * * *

[Revise the last sentence of the introductory text of item b to read as follows:]

b. * * * Mail manifested using the USPS Ship system under 705.2.0 must bear the basic marking and the additional marking ‘‘USPS Ship’’ in two places:

* * * * *

6.0 Barcode Placement for Parcels

* * * * *

6.3 Intelligent Mail Barcodes

[Revise the first sentence of 6.3 to read as follows:]

Intelligent Mail barcodes (IMb) do not meet barcode eligibility requirements for parcels and do not qualify for any barcode-related prices for parcels, but one barcode may be included only in the address block on a parcel, except on USPS Ship parcels. * * *

* * * * *

203 Basic Postage Statement, Documentation, and Preparation Standards

1.0 Postage Statements

1.1 Completing Postage Statements

[Revise the first sentence under 1.1 to read as follows:]

Unless manifested using USPS Ship under 705.2.9, any mailing claiming a discount and all permit imprint mailings must be accompanied by a postage statement completed and signed by the mailer (in duplicate if the mailer wants a receipted copy). * * *

* * * * *

2.0 Documentation

2.1 Basic Documentation Standards

[Revise the second sentence of 2.1 to read as follows:]

* * * Supporting documentation (see 3.0) of postage is required for each mailing except for USPS Ship mailings under 705.2.9, or unless the correct price is affixed to each piece or each piece is of identical weight and the pieces are separated by price and when applicable zone (including separation by In-County and Outside-County prices and destination entry for Periodicals) when presented for acceptance. * * *

* * * * *

5.0 Letter and Flat Trays

* * * * *

5.13 Line 3 (Office of Mailing or Mailer Information Line)

[Revise the text of 5.13 to read as follows:]

Line 3 (origin line showing office of mailing or mailer information) must be the bottom line of required information unless the sack/flat tray contains mail manifested using the USPS Ship under 705.2.9. Line 3 must show either the city and state of the entry Post Office or the mailer‘s name and the city and state of the mailer‘s location. It is recommended that the mailer‘s name also appear with the city and state of the entry Post Office. As an alternative to adding a fourth line for USPS Ship mailings as required by 5.6, ‘‘USPS Ship’’ may appear as the first element on Line 3.

* * * * *

6.0 Sacks

* * * * *

6.4 USPS Ship System

[Revise the text of 6.4 to read as follows:]

All sacks containing parcels prepared and identified using the USPS Ship program under 705.2.9 must show ‘‘USPS Ship’’ directly below Line 3 using the same size and lettering used for Line 3. As an option, ‘‘USPS Ship’’ may be placed as the first element on Line 3.

* * * * *

204 Barcode Standards

* * * * *

2.0 Standards for Package and Extra Service Barcodes

2.1 Intelligent Mail Package Barcode

* * * * *

2.1.8 Compliance Quality Thresholds

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Exhibit 2.1.8 IMpb Compliance Quality Thresholds

Compliance Categories Compliance Codes Validations Compliance Thresholds

* * * * *

[Revise the fifth bullet under the ‘‘Validations’’ column to read as follows:]

• Customers using USPS Ship must provide the address information before the Arrival at Unit (07) Event Scan and non-USPS Ship customers at the time of mailing.

* * * * *

210 Commercial Mail Priority Mail Express

213 Prices and Eligibility

1.0 Prices and Fees

* * * * *

1.2 Determining Single-Piece Weight

[Revise the first sentence of 1.2 to read as follows:]

When determining single-piece weight, express all weights in decimal pounds rounded off to two decimal places (except mailers using USPS Ship). * * *

1.3 Commercial Prices

Priority Mail Express commercial prices are less than Priority Mail Express retail prices (see Notice 123—Price List). These prices are available to:

* * * * *

[Revise the text of item d to read as follows:]

d. Customers who pay postage with a permit imprint using the USPS Ship system to document and pay postage (see 705.2.9).

* * * * *

214 Postage Payment and Documentation

* * * * *

1.0 Basic Standards for Postage Payment Options

* * * * *

1.2 Commercial Prices

Commercial Priority Mail Express postage may be paid with:

* * * * *

[Revise the text of item d to read as follows:]

d. Permit imprint through the USPS Ship system under 705.2.9.

* * * * *

220 Commercial Mail Priority Mail

223 Prices and Eligibility

1.0 Prices and Fees

* * * * *

1.3 Cubic

1.3.1 Cubic Eligibility

* * * * *

[Revise the second sentence of item b to read as follows:]

b. Permit imprint customers. * * * Customers are required to use the USPS Ship program or submit an electronic postage statement with a computerized manifest under 705.2.0. * * *

* * * * *

1.7 Determining Single-Piece Weight

[Revise the third and fourth sentence in 1.7 to read as follows:]

* * * Except for mailers using USPS Ship, express all single-piece weights in decimal pounds rounded off to two decimal places.

Mailers using USPS Ship may round off to four decimals, and USPS Ship will automatically round to the appropriate decimal place. * * *

* * * * *

240 Commercial Mail USPS Marketing Mail

243 Prices and Eligibility

1.0 Prices and Fees

* * * * *

1.4 Fees

1.4.1 Presort Mailing Fee

[Revise the third sentence in 1.4.1 to read as follows:]

* * * For mail manifested using the USPS Ship System under 705.2.9, only one annual mailing fee, paid at the Post Office of account where the permit imprint account is held, is required regardless of the number of Post Offices of mailing. * * *

* * * * *

244 Postage Payment and Documentation

1.0 Basic Standards for Postage Payment

[Revise the third sentence in 1.0 to read as follows:]

* * * Mail manifested using the USPS Ship system under 705.2.9 must be paid with a permit imprint. * * *

* * * * *

250 Commercial Mail Parcel Select

253 Prices and Eligibility

1.0 Prices and Fees

* * * * *

1.3 Computing Postage

1.3.1 Determining Single-Piece Weight

[Revise the third and fourth sentence in 1.3.1 to read as follows:]

* * * Except for mailers using the USPS Ship system or preparing Parcel Select lightweight mailings, when determining single-piece weight for Parcel Select mailpieces, express all weights in decimal pounds rounded off to two decimal places. Mailers using USPS Ship may round off to four decimals, and USPS Ship will automatically round to the appropriate decimal place. * * *

* * * * *

254 Postage Payment and Documentation

1.0 Basic Standards for Postage Payment

1.1 Postage Payment Options

1.1.1 Parcel Select Destination Entry

Parcel Select destination entry postage may be paid as follows:

* * * * *

[Revise the first and second sentence of item c to read as follows:]

c. Except for plant-verified drop shipments (see 705.17.0), USPS Ship shipments (see 705.2.9), and metered mail drop shipments (see 705.19.0), the mailer must have a meter license or permit imprint authorization at the destination facility parent Post Office for mailings deposited for entry at a DNDC/DRP&DC or ASF/RP&DC, at a DSCF/DRP&DC, or at the parent Post Office of a DDU or DS&DC. Except for manifested mail using USPS Ship under 705.2.9, postage and fees are paid to the Post Office that verifies the mailings. * * *

* * * * *

2.0 Mailing Documentation

2.1 Completing Postage Statements

[Revise the first sentence in 2.1 to read as follows:]

All metered and permit imprint mailings of 50 pieces or more, except manifested mail using USPS Ship under 705.2.9, must be accompanied by a postage statement completed and signed by the mailer (in duplicate if the mailer wants a receipted copy). * * *

* * * * *

256 Enter and Deposit

* * * * *

2.0 Deposit

* * * * *

2.5 Mail Separation and Presentation of Destination Entry Mailings

[Revise the second and third sentence in 2.5 to read as follows:]

* * * Mailers may deposit only PVDS and USPS Ship mailings at a destination delivery unit not co-located with a Post Office or other Postal Service facility with a business mail entry unit. If authorized under 705.7.0, mailers may commingle Parcel Select with other approved parcel mail using USPS Ship. * * * Mailers presenting destination entry mailings to the Postal Service must meet the following requirements:

[Revise the last sentence of item a to read as follows:]

a. * * * If USPS Ship is used, include the marking ''USPS Ship'' on each piece as described in 604.5.0.

* * * * *

[Revise the last sentence of items c and d to read as follows:]

c. * * * USPS Ship mailings do not require these forms.

d. * * * For PVDS mailings and USPS Ship mailings, separate mailings for deposit at different destination Postal Service facilities.

* * * * *

260 Commercial Mail Bound Printed Matter

263 Prices and Eligibility

1.0 Prices and Fees

* * * * *

1.2 Presorted and Carrier Route Bound Printed Matter

* * * * *

1.2.5 Destination Entry Mailing Fee

[Revise the second sentence of 1.2.5 to read as follows:]

* * * For BPM Flats destination entry mail manifested using USPS Ship under 705.2.9, only one annual BPM Flats destination entry mailing fee, paid at the Post Office where the USPS Ship permit imprint account is held, is required regardless of the number of Postal Service facilities where mailings are verified. * * *

* * * * *

265 Mail Preparation

* * * * *

8.0 Preparing Presorted Parcels

* * * * *

8.2 Preparing Irregular Parcels Weighing Less Than 10 Pounds

8.2.1 Required Bundling

* * * Each physical bundle must contain at least two addressed pieces (except mixed ADC/RP&DC bundles). Bundling also is subject to these conditions:

* * * * *

[Revise the text of item c to read as follows:]

c. Mailers must note on the postage statement whether they applied the piece count, weight, or both, except for USPS Ship mailings prepared under 705.2.9.

* * * * *

8.2.3 Required Sacking

* * * Sacking also is subject to these conditions:

* * * * *

[Revise the text of item c to read as follows:]

c. Mailers must note on the postage statement whether they applied the piece count or weight except for USPS Ship mailings prepared under 705.2.9.

* * * * *

8.4 Preparing Machinable Parcels Not Claiming DNDC Prices

8.4.1 Required Sacking

* * * Sacking also is subject to these conditions:

* * * * *

[Revise the text of item c to read as follows:]

c. Mailers must note on the postage statement whether they applied the piece count or weight except for USPS Ship mailings prepared under 705.2.9.

* * * * *

8.5 Preparing Machinable Parcels Claiming DNDC Prices

8.5.1 Required Sacking

* * * Sacking also is subject to these conditions:

* * * * *

[Revise the text of item c to read as follows:]

c. Mailers must note on the postage statement whether they applied the piece count or weight except for USPS Ship mailings prepared under 705.2.9.

* * * * *

266 Enter and Deposit

* * * * *

3.0 Destination Entry

* * * * *

3.2 Minimum Volume

A destination entry price BPM mailing is subject to these minimum volume requirements:

* * * * *

[Revise the first sentence of item f to read as follows:]

f. When Bound Printed Matter presorted parcel mailings are presented together under the USPS Ship system, a mailer may use the total piece count for all line items to all destinations reported within the 24-hour mailing period defined in 705.2.9. * * *

* * * * *

270 Commercial Mail Media Mail and Library Mail

* * * * *

274 Postage Payment and Documentation

1.0 Basic Standards for Postage Payment

[Revise the second sentence of 1.0 to read as follows:]

* * * Mail manifested using USPS Ship under 705.2.9 must be paid with a permit imprint. * * *

* * * * *

275 Mail Preparation

* * * * *

6.0 Preparing Media Mail and Library Mail Parcels

* * * * *

6.2 Preparing Machinable Parcels

6.2.1 Required Sacking

* * * Sacking also is subject to these conditions:

* * * * *

[Revise the text of item c to read as follows:]

c. Mailers must note on the postage statement which sacking method was used except for USPS Ship mailings prepared under 705.2.9.

* * * * *

6.3 Preparing Irregular Parcels

6.3.1 Required Bundling

* * * Bundling is also subject to these conditions:

* * * * *

c. Mailers must note on the postage statement which sacking method was used except for USPS Ship mailings prepared under 705.2.9.

* * * * *

6.3.3 Required Sacking

* * * Sacking is also subject to these conditions:

* * * * *

[Revise the text of item c to read as follows:]

c. Mailers must note on the postage statement which sacking method was used except for USPS Ship mailings prepared under 705.2.9.

* * * * *

276 Enter and Deposit

1.0 Verification and Deposit

[Revise the first sentence of 1.0 to read as follows:]

Except for USPS Ship shipments (see 705.2.9) or metered mail drop shipments (see 705.20.0), all presorted mailings must be presented for verification and acceptance at the Post Office where the permit or license is held. * * *

* * * * *

280 Commercial Mail USPS Ground Advantage—Commercial

* * * * *

284 Postage Payment and Documentation

* * * * *

2.0 Postage Payment for USPS Ground Advantage—Commercial

2.1 Permit Imprint Postage

[Revise the second sentence of 2.1 to read as follows:]

* * * All mail manifested using USPS Ship under 705.2.9 must be paid using a permit imprint. * * *

* * * * *

500 Additional Services

* * * * *

507 Mailer Services

* * * * *

3.0 Hold For Pickup

* * * * *

3.2 Basic Information

* * * * *

3.2.2 Basic Eligibility

It is also available with commercial mailings of Priority Mail Express presented under 213.4.2 or 213.4.3, Priority Mail, USPS Ground Advantage—Commercial, Parcel Select Lightweight, and Bound Printed Matter parcels, when:

* * * * *

[Revise the last sentence of item b to read as follows:]

b. * * * If the pieces are not of identical weight, then either the exact postage must be affixed to each piece or postage must be paid with permit imprint using USPS Ship (705.2.9).

* * * * *

508 Recipient Services

* * * * *

7.0 Premium Forwarding Services

* * * * *

7.3 Premium Forwarding Service Commercial

* * * * *

7.3.3 Conditions

* * * PFS-Commercial service is subject to these conditions:

* * * * *

[Revise the text of item b to read as follows:]

b. The annual enrollment fee and applicable Priority Mail Express or Priority Mail postage for each shipment container is paid using an USPS Ship account linked to the Enterprise Payment System (EPS).

* * * * *

600 Basic Standards for All Mailing Services

* * * * *

604 Postage Payment Methods and Refunds

* * * * *

5.0 Permit Imprint (Indicia)

5.1 General Standards

5.1.1 Definition

[Revise the second sentence of 5.1.1 to read as follows:]

* * * This payment method may be used for postage and extra service fees for Priority Mail Express (''USPS Ship'' only), Priority Mail, First-Class Mail, USPS Ground Advantage—Commercial, USPS Marketing Mail, Package Services, and Parcel Select mailpieces. * * *

5.1.2 Minimum Volume

Permit imprint mailings must contain at least 200 pieces or 50 pounds of mail, except:

* * * * *

[Revise the first and second sentence of item g to read as follows:]

g. A mailing containing 50 pieces or 50 pounds of nonpresorted single-piece domestic mail parcels submitted under the terms of an approved Manifest Mailing System (including USPS Ship) agreement under 705.2.0. Mailers may include any combination of the following products under this provision: Priority Mail Express (USPS Ship only), Priority Mail, USPS Ground Advantage—Commercial parcels, nonpresorted Bound Printed Matter parcels, and single-piece Media Mail and Library Mail parcels. * * *

* * * * *

5.1.5 Application Fee

[Revise the first sentence of 5.1.5 to read as follows:]

An application fee is required only when a permit imprint is used as the payment method for First-Class Mail, USPS Marketing Mail, Bound Printed Matter Flats and international mail, and the mailer does not use USPS Ship. * * *

* * * * *

5.3.6 Priority Mail Express, Priority Mail, First-Class Mail, and USPS Ground Advantage—Commercial Format

A permit imprint indicia on Priority Mail Express, Priority Mail, First-Class Mail, or USPS Ground Advantage—Commercial mailpieces must be formatted as follows:

[Revise the second sentence of item a to read as follows:]

a. * * * If the USPS Ship program is used under 705.2.9, the marking ''USPS Ship'' must appear directly below the permit number. * * *

* * * * *

5.3.7 USPS Marketing Mail, Parcel Select and Package Services Format

[Revise the second sentence of 5.3.7 to read as follows:]

* * * If USPS Ship is used under 705.2.9, the marking ''USPS Ship'' must appear directly below the permit number. * * *

* * * * *

5.3.9 Use of a Company Permit Imprint

[Revise the second and third sentence in the introductory text of 5.3.9 to read as follows:]

* * * If a company permit imprint is used for USPS Ship under 705.2.9, the marking ''USPS Ship'' is placed directly below the name on a separate line. As an option for USPS Ship mail only, ''Permit No.'' and the permit number used exclusively for USPS Ship may appear on a separate line between the company name and the marking ''USPS Ship.'' * * *

* * * * *

608 Postal Information and Resources

* * * * *

7.0 Trademarks and Copyrights of the USPS

7.1 USPS Trademarks

[Revise the list of trademarked items under 7.1 by deleting ''eVS'' and ''e-VS'', and add USPS Ship alphabetically.]

* * * * *

609 Filing Indemnity Claims for Loss or Damage

1.0 General Filing Instructions

* * * * *

1.3 Who May File

A claim may be filed by:

* * * * *

[Revise the text of item e to read as follows:]

e. Only the mailer, for insured or collect on delivery (COD) parcels paid using USPS Ship under 705.2.9.

* * * * *

3.0 Providing Evidence of Insurance and Value

3.1 Evidence of Insurance

* * * Examples of acceptable evidence are:

* * * * *

[Revise the introductory text of item d to read as follows:]

d. For insured mail or COD mail paid using MMS or USPS Ship under 705.2.0, or for insured mail paid using an EPS account for USPS Returns service under 505.3.0, the mailer must use one of the following:

* * * * *

700 Special Standards

* * * * *

705 Advanced Preparation and Special Postage Payment Systems

* * * * *

2.0 Manifest Mailing System

2.1 Description

* * * * *

2.1.2 Eligible Mail

[Revise the second sentence of 2.1.2 to read as follows:]

* * * For Priority Mail Express (USPS Ship only) see 2.9. * * *

* * * * *

2.1.4 USPS Ship System

[Revise the text of 2.1.4 to read as follows:]

Mailers using a MMS when presenting Parcel Select destination entry mailings under 256.2.0 or commingled parcel mailings under 6.0 or 7.0, may document and pay postage using USPS Ship (see 2.9). Business Acceptance Solutions, USPS Headquarters, must approve these systems. Unless authorized by Business Acceptance Solutions, mailers may not commingle USPS Ship mail with non-USPS Ship mail within the same mailing or place USPS Ship mail and non-USPS Ship mail in or on the same mailing container.

* * * * *

2.4 Authorization

2.4.1 Application

The mailer must submit an MMS application and supporting documentation as specified on the application to the postmaster of each Post Office where mailings will be deposited and under the publications as follows:

* * * * *

[Revise the text of item b to read as follows:]

b. Publication 205, *USPS Ship Technical Guide,* provides the USPS Ship application procedures for mailers. Customers using an Electronic Manifesting Solution for Parcels must also establish a user account and mailer agreement with USPS in the Business Customer Gateway at *https://gateway.usps.com.*

* * * * *

2.4.3 General Requirements for Authorization

General requirements for authorization are as follows:

* * * * *

[Revise the introductory text of item c to read as follows:]

c. For USPS Ship mailings prepared under 2.9, USPS charges USPS Ship mailers for postage due for any underpaid, unmanifested, or mis-shipped destination delivery unit (DDU) parcels at the end of the review period following the monthly mailing period as follows:

* * * * *

[Revise the first sentence of item c2 to read as follows:]

2. *Unmanifested Parcels.* USPS charges USPS Ship mailers for parcels not listed in the mailer's manifest files but identified by USPS processing scans or acceptance and delivery scans as being mailed. * * *

[Revise the first sentence of item c3 to read as follows:]

3. *Mis-Shipped DDU or DS&DC Parcels.* USPS charges USPS Ship mailers the appropriate single-piece price less the original price paid for parcels identified by acceptance scans to be deposited at incorrect destination delivery units or sorting and delivery centers. * * *

* * * * *

2.4.5 Approval Authority

Approval authority for manifest mailing systems is as follows:

* * * * *

[Revise the text of item b to read as follows:]

b. The director, Business Acceptance Solutions, USPS Headquarters, approves MMS that produce presorted First-Class Mail (except as noted in 2.4.5a) or USPS Marketing Mail mailings, Package Services or Parcel Select presort mailings, PVDS mailings, or USPS Ship mailings.

* * * * *

[Revise the heading and text of 2.6 to read as follows:]

2.6 USPS Ship System

The USPS Ship program is an electronic manifest mailing system that allows mailers to document and pay postage and extra services fees by transmitting electronic files to the Postal Service without generating paper manifests, postage statements, or clearance documents. Additional information on USPS Ship can be found online and in Publication 205, *USPS Ship Business and Technical Guide,* available on PostalPro at *https://postalpro.usps.com.*

* * * * *

7.0 Combining Package Services and Parcel Select Parcels for Destination Entry

7.1 Combining Parcels—DSCF/DRP&DC and DDU or DS&DC Entry

* * * * *

7.1.2 Basic Standards

Package Services and Parcel Select parcels that qualify as machinable, nonmachinable, and irregular under 201 and meet the following conditions may be combined in 5-digit scheme and 5-digit sacks or 5-digit scheme and 5-digit pallets under these conditions:

* * * * *

[Revise the second sentence of item b to read as follows:]

b. * * * For mailings presented under 7.0, mailers may document and pay postage using USPS Ship under 2.9.

* * * * *

7.2 Combining Parcel Select and Package Services Machinable Parcels for DNDC/DRP&DC Entry

* * * * *

7.2.2 Basic Standards

Parcel Select and Package Services parcels must meet the following conditions:

* * * * *

[Revise the second sentence of item d to read as follows:]

d. * * * For mailings presented under 7.0, mailers may document and pay postage using USPS Ship under 2.9.

* * * * *

8.0 Preparing Pallets

* * * * *

8.6 Pallet Labels

* * * * *

8.6.6 Line 3

[Revise the third sentence of the introductory text of 8.6.6 to read as follows:]

* * * Labels on containers of parcels prepared using USPS Ship under 2.9 must show ''USPS Ship'' either to the left of required line 3 information or directly below line 3 using the same size and lettering used for line 3. * * *

* * * * *

18.0 riority Mail Express Open and Distribute and Priority Mail Open and Distribute

18.1 Prices and Fees

* * * * *

18.1.6 Postage Statement for Enclosed Mail

[Revise the text of 18.1.6 to read as follows:]

The mailer must provide the correct postage statement for the enclosed mail unless prepared under USPS Ship. If the enclosed mail is zone-priced, the mailer must either provide documentation that details the pieces and postage, by zone for each Priority Mail Express Open and Distribute or Priority Mail Open and Distribute shipment destination or provide a separate postage statement for each Priority Mail Express Open and Distribute or Priority Mail Open and Distribute shipment destination. The mailer must always present the mailing to the designated USPS acceptance unit for verification of postage and fees. A postage statement is not required for the Priority Mail Express or Priority Mail portion of the Open and Distribute shipment, unless Priority Mail postage is paid by permit imprint not prepared under USPS Ship.

* * * * *

18.5 Preparation

* * * * *

18.5.3 Tags 257 and 267—Priority Mail Express Open and Distribute

[Revise the second sentence of the introductory text of 18.5.3 to read as follows:]

* * * For mailings prepared under USPS Ship, use blue Tag 257–EVS and yellow Tag 267–EVS. * * *

* * * * *

18.5.4 Tags 161 and 190—Priority Mail Open and Distribute

[Revise the second sentence of the introductory text of 18.5.4 to read as follows:]

* * * For mailings prepared under USPS Ship, use green Tag 161–EVS and pink Tag 190–EVS. * * *

* * * * *

18.5.7 Address Label Service Barcode Requirement

[Revise the first sentence in the introductory text of 18.5.7 to read as follows:]

An electronic service barcode must include USS 128 or Intelligent Mail package barcode (IMpb) (USPS Ship approved mailers) symbology for Priority Mail Express Open and Distribute, and the IMpb symbology for Priority Mail Open and Distribute in the address label. * * *

* * * * *

18.6 Enter and Deposit

* * * * *

18.6.3 Postmark and Signing Tags and Labels

[Revise the text of 18.6.3 to read as follows:]

Upon completion of the verification and acceptance of the contents, all Open and Distribute tags and labels must be postmarked and signed in the space provided unless prepared under an authorized USPS Ship manifest mailing system. Open and Distribute USPS Ship tags and labels bear the marking ''APPROVED USPS Ship MAILER'' in the space normally designated for the postmark and signature.

* * * * *

21.0 Optional Combined Parcel Mailings

21.1 Basic Standards for Combining Parcel Select, Package Services, and USPS Marketing Mail Parcels

* * * * *

21.1.2 Postage Payment

[Revise the last sentence of 21.1.2 to read as follows:]

* * * Mailers may document and pay postage using USPS Ship under 2.9.

* * * * *

Index

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E

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[Delete the ''Electronic Verification System (eVS), 705.2.9'' line item.

* * * * *

U

* * * * *

[Alphabetically under ''U'' list the following:]

USPS Ship, 705.2.9

* * * * *

Colleen Hibbert-Kapler,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2024–08814 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2021–0936; FRL–9859–02–R5]

Air Plan Approval; Indiana; Opacity Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the Indiana State Implementation Plan (SIP), authorizing temporary alternative opacity limitations at the BP Products North America, Inc. (BP) facility in Whiting, Indiana during startup and shutdown. This approval is consistent with the Clean Air Act (CAA) and EPA regulations regarding emissions during these periods in the refinery sector. EPA proposed to approve this SIP submission on August 17, 2022, and received no comments.

DATES: This final rule is effective May 28, 2024.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2021–0936. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (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 either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Matt Rau at (312) 886–6524 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Air and Radiation Division (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background Information

On August 17, 2022 (87 FR 50594), EPA proposed to approve Indiana's opacity rule section 326 Indiana Administrative Code (IAC) 5–1–8, effective December 8, 2021, as a revision to the Indiana SIP. The rule revision provides BP's two fluidized catalytic cracking units (FCUs), FCU 500 and FCU 600, with a temporary alternative opacity limitation to address safety hazards during startup, shutdown, and hot standby.

As noted in EPA's proposal, the temporary alternative opacity limitation provided to BP in 326 IAC 5–1–8 is consistent with applicable requirements in 326 IAC 5–1–3, approved by EPA on July 16, 2002 (67 FR 46589). This revision applies only to opacity rules at 326 IAC 5–1–8 as allowed under 326 IAC 5–1–3. Emission limitations and monitoring for all other pollutants, including particulate matter, remain unchanged.

The temporary alternative opacity limit is also consistent with the requirements of 40 CFR part 63, subpart UUU, the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units. The NESHAP allows units to demonstrate compliance during periods of startup, shutdown, or hot standby by maintaining the inlet velocity to the primary internal cyclones of the FCU catalyst regenerator at or above 20 feet per second. 326 IAC 5–1–8(c) requires BP to follow the same requirement as the NESHAP for FCU 500 and FCU 600, including the operating, data collection, and recordkeeping requirements. 326 IAC 5–1–8 (c)(3)(G) also requires BP to minimize emissions consistent with the NESHAP.

The public comment period for this proposed rule ended on September 16, 2022. EPA received no comments. EPA is finalizing this action as proposed.

II. Final Action.

EPA is approving Indiana's opacity rule section 326 IAC 5–1–8 as a revision to the Indiana SIP.

III. Incorporation by Reference.

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Indiana Regulations described in Section I of this preamble and set forth in the amendments to 40 CFR part 52 below. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov,* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

IV. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993), and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

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

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

Indiana did not evaluate environmental justice considerations as part of its SIP submission; 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.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 24, 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

[1] 62 FR 27968 (May 22, 1997).

be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: April 18, 2024.

Debra Shore,

Regional Administrator, Region 5.

For the reasons stated in the preamble, title 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. In § 52.770, the table in paragraph (c) is amended by revising the entry for ''5–1–8'' to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

EPA—APPROVED—INDIANA REGULATIONS

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
*	*	*	* * *	*
5–1–8	Site-specific temporary alternate opacity limitations.	12/8/2021	4/25/2024, [INSERT FIRST PAGE OF **FEDERAL REGISTER** CITATION].	
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[FR Doc. 2024–08712 Filed 4–24–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R02–OAR–2023–0636, FRL–11638–02–R2]

Approval and Promulgation of Plans for Designated Facilities; New Jersey; Delegation of Authority

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a request from the New Jersey Department of Environmental Protection (NJDEP) for delegation of authority to implement and enforce the Federal Plan Requirements for Municipal Solid Waste (MSW) landfills that commenced construction on or before July 17, 2014, and have not been modified or reconstructed since July 17, 2014. On November 21, 2023, the NJDEP Assistant Commissioner signed a memorandum of agreement (MoA) concerning the delegation of authority of the Federal Plan for existing MSW landfills to the NJDEP by the EPA. Subsequently, on November 28, 2023, the MoA became effective upon the EPA Region 2 Regional Administrator's signature. The signed MoA serves as the mechanism for the transfer of the EPA's authority to the NJDEP. The purpose of this delegation is to acknowledge the NJDEP's ability to implement the Federal Plan and to transfer primary implementation and enforcement responsibilities from the EPA to the NJDEP for existing sources of MSW landfills. This notice informs the public of the MoA, provides a copy of the signed document, and amends regulatory text to promulgate the delegation of authority.

DATES: This rule is effective on May 28, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID Number EPA–R02–OAR–2023–0636. 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, *e.g.,* Controlled Unclassified Information (CUI) (formally referred to as Confidential Business Information (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 electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Fausto Taveras, Environmental Protection Agency, Region 2, Air Programs Branch, 290 Broadway, New York, New York 10007–1866, at (212) 637–3378, or by email at *Taveras.Fausto@epa.gov.*

SUPPLEMENTARY INFORMATION: The **SUPPLEMENTARY INFORMATION** section is arranged as follows:

I. What is the background for this action?
II. What comments were received in response to the EPA's proposed action?
III. What action is the EPA taking?
IV. Statutory and Executive Order Reviews

I. What is the background for this action?

On February 20, 2024 (89 FR 12796), the EPA published a Notice of Proposed Rulemaking (NPRM) that proposed approving the New Jersey Department of Environmental Protection (NJDEP) request, dated May 8, 2023, for delegation of authority of the Federal Plan Requirements for Municipal Solid Waste (MSW) Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014, (Federal Plan), codified at 40 CFR part 62, subpart OOO, for existing sources of MSW Landfills. New Jersey's request letter included a commitment to enter a memorandum of agreement (MoA) developed by the NJDEP and the EPA, which defines the policies, responsibilities, and procedures that the NJDEP and the EPA will conform to in administering the Federal Plan requirements. The MoA was signed by the NJDEP Assistant Commissioner on November 21, 2023, and the EPA Region 2 Regional Administrator on November 28, 2023. The NPRM informed the public of the MoA, provided a copy of the signed document, and proposed amending associated regulatory text at 40 CFR part 62, subpart FF—New Jersey to promulgate the approved delegation of authority to the NJDEP for implementing and enforcing the Federal Plan Requirements for Municipal Solid

Waste Landfills That Commenced Construction On or Before July 17, 2014 and Have Not Been Modified or Reconstructed Since July 17, 2014 at 40 CFR part 62, subpart OOO.

The EPA will continue to retain enforcement authority along with the NJDEP, and the EPA will continue to retain certain specific authorities reserved for the EPA in the Federal Plans and as indicated in the MoA (*e.g.,* authority to approve major alternatives to test methods or monitoring, authority to approve alternative methods to determine the site-specific NMOC concentration or a site-specific methane generation rate constant, etc).

II. What comments were received in response to the EPA's proposed action?

On February 20, 2024 (89 FR 12796), the EPA proposed to approve the NJDEP's request for delegation of the MSW landfill Federal Plan. For a detailed discussion on the content and requirements of the NJDEP's delegation request, the reader is referred to the EPA's proposed rulemaking action. The EPA received no public comments in response to its February 20, 2024, NPRM.

III. What action is the EPA taking?

The EPA approves amending regulatory text at 40 CFR part 62, subpart FF—New Jersey, to promulgate the delegation of authority to the NJDEP for implementing and enforcing the Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014, at 40 CFR part 62, subpart OOO.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator has the authority to delegate the authority to implement a 111(d)/129 Federal Plan that complies with the provisions of the CAA and applicable Federal regulations. *See* 40 CFR 60.27. In reviewing 111(d)/129 Federal Plan delegation requests, the EPA's role is to approve State choices, provided that they meet the criteria of the CAA and of the EPA's implementing regulations. Accordingly, this action merely codifies in the Code of Federal Regulations the EPA's delegation of authority to implement the Federal Plan and does not impose additional requirements beyond those imposed by the already-applicable Federal Plan. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 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);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

In addition, this rulemaking action, pertaining to New Jersey's section 111(d) request for delegation of authority to implement and enforce the Federal Plan for existing MSW landfills, is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and it will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

The NJDEP did not evaluate EJ considerations as part of its formal request; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. 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 the EPA will submit a rule report to each House of the Congress and the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the 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 24, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Landfills, Reporting and recordkeeping requirements, Waste treatment and disposal.

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

Lisa Garcia,

Regional Administrator, Region 2.

For the reasons set forth in the preamble, 40 CFR part 62 is amended as follows:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart FF—New Jersey

■ 2. Amend § 62.7605, by adding paragraphs (e) through (h) to read as follows:

§ 62.7605 Identification of plan—delegation of authority.

* * * * *

(e) Letter from the New Jersey Department of Environmental Protection (NJDEP), submitted May 8, 2023, requested delegation of authority from EPA to implement and enforce the Federal Plan Requirements for existing Municipal Solid Waste Landfills. The Federal plan will be administered by both the NJDEP and the EPA, pursuant to ''Federal Plan Requirements for Municipal Solid Waste (MSW) Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014'' 40 CFR 62.16710–62.16730.

(f) Identification of sources. The Existing MSW Landfills Federal Plan applies to each municipal solid waste landfill that meets the following criteria:

(1) Commenced construction, reconstruction, or modification on or before July 17, 2014.

(2) Accepted waste at any time since November 8, 1987, or has additional capacity for future waste deposition.

(g) On November 21, 2023, the NJDEP Assistant Commissioner signed a Memorandum of Agreement (MoA) concerning the Delegation of Authority of the Federal Plan for Existing Municipal Solid Waste Landfills to the New Jersey Department of Environmental Protection by the United States Environmental Protection Agency. On November 28, 2023, the EPA Region 2 Regional Administrator signed the MoA, therefore agreeing to the terms and conditions of the MoA and accepting responsibility to enforce and implement the policies, responsibilities, and procedures for existing MSW landfills.

(h) The delegation became fully effective on November 28, 2023, the date the MoA was signed by the EPA Region 2 Regional Administrator.

[FR Doc. 2024–08737 Filed 4–24–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 174

[EPA–HQ–OPP–2024–0052; FRL–11896–01–OCSPP]

BLB2 and AMR3 Proteins in Potato; Temporary Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends and extends a temporary exemption from the requirement of a tolerance for residues of the BLB2 and AMR3 proteins in potato, when used as a plant-incorporated protectant (PIP) in accordance with the terms of Experimental Use Permit (EUP) No. 8971–EUP–3. J.R. Simplot Company, submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting the temporary tolerance exemption. This regulation eliminates the need under FFDCA to establish a maximum permissible level for residues of BLB2 and AMR3 proteins. The temporary tolerance exemption expires on March 31, 2025.

DATES: This regulation is effective April 25, 2024. Objections and requests for hearings must be received on or before June 24, 2024, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2024–0052, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and for the OPP Docket is (202) 566–1744. Please review the visitor instructions and additional information about the docket available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Madison Le, Biopesticides and Pollution Prevention Division (7511M), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1400; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 174 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2024–0052 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before June 24, 2024. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2024–0052, by one of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

II. Background

In the **Federal Register** of February 29, 2024 (89 FR 14795) (FRL–11682–01–OCSPP), EPA issued notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (3F9098) by J.R. Simplot Company, 5369 W. Irving Street, Boise, ID 83706. The petition requested that 40 CFR part 174 be amended to extend a temporary exemption from the requirement of a tolerance for plant-incorporated protectants BLB2 and AMR3 proteins in potato from March 31, 2024, to March 31, 2025. That document referenced a summary of the petition prepared by the petitioner J.R. Simplot Company, which is available in the docket via *https://www.regulations.gov.* There were no comments received in response to the Notice of Filing.

III. Final Rule

A. EPA's Safety Determination

Section 408(r) of FFDCA authorizes EPA to establish a temporary exemption from the requirement of a tolerance for residues covered by an experimental use permit issued under the Federal Insecticide, Fungicide, and Rodenticide Act. That section states that the provisions of section 408(c)(2) of FFDCA apply to exemptions issued under FFDCA section 408(r). Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance or tolerance exemption and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that EPA consider, among other factors, ''available information concerning the cumulative effects of [a particular pesticide's] . . . residues and other substances that have a common mechanism of toxicity.''

EPA evaluated the available toxicity and exposure data on BLB2 and AMR3 proteins and considered its validity, completeness, and reliability, as well as the relationship of this information to human risk. In summary, the available data does not indicate any adverse effects due to toxicity or allergenicity of the BLB2 and AMR3 proteins. A full summary of the data upon which EPA relied and its risk assessments based on that data can be found within the document entitled ''Review of the Application for an Experimental Use Permit for Gen 3 Potatoes expressing transgenic R-proteins BLB2, AMR3 and VNT1, PVY Coat Protein Hairpin RNA and inert ingredient StmALS and associated FFDCA Petitions for the Temporary Exemption from a Tolerance for AMR3 and BLB2, as well as FFDCA Petition for the Exemption from a Tolerance for StmALS'' (Human Health Risk Assessment). This document, which was prepared in support of the original temporary exemption from the requirement of a tolerance for residues of the BLB2 and AMR3 proteins in potato, continues to support this amendment and extension of the tolerance exemption. The Human Health Risk Assessment, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**.

Available data have demonstrated that, with regard to humans, BLB2 and AMR3 proteins are not anticipated to be toxic or allergenic via any reasonably foreseeable route of exposure. The plant-incorporated protectant (PIP) active ingredients are resistance (''R'') proteins that confer protection against potato pathogens by directly or indirectly recognizing pathogen-secreted effector proteins. This recognition leads to the activation of the hypersensitive response, which is a form of programmed cell death characterized by cytoplasmic shrinkage, chromatin condensation, mitochondrial swelling, vacuolization and chloroplast disruption. This hypersensitive response pathway involves immune signaling triggered by R proteins that is specific to plants; activated R-proteins cannot trigger cell death in mammals. Thus, BLB2 and AMR3 proteins do not have a toxic mechanism of action, but instead activate signaling cascades within the plant which invoke the plant cell death pathway to prevent growth and spread of the pathogen.

There is likely to be dietary exposure to BLB2 and AMR3 through consumption of potato-derived foods containing the proteins. However, the Agency has concluded that any potential dietary risk from the use of BLB2 and AMR3 proteins to human health is considered negligible for the following reasons. (1) As described above, the mode-of-action of BLB2 and AMR3 is specific to plants and does not affect mammalian cells. (2) Both the BLB2 and AMR3 proteins are expressed at extremely low levels in potato, which indicates very low human exposure to the proteins through the consumption of BLB2- and AMR3-expressing potatoes. (3) Bioinformatics analyses of BLB2 and AMR3 proteins revealed no homology with known toxins or allergens. (4) The source organisms for the active ingredients, *Solanum bulbocastanum* (BLB2) and *Solanum americanum* (AMR3), are not known as allergens. (5) Both proteins have a history of safe use. BLB2 originates from *S. bulbocastanum* (ornamental nightshade), a close potato relative that has 82% sequency similarity with the tomato gene Mi-1, which has a history of safe use since tomatoes have been consumed by humans for hundreds of years. Furthermore, the BLB2 protein is present in two *Solanum tuberosum* potato varieties (Toluca and Bionica) that have been conventionally bred and cultivated for food use in Europe. AMR3 originates from *S. americanum* (American black nightshade) which is cultivated for medicinal and food use, and as part of breeding programs for improved nutrition. Although some members of the *Solanum* genus have toxicity, these effects are caused by glycoalkaloids, which can cause toxicity even in the common potato, *Solanum*

tuberosum. Neither BLB2 nor AMR3 are glycoalkaloids; instead, they belong to a large family of R-proteins found throughout the plant kingdom. There are hundreds to thousands of R-proteins in *S. tuberosum* and other crops which have a long history of safe consumption.

Oral exposure from ingestion of drinking water is unlikely because BLB2 and AMR3 proteins are present at very low levels within the plant cells. If AMR3 and BLB2 do enter the water column, they are expected to degrade rapidly in the presence of soil microbes, or upon normal communal water-treatment procedures. In addition, there is unlikely to be residential or non-occupational exposure given that the active ingredients are plant-incorporated protectants in potato. Therefore, the only possible route of non-occupational exposure, other than dietary, is via handling of the plants and plant products. However, BLB2 and AMR3 proteins are present in the transformed potato tissues at levels below the level of detection, resulting in minimal to negligible exposure. Furthermore, there are no risks associated with these exposure routes because bioinformatics analysis and the history of safe use have shown that the proteins are not toxic or allergenic.

Although FFDCA section 408(b)(2)(C) provides for an additional tenfold margin of safety for infants and children in the case of threshold effects, EPA has determined that there are no such effects due to the lack of toxicity and allergenicity for these PIP active ingredients. As a result, an additional margin of safety for the protection of infants and children is unnecessary.

Based upon its evaluation, EPA concludes that there is reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of the BLB2 and AMR3 proteins in potatoes. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. The Agency has arrived at this conclusion based on the mode-of-action, history of safe use, and lack of toxicity and allergenicity for the BLB2 and AMR3 proteins in potato.

B. Analytical Enforcement Methodology

EPA has determined that an analytical method is not required for enforcement purposes since the Agency is establishing a temporary exemption from the requirement of a tolerance without any numerical limitation. Nonetheless, the petitioner submitted a reverse transcription-quantitative polymerase chain reaction (RT-qPCR) method for detection of BLB2 and AMR3 in transformed leaves and tubers.

C. Conclusion

Based upon its evaluation in the Human Health Risk Assessment, EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of BLB2 and ARM3 proteins in potatoes. Therefore, the expiration date for the temporary exemption from the requirement of a tolerance for residues of BLB2 and AMR3 proteins in potato, when used as a plant-incorporated protectant in accordance with the terms of Experimental Use Permit No. 8971–EUP–3, is extended from March 31, 2024, to March 31, 2025.

IV. Statutory and Executive Order Reviews

This action modifies an exemption from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to EPA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*) nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemption in this action, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes. As a result, this action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, EPA has determined that this action will not have a substantial direct effect on States or Tribal governments, on the relationship between the National Government and the States or Tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, EPA has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require EPA's consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 174

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 18, 2024.

Madison Le,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 174—PROCEDURES AND REQUIREMENTS FOR PLANT-INCORPORATED PROTECTANTS

■ 1. The authority citation for part 174 continues to read as follows:

Authority: 7 U.S.C. 136–136y; 21 U.S.C. 321(q), 346a and 371.

■ 2. Revise and republish § 174.545 to subpart W to read as follows:

§ 174.545 BLB2 and AMR3 proteins in potato; temporary exemption from the requirement of a tolerance.

Residues of BLB2 and AMR3 proteins in potato are temporarily exempt from the requirement of a tolerance when used as a plant-incorporated protectant in potato in accordance with the terms of Experimental Use Permit No. 8917–EUP–3. This temporary exemption from the requirement of a tolerance expires on March 31, 2025.

[FR Doc. 2024–08801 Filed 4–24–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2021–0681; FRL–11878–01–OCSPP]

Escherichia coli Strain K–12 P678–54 Micelles in Pesticide Formulations; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of *Escherichia coli* strain K–12 P678–54 micelles (also known as *E. coli* K–12 derived micelles) when used as an inert ingredient (encapsulation of active ingredient) on growing crops and raw agricultural commodities pre- and post-harvest. AgroSpheres, Inc., submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *E. coli* K–12 derived micelles, when used in accordance with the terms of those exemptions.

DATES: This regulation is effective April 25, 2024. Objections and requests for hearings must be received on or before June 24, 2024 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2021–0681, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP docket is (202) 566–1744. Please review the visitor instructions and additional information about the docket available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Director, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2021–0681 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before June 24, 2024. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2021–0681, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets#express.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

II. Petition for Exemption

In the **Federal Register** of October 21, 2021 (86 FR 58239) (FRL–8793–04–OCSPP), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP IN–11585) by AgroSpheres, Inc., 1180 Seminole Trail, Charlottesville, VA, USA, 22901. The petition requested that 40 CFR be amended by establishing an exemption from the requirement of a tolerance for residues of *E. coli* K–12 derived micelles, when used as an inert ingredient (encapsulation of active ingredient) in pesticide formulations applied to growing crops or raw agricultural commodities pre- and post-harvest under 40 CFR 180.910. That document referenced a summary of the petition prepared by AgroSpheres, Inc., 1180 Seminole Trail, Charlottesville, VA, USA, 22901, the petitioner, which is available in the docket, *https://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. When making a safety determination for an exemption for the requirement of a tolerance FFDCA section 408(c)(2)(B) directs EPA to consider the considerations in section 408(b)(2)(C) and (D). Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . .'' Section 408(b)(2)(D) lists other factors for EPA consideration making safety determinations, *e.g.,* the validity, completeness, and reliability of available data, nature of toxic effects, available information concerning the cumulative effects of the pesticide chemical and other substances with a common mechanism of toxicity, and available information concerning aggregate exposure levels to the pesticide chemical and other related substances, among others.

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no harm to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for *E. coli* K–12 derived micelles including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with *E. coli* K–12 derived micelles follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by *E. coli* K–12 derived micelles as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in this unit.

The available toxicity studies show that *E. coli* K–12 derived micelles have a low overall acute toxicity via the oral and inhalation route. Furthermore, *E. coli* K–12 derived micelles are obtained from bacteria (E. coli K–12) that are nontoxigenic and nonpathogenic. *E. coli* K–12 derived micelles are also non-viable, further reducing the likelihood of infectivity or pathogenicity to negligible levels. Repeated exposures to high concentrations of microbial proteins may cause allergic sensitization, but this scenario is not anticipated in residential settings.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/overview-risk-assessment-pesticide-program.*

The hazard profile of *E. coli* K–12 derived micelles is adequately defined. Overall, *E. coli* K–12 derived micelles have low toxicity and are nontoxigenic and non-pathogenic. This conclusion is predicated on the manufacturing process ensuring the absence of human pathogenic bacteria in the inert ingredient product. Taking into consideration all available information, no toxicological endpoints were identified, and a quantitative risk assessment is not needed.

C. Exposure Assessment

1. Dietary exposure from food and feed uses. In evaluating dietary exposure to *E. coli* K–12 derived micelles, EPA considered exposure under the proposed exemption from the requirement of a tolerance. EPA assessed dietary exposures from *E. coli*

K–12 derived micelles in food as follows:

Dietary exposure (food and drinking water) to *E. coli* K–12 derived micelles may occur from eating foods treated with pesticide formulations containing this inert ingredient and drinking water containing runoff from soils containing the treated crops. However, no toxicological endpoints of concern were selected, and therefore, a quantitative dietary exposure assessment for *E. coli* K–12 derived micelles was not conducted.

2. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

E. coli K–12 derived micelles may be present in pesticide and non-pesticide products that may be used in and around the home. However, a quantitative residential exposure assessment was not conducted since a toxicological endpoint for risk assessment was not identified.

3. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

Based on the lack of toxicity in the available database, EPA has not found *E. coli* K–12 derived micelles to share a common mechanism of toxicity with any other substances, and *E. coli* K–12 derived micelles do not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance exemption, therefore, EPA has not found *E. coli* K–12 derived micelles to share a common mechanism of toxicity with any other substances, and *E. coli* K–12 derived micelles do not appear to produce a toxic metabolite produced by other substances. Therefore, for the purposes of this tolerance exemption, EPA has not assumed that *E. coli K–12 derived micelles* have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by OPP concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website. (*https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides*).

D. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act (FQPA) Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

Based on an assessment of *E. coli* K–12 derived micelles, EPA has concluded that there are no toxicological endpoints of concern for the U.S. population, including infants and children. Because there are no threshold effects associated with *E. coli* K–12 derived micelles, EPA conducted a qualitative assessment. As part of that assessment, the Agency did not use safety factors for assessing risk, and no additional safety factor is needed for assessing risk to infants and children.

E. Aggregate Risks and Determination of Safety

Because no toxicological endpoints of concern were identified, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to *E. coli* K–12 derived micelle residues.

V. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established for residues of *Escherichia coli* strain K–12 P678–54 micelles (also known as *E. coli* K–12 derived micelles) (No CAS Reg. No.) when used as an inert ingredient (encapsulation of active ingredient) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest under 40 CFR 180.910.

VII. Statutory and Executive Order Reviews

This action establishes exemptions from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the exemptions in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal governments, on the relationship between the National Government and the States or Tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000) do not apply

to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 18, 2024.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

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

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.910, amend Table 1 to 180.910 by adding, in alphabetical order, an entry for ''*Escherichia coli* strain K–12 P678–54 micelles'' to read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO 180.910

Inert ingredients	Limits	Uses
* * * * * * *		
Escherichia coli strain K–12 P678–54 micelles	....	Encapsulation of active ingredient.
* * * * * * *		

[FR Doc. 2024–08718 Filed 4–24–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2021–0057; FRL–8332–05–OCSPP]

RIN 2070–AK86

Asbestos Part 1; Chrysotile Asbestos; Regulation of Certain Conditions of Use Under the Toxic Substances Control Act (TSCA); Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: The Environmental Protection Agency (EPA) is correcting a final rule that appeared in the **Federal Register** of Thursday, March 28, 2024, which finalized the rule under the Toxic Substances Control Act (TSCA) to address to the extent necessary the unreasonable risk of injury to health presented by chrysotile asbestos based on the risks posed by certain conditions of use. The injuries to human health include mesothelioma and lung, ovarian, and laryngeal cancers resulting from chronic inhalation exposure to chrysotile asbestos.

DATES: This correction is effective on May 28, 2024.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2021–0057, is available online at *https://www.regulations.gov*. Additional instructions for visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/*.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Peter Gimlin, Existing Chemicals Risk Management Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0515; email address: *gimlin.peter@epa.gov*.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA is correcting the final rule that published in the **Federal Register** of Thursday, March 28, 2024 (89 FR 21970); FRL–8332–01–OCSPP) to address an inadvertent error made while numbering the paragraphs in § 751.515(c)(1).

Correction

In FR Doc. 2024–05972, appearing on page 21970 in the **Federal Register** of Thursday, March 28, 2024, the following correction is made:

§ 751.515 [Corrected]

■ On page 22010, in the third column, in § 751.515(c)(1), the paragraph designation ''(vi)'' is correctly designated as ''(v)'' and the paragraph designation ''(vii)'' is correctly designated as ''(vi)''.

Dated: April 19, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–08871 Filed 4–24–24; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 207 and 234

[Docket DARS–2023–0030]

RIN 0750–AL82

Defense Federal Acquisition Regulation Supplement: Use of Fixed-Price Contracts for Certain Major Defense Acquisition Programs (DFARS Case 2023–D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2023 that limits the number of low-rate initial production lots associated with a major defense acquisition program under certain circumstances.

DATES: Effective April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Jon Snyder, telephone 703–945–5341.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 88 FR 67611 on September 29, 2023, to implement section 808 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117–263). Section 808 amends section 818 of Public Law 109–364 to limit the number of low-rate initial production lots associated with a major defense acquisition program to be procured to no more than one when the milestone decision authority authorizes the use of a fixed-price type contract at Milestone B and the scope of the work includes both development and low-rate initial production. This limitation may be waived. Two respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent indicted support for the rule.

Response: The support for the rule is noted.

2. Clarifications

Comment: One respondent suggested that the rule should define or provide a reference to the definition of a fixed-price contract. The rule does not specify whether fixed-price contracts include firm-fixed-price, fixed-price-incentive, or fixed-price-with-economic-price-adjustment, which could create ambiguity or inconsistency in the application of the rule and affect the level of risk and incentive for the Government and contractors. The respondent recommended providing a reference to the relevant section of the Federal Acquisition Regulation (FAR) that defines these types of contracts or specify the types of fixed-price contracts that can be used.

Response: This rule does not stand alone; contracting officers will implement the rule in the context provided by the FAR and DFARS. FAR subpart 16.2 describes the types of fixed-price contracts that a contracting officer may use. The DFARS, as a supplement to the FAR, does not duplicate the content of the FAR.

Comment: One respondent suggested that the rule should explain the rationale or purpose of the limitation on procuring more than one lot for low-rate initial production (LRIP) using a fixed-price type contract for a major defense acquisition program. The rule currently does not state why this limitation is necessary or beneficial, or how it relates to the objective of reducing cost risk and improving performance. This could make it difficult to evaluate the effectiveness or impact of the rule, or to justify its use in specific cases.

Response: Section 808 of the NDAA for FY 2023 limits the number of LRIP lots to no more than one on fixed-price contracts that also include development. Neither section 808 nor the Joint Explanatory Statement provides the rationale or purpose of the limitation. However, the limitation may result in a reduction in risk to the contractor associated with proposing prices for multiple production lots of an item prior to the completion of development and initial production of the item.

Comment: One respondent suggested that the rule should establish some criteria or guidelines for exercising the waiver authority for the limitation on LRIP procurement. The rule currently does not indicate how the service acquisition executive should decide whether to grant or deny a waiver, or what factors should be considered in making this decision. This could lead to arbitrary or inconsistent decisions or undermine the accountability or transparency of the waiver process. Providing examples of factors that could justify a waiver and indicate that the waiver authority should be used sparingly and only in exceptional circumstances.

Response: Section 808 provides the service acquisition executive the authority to waive this limitation. It does not specify the criteria to be considered in making such a waiver decision. Providing examples of factors to consider in determining whether or not to waive the limitation may preclude the consideration of factors that are relevant to the instant acquisition and may have a negative impact on meeting mission needs.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), and for Commercial Services

This final rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

IV. Expected Impact of the Rule

As a result of this final rule, unless waived, the Government may not procure more than one low-rate initial production lot associated with a major defense acquisition program if, at the time of Milestone B approval, the milestone decision authority authorizes the use of a fixed-price type contract and the scope of work of the fixed-price contract includes both development and low-rate initial production of items associated with such major defense acquisition program. This rule does not impact contractor operations; however, it may limit contractor risk assumed under such contracts. Development and initial production of an item likely involve the discovery and resolution of problems that are unknown beforehand. Risk to a contractor is higher when the contractor must propose prices for multiple production lots of an item before the development and initial production of that item are complete. By limiting the number of low-rate initial production lots on a fixed-price contract

that also includes development, this risk to the contractor may be reduced.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* and is summarized as follows:

This final rule is necessary to implement section 808 of the National Defense Authorization Act for Fiscal Year (FY) 2023 (Pub. L. 117–263). Section 808 modifies section 818 of Public Law 109–364 to limit the number of low-rate initial production lots associated with a major defense acquisition program to be procured to no more than one when the milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval and the scope of the fixed-price contract includes both development and low-rate initial production.

No comments were received in response to the initial regulatory flexibility analysis.

Data is not available on the number of fixed-price type contracts for major defense acquisition programs that contain both development and low-rate initial production; therefore, data was obtained for contracts that include DFARS clause 252.234–7004, Cost and Software Data Reporting System, or its alternate I clause. This DFARS clause is required to be included in solicitations and contracts for major defense acquisition programs that exceed $50 million, and its alternate I clause is required to be included in solicitations and contracts for major defense acquisition programs that are greater than $20 million but less than or equal to $50 million under certain circumstances. According to the Procurement Business Intelligence Service, DoD awarded contracts for major defense acquisition programs to 130 unique small entities in FY 2021, 99 in FY 2022, and 109 in FY 2023. The average over the three-year period is 112 per fiscal year. Therefore, the number of small entities to which this rule may apply is 112.

This final rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

VIII. Paperwork Reduction Act

This final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 207 and 234

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 207 and 234 are amended as follows:

■ 1. The authority citation for parts 207 and 234 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 207—ACQUISITION PLANNING

■ 2. In section 207.106, revise paragraph (S–74) to read as follows:

207.106 Additional requirements for major systems.

* * * * *

(S–74) When selecting contract type for a major defense acquisition program, see 234.004.

PART 234—MAJOR SYSTEM ACQUISITION

■ 3. Amend section 234.004 by adding paragraph (2)(v) to read as follows:

234.004 Acquisition strategy.

* * * * *

(2) * * *

(v) In accordance with section 808 of the National Defense Authorization Act for Fiscal Year 2023 (Pub. L. 117–263)—

(A) The contracting officer shall not procure more than one lot for low-rate initial production, as defined at 10 U.S.C. 4231, associated with a major defense acquisition program if—

(*1*) The milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval; and

(*2*) The scope of work of the fixed-price type contract includes both the development and low-rate initial production of items for such major defense acquisition program; and

(B) This limitation may be waived by the service acquisition executive for the department concerned, delegable to no lower than one level above the contracting officer, if—

(*1*) A written notification of the waiver, including associated rationale, is provided to the congressional defense committees no later than 30 days after issuance of the waiver in accordance with agency procedures; and

(*2*) A copy of the waiver and such congressional notification are included in the contract file.

* * * * *

[FR Doc. 2024–08435 Filed 4–24–24; 8:45 am]

BILLING CODE 6001–FR–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Parts 701 and 705

RIN 0412–AA88

U.S. Agency for International Development Acquisition Regulation; Administrative Updates: Correction

AGENCY: U.S. Agency for International Development.

ACTION: Direct final rule, Correction.

SUMMARY: The U.S. Agency for International Development (USAID) is issuing this final rule revising the Agency for International Development Acquisition Regulation (AIDAR) to maintain consistency with Federal and agency regulations, remove obsolete material and internal agency procedures, and make editorial amendments to clarify the regulation.

DATES: *Effective date:* May 22, 2024.

FOR FURTHER INFORMATION CONTACT: Lyudmila Bond, 202–916–2622, *policymailbox@usaid.gov.*

SUPPLEMENTARY INFORMATION: In the FR Doc. 2023–27953, starting on page 4201 in the **Federal Register** of January 23, 2024, USAID is making the following corrections:

■ 1. On page 4203, starting in the first column, section 701.470 is corrected by:

■ a. Revising paragraphs (a)(2)and (b)(1);

■ b. redesignating paragraph (b)(3) through (5) as (b)(4) through (6); and

■ c. adding new paragraph (b)(3).

The revisions and addition read as follows:

701.470 [Corrected]

(a) * * *

(2) In preparing and submitting deviations for approval, USAID operating units must follow the applicable USAID policies in the ADS 300 series, including mandatory written consultations with the Bureau for Management, Office of Acquisition and Assistance, Policy Division (M/OAA/P) and the Office of the General Counsel. For deviations related to AIDAR appendices D and J, Director of M/OAA clearance is required in lieu of M/OAA/P consultations, as outlined in appendices D and J. The CO must retain all approved deviations in the contract file.

(b) * * *

(1) Class deviations from the AIDAR will be processed in the same manner as prescribed in paragraph (a)(2) of this section.

* * * * *

(3) Individual heads of contracting activities have authority to approve class deviations affecting contracts only within the contracting activity under their management authority. Only the M/OAA Director has authority to approve class deviations that affect more than one contracting activity.

* * * * *

■ 2. On page 4205, in the first column, section 705.102 is corrected by adding a sentence at the end of the paragraph to read as follows:

705.102 [Corrected]

* * * For FAR 5.102(a)(5) exceptions applicable to personal services contracts with individuals, see appendix D, section 5 and appendix J, section 5.

Jami J. Rodgers,

Chief Acquisition Officer.

[FR Doc. 2024–08588 Filed 4–24–24; 8:45 am]

BILLING CODE 6116–01–P

Proposed Rules

Federal Register
Vol. 89, No. 81
Thursday, April 25, 2024

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1004; Project Identifier AD–2023–01058–R]

RIN 2120–AA64

Airworthiness Directives; Various Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for various helicopters modified by certain supplemental type certificates (STCs) that approve the installation of an emergency float kit or an emergency float with liferaft kit. This proposed AD was prompted by the results of an accident investigation and subsequent reports of difficulty pulling the emergency float kit float activation handle installed on the pilot cyclic. This proposed AD would require repetitively inspecting the pull force on the float activation handle and, depending on the results, accomplishing corrective actions. For certain model helicopters, this proposed AD would also require removing from service and replacing certain part-numbered float inflation reservoirs (reservoirs) and pull cable assemblies (cables) with certain other part-numbered reservoirs and cables. Finally, this proposed AD would prohibit installing certain part-numbered reservoirs and cables on certain helicopters. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by June 10, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–1004; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For Dart Aerospace service information identified in this NPRM, contact Dart Aerospace, LTD., 1270 Aberdeen St., Hawkesbury, ON, K6A 1K7, Canada; phone: 1–613–632–5200; Fax: 1–613–632–5246; or at *dartaero.com.*
- You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Parkway, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

Other Related Service Information: For additional Dart Aerospace service information identified in this NPRM, use the Dart Aerospace, LTD., contact information under *Material Incorporated by Reference* above. You may also view this service information at the FAA contact information under *Material Incorporated by Reference* above.

FOR FURTHER INFORMATION CONTACT: Johann Magana, Aviation Safety Engineer, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712; phone: (562) 627–5322; email: *johann.magana@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–1004; Project Identifier AD–2023–01058–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Johann Magana, Aviation Safety Engineer, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712; phone: (562) 627–5322; email: *johann.magana@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA received reports of an accident involving an Airbus Helicopters Model AS350B2 helicopter impacting a body of water during an autorotation. The left-hand and right-hand emergency floats did not inflate symmetrically, and the helicopter subsequently capsized.

During the accident investigation, the FAA learned of reports of difficulty pulling the emergency float kit float activation handle installed on the pilot cyclic. Asymmetric inflation of the float system and difficulty deploying the float system from the float activation handle installed on the pilot cyclic can be caused by improperly installed cables. These emergency float kits utilize a system of cables to activate and release compressed gas from the float cylinders into the floats. Proper installation of the cables allows the two float cylinders installed on the aircraft to activate simultaneously, allowing for proper distribution of gas to all floats in the system. Improperly installed cables, if not addressed, could result in loss of the left or right-hand float, causing the helicopter to roll to one side but remain buoyant, or loss of both floats, causing the helicopter to capsize underwater.

Accordingly, the FAA issued AD 2020–02–23, Amendment 39–21027 (85 FR 8150, February 13, 2020) (AD 2020–02–23), for Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, and AS350D1 helicopters modified by STC SR00470LA, and Airbus Helicopters Model AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters modified by STC SR00645LA. AD 2020–02–23 requires repetitive inspections of the installation of the cables on the emergency float kits. After AD 2020–02–23 was issued, the National Transportation Safety Board reported that similar deficiencies may remain unresolved in other similar FAA-approved emergency flotation systems.[1]

Additionally, after AD 2020–02–23 was issued, the FAA determined additional design approval holders that use the same float activation pull system may have similar deployment mechanism deficiencies as the unsafe condition addressed in AD 2020–02–23. Consequently, this proposed AD would require repetitively inspecting the pull force on the float activation handle to detect and address improperly installed cables and, depending on the results, accomplishing corrective actions. This condition, if not addressed, could result in loss of the left-hand or right-hand float, causing the helicopter to roll to one side, or loss of both floats, causing the helicopter to capsize underwater.

[1] NTSB Investigation; Inadvertent Activation of the Fuel Shutoff Lever, Subsequent Loss of Engine Power, and Ditching on the East River, Liberty Helicopters Inc. This information may be viewed under 2.4.3 Certification Review Process, of Docket Item #79 NTSB—Adopted Board Report, which is available at *https://data.ntsb.gov/Docket/?NTSBNumber=ERA18MA099.*

FAA's Determination

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed DART Aerospace Operation Instructional Manual for General Pull Cable Rigging and Testing Procedure, Revision A, dated December 23, 2020. This service information specifies procedures for testing the pull cable rigging on the DART Aerospace emergency float and liferaft systems using certain part-numbered pull cable test tools.

The FAA also reviewed DART Aerospace Service Bulletin (SB) No. SB2020–09, Revision A, dated March 16, 2021, DART Aerospace SB No. SB2021–01, Revision A, dated December 28, 2021, DART Aerospace SB No. SB2021–02, dated April 30, 2021, DART Aerospace SB No. SB2021–03, dated June 30, 2021, and DART Aerospace SB No. SB2022–01, dated March 14, 2022. This service information specifies procedures for inspecting the installation of the cable emergency float kits (*e.g.,* inspecting for activation pull forces on the float activation handle), readjusting the cable rigging if improperly installed, and contacting DART if readjusting the rigging is not successful. This service information also specifies optional procedures for deactivating the emergency float system as inoperative and reporting compliance to DART.

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

Other Related Service Information

The FAA reviewed DART Aerospace SB No. SB 2022–03, dated May 12, 2023, for Model R44 and R44 II helicopters, which specifies procedures for removing and replacing certain-part numbered reservoirs and cables with new part-numbered reservoirs and cables. This service information also specifies procedures for revising the rotorcraft flight manual and recording compliance with the service information in the aircraft logbook.

Proposed AD Requirements in This NPRM

This proposed AD would require repetitively inspecting the installation of the cables on certain emergency float systems and, depending on the results, repairing the cable installation or, deactivating and placarding the emergency float system as inoperative. For certain helicopters, this proposed AD would also require removing from service and replacing certain part-numbered reservoirs and cables with other part-numbered reservoirs and cables. Additionally, this proposed AD would prohibit installing certain part-numbered reservoirs and cables on certain helicopters.

Differences Between This Proposed AD and the Service Information

The service information specifies a one-time pull cable test, whereas this proposed AD would require repetitively inspecting the pull force on the float activation handle.

Where the service information specifies contacting DART, this proposed AD would require actions in accordance with FAA-approved procedures.

Appendix A of the service information specifies to ty-wrap the pin into place on the pilot collective and contacting DART customer service for a resolution, whereas this proposed AD would require accomplishing corrective actions in accordance with FAA-approved procedures.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 1,150 emergency float kits or emergency float with liferaft kits installed on helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD. Labor costs are estimated at $85 per work-hour.

Inspecting the pull force on the float activation handle would take approximately 1 work-hour with one test kit costing approximately $2,000 for an estimated cost of $2,085 per helicopter and $2,397,750 for the U.S. fleet, per inspection cycle.

Replacing a reservoir and cable (Model R44 and R44 II helicopters) would take approximately 2 work-hours and parts would cost approximately $5,800 for an estimated cost of $5,970 per helicopter.

The FAA has no way of determining what repairs may be required following the inspection required by this proposed AD, the number of helicopters that may need repairs, or the costs to perform repairs. However, if required as a repair, replacing and adjusting an affected cable would take approximately 8 work-hours and parts would cost approximately $255 for an estimated cost of $935 per helicopter.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Various Helicopters: Docket No. FAA–2024–1004; Project Identifier AD–2023–01058–R.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by June 10, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the helicopters identified in paragraphs (c)(1) through (8) of this AD, certificated in any category.

(1) Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, and AS355N helicopters modified by Supplemental Type Certificate (STC) SR00831LA; Model EC120B helicopters modified by STC SR00780LA; and Model EC130B4 helicopters modified by STC SR01687LA.

Note 1 to paragraph (c)(1): Helicopters with an AS350B3e designation are Model AS350B3 helicopters.

(2) Airbus Helicopters Deutschland GmbH (AHD) Model BO–105A, BO–105C, BO–105S, and BO–105LS A–3 helicopters modified by STC SR00856LA; Model EC135P1, EC135P2, EC135P2+, EC135P3, EC135T1, EC135T2, EC135T2+, and EC135T3 helicopters modified by STC SR01855LA; and Model MBB–BK 117 C–2 and MBB–BK 117 D–2 helicopters modified by STC SR02244LA.

Note 2 to paragraph (c)(2): Helicopters with an EC135P3H designation are Model EC135P3 helicopters; helicopters with an EC135T3H designation are Model EC135T3 helicopters; and helicopters with an MBB–BK117 C–2e designation are Model MBB–BK117 C–2 helicopters.

(3) Bell Textron Inc., Model 210, 212, 412, 412CF, and 412EP helicopters modified by STC SR01779LA; and Model 412, 412CF, and 412EP helicopters modified by STC SR01459LA.

(4) Bell Textron Canada Limited Model 206A, 206B, 206L, 206L–1, 206L–3, 206L–4, and 407 helicopters modified by STC SR01535LA.

Note 3 to paragraph (c)(4): Helicopters with a 206B3 designation are Model 206B helicopters; helicopters with a 206L–1+ designation are Model 206L–1 helicopters; and helicopters with a 206L–3+ designation are Model 206L–3 helicopters.

(5) Leonardo S.p.a. Model AB412 and AB412 EP helicopters modified by STC SR01779LA.

(6) MD Helicopters, LLC, Model 369D, 369E, 369F, 369FF, 369HE, 369HM, 369HS, and 500N helicopters modified by STC SR00932LA.

(7) Robinson Helicopter Company Model R44 and R44 II helicopters modified by STC SR02049LA; and Model R66 helicopters modified by STC SR02484LA.

(8) Sikorsky Aircraft Corporation Model S–76A, S–76B, and S–76C helicopters modified by STC SR01902LA.

(d) Subject

Joint Aircraft System Component (JASC) Code: 2560, Emergency Equipment; and 3212, Emergency Flotation Section.

(e) Unsafe Condition

This AD was prompted by the results of an accident investigation and subsequent reports of difficulty pulling the emergency float kit float activation handle installed on the pilot cyclic. The FAA is issuing this AD to detect and address improperly installed cables, which can lead to difficulty deploying the float system from the float activation handle. The unsafe condition, if not addressed, could result in loss of the left-hand or right-hand float, causing the helicopter to roll to one side, or loss of both floats causing the helicopter to capsize underwater.

(f) Compliance

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

(g) Required Actions

(1) Within 100 hours time-in-service (TIS) or 30 days after the effective date of this AD, whichever occurs first, and thereafter at intervals not to exceed six months, accomplish the actions required by paragraphs (g)(1)(i) through (vi) of this AD, as applicable to your model helicopter.

(i) For Airbus Helicopters Model EC130B4 helicopters identified in paragraph (c)(1) of this AD, accomplish the actions required by paragraphs (g)(1)(i)(A) or (B) of this AD, as applicable, and paragraph (g)(1)(i)(C) of this AD, as applicable.

(A) Inspect the pull force on the float activation handle in accordance with section 2.0 (for pull cable test tool part-number (P/N) 606.7803), paragraphs 1 through 14 of DART Aerospace Operation Instructional Manual for General Pull Cable Rigging and Testing Procedure, Revision B, dated May 12, 2023 (DART OIM–11 Rev B), except if the inflation handle makes contact with the cyclic stick in paragraph 6, before further flight, perform cable rigging in accordance with FAA-approved procedures and, once the cable is properly rigged, continue with the actions required by this paragraph, and except the measurement in paragraph 8 must be 0.85 in (2.16 cm) or greater; or

(B) Inspect the pull force on the float activation handle in accordance with section 3.0 (for pull cable test tool P/N 607.1602), paragraphs 3 through 20 of DART OIM–11 Rev B, except in paragraph 3, where it states, ''it is advised to mark these locations and verify the hole centers by removing the two set screws from the test tool and sliding the tool onto the shroud and aligning the tool with the marks,'' replace that text with ''mark these locations and verify the hole centers by removing the two set screws from the test tool and sliding the tool onto the shroud and aligning the tool with the marks,'' and except the measurement in paragraph 13 must be 0.75 in (1.91 cm) or greater.

(C) If the pull force is greater than 25 lbf (111.2N) or exceeds the limits in the existing Installation Instructions or Instructions for Continued Airworthiness for your helicopter, as applicable, before further flight, comply with paragraph (g)(2) of this AD, as applicable to your model helicopter.

(ii) For Airbus Helicopters Deutschland GmbH (AHD) Model MBB–BK 117 C–2 and MBB–BK 117 D–2 helicopters identified in paragraph (c)(2) of this AD, accomplish the actions required by paragraphs (g)(1)(ii)(A) and (B) of this AD, as applicable.

(A) Inspect the pull force on the float activation handle in accordance with section 2.0 (for pull cable test tool P/N 606.7803), paragraphs 1 through 14 of DART OIM–11 Rev B, except if the inflation handle makes contact with the cyclic stick in paragraph 6, before further flight perform cable rigging in accordance with FAA-approved procedures, and except the measurement in paragraph 8 must be 0.85 in (2.16 cm) or greater.

(B) If the pull force is greater than 25 lbf (111.2N), or exceeds the limits in the existing Installation Instructions or Instructions for Continued Airworthiness for your helicopter, as applicable, before further flight, comply with paragraph (g)(2) of this AD, as applicable to your model helicopter.

(iii) For Bell Textron Inc., Model 210, 212, 412, 412CF, and 412EP helicopters identified in paragraph (c)(3) of this AD, accomplish the actions required by paragraphs (g)(1)(iii)(A) or (B) of this AD, as applicable, and paragraph (g)(1)(iii)(C) of this AD, as applicable.

(A) Inspect the pull force on the float activation handle in accordance with section 2.0 (for pull cable test tool P/N 606.7803), paragraphs 1 through 14 of DART OIM–11 Rev B, except if the inflation handle makes contact with the cyclic stick in paragraph 6, before further flight perform cable rigging in accordance with FAA-approved procedures, and except the measurement in paragraph 8 must be 0.85 in (2.16 cm) or greater; or

(B) Inspect the pull force on the float activation handle in accordance with section 3.0 (for pull cable test tool P/N 607.1602), paragraphs 3 through 20 of DART OIM–11 Rev B, except in paragraph 3, where it states, ''it is advised to mark these locations and verify the hole centers by removing the two set screws from the test tool and sliding the tool onto the shroud and aligning the tool with the marks.'' replace that text with ''mark these locations and verify the hole centers by removing the two set screws from the test tool and sliding the tool onto the shroud and aligning the tool with the marks,'' and except the measurement in paragraph 13 must be 0.75 in (1.91 cm) or greater.

(C) If the pull force is greater than 25 lbf (111.2N), or exceeds the limits in the existing Installation Instructions or Instructions for Continued Airworthiness for your helicopter, as applicable, before further flight, comply with paragraph (g)(2) of this AD, as applicable to your model helicopter.

(iv) For Bell Textron Canada Limited Model 206A, 206B, 206L, 206L–1, 206L–3, 206L–4, and 407 helicopters identified in paragraph (c)(4) of this AD, accomplish the actions required by paragraphs (g)(1)(iv)(A) and (B) of this AD, as applicable.

(A) Inspect the pull force on the float activation handle in accordance with section 2.0 (for pull cable test tool P/N 606.7803), paragraphs 1 through 14 of DART OIM–11 Rev B, except if the inflation handle makes contact with the cyclic stick in paragraph 6, before further flight perform cable rigging in accordance with FAA-approved procedures, and except the measurement in paragraph 8 must be 0.85 in (2.16 cm) or greater.

(B) If the pull force is greater than 25 lbf (111.2N), or exceeds the limits in the existing Installation Instructions or Instructions for Continued Airworthiness for your helicopter, as applicable, before further flight, comply with paragraph (g)(2) of this AD, as applicable to your model helicopter.

(v) For Robinson Helicopter Company Model R66 helicopters identified in paragraph (c)(7) of this AD, accomplish the actions required by paragraphs (g)(1)(v)(A) and (B) of this AD, as applicable.

(A) Inspect the pull force on the float activation handle in accordance with section 2.0 (for pull cable test tool P/N 607.7803), paragraphs 1 through 14 of DART OIM–11 Rev B, except if the inflation handle makes contact with the cyclic stick in paragraph 6, before further flight perform cable rigging in accordance with FAA-approved procedures, and except the measurement in paragraph 8 must be 0.85 in (2.16 cm) or greater.

(B) If the pull force is greater than 25 lbf (111.2N), or exceeds the limits in the existing Installation Instructions or Instructions for Continued Airworthiness for your helicopter, as applicable, before further flight, comply with paragraph (g)(2) of this AD, as applicable to your model helicopter.

(vi) For the helicopters identified in paragraphs (g)(1)(vi)(A) through (E) of this AD, inspect the pull force on the float activation handle in accordance with FAA-approved procedures. The threshold for this pull force inspection must not exceed 25 lbf (111.2N). If the float activation handle fails the test, (if the pull force is greater than 25 lbf (111.2N)), or exceeds the limits in the existing Installation Instructions or Instructions for Continued Airworthiness for your helicopter, as applicable, before further flight, comply with paragraph (g)(2) of this AD, as applicable to your model helicopter.

(A) Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, AS355N, and EC120B helicopters identified in paragraph (c)(1) of this AD.

(B) Airbus Helicopters Deutschland GmbH (AHD) Model BO–105A, BO–105C, BO–105S, BO–105LS A–3, EC135P1, EC135P2, EC135 P2+, EC135P3, EC135T1, EC135T2, EC135T2+, and EC135T3 helicopters identified in paragraph (c)(2) of this AD.

(C) Leonardo S.p.a. Model AB412 and AB412 EP helicopters identified in paragraph (c)(5) of this AD.

(D) MD Helicopters, LLC, Model 369D, 369E, 369F, 369FF, 369HE, 369HM, 369HS, and 500N helicopters identified in paragraph (c)(6) of this AD.

(E) Sikorsky Aircraft Corporation Model S–76A, S–76B, and S–76C helicopters identified in paragraph (c)(8) of this AD.

(2) For the helicopters identified in paragraphs (g)(1)(i) through (v) of this AD, as a result of the actions required by paragraphs (g)(1)(i) through (v) of this AD, if the pull force is greater than 25 lbf (111.2N), or exceeds the limits in the existing Installation Instructions or Instructions for Continued Airworthiness for your helicopter, as applicable, before further flight, comply with either paragraph (g)(2)(i) or (ii) of this AD.

(i) Repair the cable installation in accordance with FAA-approved procedures.

(ii) Deactivate and placard the emergency float system as inoperative in accordance with Appendix A of DART Aerospace Service Bulletin (SB) No. SB2020–09, Revision A, dated March 16, 2021, DART Aerospace SB No. SB2021–01, Revision A, dated December 28, 2021, DART Aerospace SB No. SB2021–02, dated April 30, 2021, DART Aerospace SB No. SB2021–03, dated June 30, 2021, or DART Aerospace SB No. SB2022–01, dated March 14, 2022, as applicable to your model helicopter, except where Appendix A specifies ty-wrapping the pin into place on the pilot collective, and where Appendix A specifies contacting DART customer service for a resolution, accomplish the deactivation and placarding in accordance with FAA-approved procedures. If the emergency float system is deactivated and placarded as inoperative, you are not required to accomplish the actions required by paragraph (g)(1) of this AD. This AD does not allow operation with an inoperative emergency float system unless the requirements of 14 CFR 91.205, 91.213, 135.183, and 136.11 have been met.

(3) For the helicopters identified in paragraphs (g)(1)(vi)(A) through (E) of this AD, as a result of the actions required by the introductory text of paragraph (g)(1)(vi) of this AD, if the pull force is greater than 25 lbf (111.2N), before further flight, repair the cable installation, or deactivate and placard the emergency float system as inoperative in accordance with FAA-approved procedures.

(4) For Robinson Helicopter Company Model R44 and R44 II helicopters identified in paragraph (c)(7) of this AD, within 36 months or at the next float inflation reservoir (reservoir) overhaul after the effective date of this AD, whichever occurs first, perform the requirements in paragraphs (g)(4)(i) and (ii) of this AD. Thereafter, within intervals not to exceed six months, repeat the actions required by paragraph (g)(4)(ii) of this AD.

(i) Remove cable P/N 644.7501 or P/N 644.7502 from service, as applicable, and replace with cable P/N 644.7503; and remove each reservoir P/N 644.7701 from service and replace with reservoir P/N 644.7702 or P/N 644.7703.

(ii) Inspect the pull force on the float activation handle in accordance with FAA-approved procedures. The threshold for this pull force inspection must not exceed 25 lbf (111.2N). If the pull cable installation fails the test (if the pull force is greater than 25 lbf (111.2N)), before further flight, repair the cable installation, or deactivate and placard the emergency float system as inoperative in accordance with FAA-approved procedures.

(5) As of the effective date of this AD, do not install reservoir P/N 644.7701 and cable P/N 644.7501 or reservoir P/N 644.7701 and cable P/N 644.7502 on any Robinson Helicopter Company Model R44 or R44 II helicopter.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, West Certification Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the West Certification Branch, send it to the attention of the person identified in paragraph (i) of this AD. Information may be emailed to: *9-ANM-LAACO-AMOC-REQUESTS@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Additional Information

For more information about this AD, contact Johann Magana, Aviation Safety Engineer, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712; phone: (562) 627–5322; email: *johann.magana@faa.gov*.

(j) Material Incorporated by Reference

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

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

(i) DART Aerospace Operation Instructional Manual for General Pull Cable Rigging and Testing Procedure, Revision B, dated May 12, 2023.

(ii) DART Aerospace Service Bulletin (SB) No. SB2020–09, Revision A, dated March 16, 2021.

(iii) DART Aerospace SB No. SB2021–01, Revision A, dated December 28, 2021.

(iv) DART Aerospace SB No. SB2021–02, dated April 30, 2021.

(v) DART Aerospace SB No. SB2021–03, dated June 30, 2021.

(vi) DART Aerospace SB No. SB2022–01, dated March 14, 2022.

(3) For service information identified in this AD, contact Dart Aerospace, LTD., 1270 Aberdeen St., Hawkesbury, ON, K6A 1K7, Canada; phone: 1–613–632–5200; Fax: 1–613–632–5246; or at *dartaero.com*.

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

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

Issued on April 15, 2024.

Victor Wicklund,

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

[FR Doc. 2024–08893 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1010; Project Identifier MCAI–2024–00079–T]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2023–18–09, which applies to certain Dassault Aviation Model FALCON 900EX airplanes. AD 2023–18–09 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2023–18–09, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require certain actions in AD 2023–18–09 and would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by June 10, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–1010; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For the EASA ADs, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2024–1010.
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3226; email *tom.rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–1010; Project Identifier MCAI–2024–00079–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important

that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3226; email *tom.rodriguez@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2023–18–09, Amendment 39–22550 (88 FR 66683, September 28, 2023) (AD 2023–18–09), for certain Dassault Aviation Model FALCON 900EX airplanes. AD 2023–18–09 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2023–0047, dated March 2, 2023 (EASA AD 2023–0047) (which corresponds to FAA AD 2023–18–09), to correct an unsafe condition.

AD 2023–18–09 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2023–18–09 to address among other things, fatigue cracking and damage in principal structural elements. The unsafe condition, if not addressed, could result in reduced structural integrity of the airplane.

Actions Since AD 2023–18–09 Was Issued

Since the FAA issued AD 2023–18–09, EASA superseded EASA AD 2023–0047, and issued EASA AD 2024–0034, dated January 31, 2024 (EASA AD 2024–0034) (also referred to as the MCAI), to correct an unsafe condition for certain Dassault Aviation Model FALCON 900EX airplanes. The MCAI states that new or more restrictive airworthiness limitations have been developed.

Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after November 15, 2023, must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability.

The FAA is proposing this AD to address among other things, fatigue cracking and damage in principal structural elements. The unsafe condition, if not addressed, could result in reduced structural integrity of the airplane. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–1010.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2024–0034 which specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This proposed AD would also require EASA AD 2023–0047, which the Director of the Federal Register approved for incorporation by reference as of November 2, 2023 (88 FR 66683, September 28, 2023).

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

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would retain certain requirements of AD 2023–18–09. This proposed AD would also require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, which are specified in EASA AD 2024–0034 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (m)(1) of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to retain the IBR of EASA AD 2023–0047 and incorporate EASA AD 2024–0034 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0047 and EASA AD 2024–0034 in their entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0047 or EASA AD 2024–0034 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0047 or EASA AD 2024–0034. Service information required by EASA AD 2023–0047 and EASA AD 2024–0034 for compliance will be available at *regulations.gov* under Docket No. FAA–2024–1010 after the FAA final rule is published.

Airworthiness Limitation ADs Using the New Process

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness

limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in the AMOCs paragraph under ''Additional AD Provisions.'' This new format includes a ''New Provisions for Alternative and Intervals'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action or interval.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 158 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA estimates the total cost per operator for the retained actions from AD 2023–18–09 to be $7,650 (90 work-hours × $85 per work-hour).

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

The FAA estimates the total cost per operator for the new proposed actions to be $7,650 (90 work-hours × $85 per work-hour).

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing airworthiness directive 2023–18–09, Amendment 39–22550 (88 FR 66683, September 28, 2023); and

■ b. Adding the following new airworthiness directive:

Dassault Aviation: Docket No. FAA–2024–1010; Project Identifier MCAI–2024–00079–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by June 10, 2024.

(b) Affected ADs

This AD replaces AD 2023–18–09, Amendment 39 22550 (88 FR 66683, September 28, 2023) (AD 2023–18–09).

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 900EX airplanes, serial number (S/N) 97 and S/Ns 120 and higher, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before November 15, 2023.

(d) Subject

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

(e) Unsafe Condition

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

(f) Compliance

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

(g) Retained Revision of the Existing Maintenance or Inspection Program, With a New Terminating Action

This paragraph restates the requirements of paragraph (j) of AD 2023–18–09, with a new terminating action. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before November 15, 2022: Except as specified in paragraph (h) of this AD, comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0047, dated March 2, 2023 (EASA AD 2023–0047). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (j) of this AD terminates the requirements of this paragraph.

(h) Retained Exceptions to EASA AD 2023–0047, With No Changes

This paragraph restates the exceptions specified in paragraph (k) of AD 2023–18–09, with no changes.

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2023–0047 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2023–0047 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after November 2, 2023 (the effective date of AD 2023–18–09).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2023–0047 is at the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0047, or within 90 days after November 2, 2023 (the effective date of AD 2023–18–09), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2023–0047 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2023–0047 does not apply to this AD.

(i) Retained Restrictions on Alternative Actions and Intervals, With a New Exception

This paragraph restates the requirements of paragraph (l) of AD 2023–18–09, with a new exception. Except as required by paragraph (j) of this AD, after the maintenance or

inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0047.

(j) New Revision of the Existing Maintenance or Inspection Program

Except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2024–0034, dated January 31, 2024 (EASA AD 2024–0034). Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraph (g) of this AD.

(k) Exceptions to EASA AD 2024–0034

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2024–0034.

(2) Paragraph (3) of EASA AD 2024–0034 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2024–0034 is at the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2024–0034, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) and (5) of EASA AD 2024–0034.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2024–0034.

(l) New Provisions for Alternative Actions and Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2024–0034.

(m) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(n) Additional Information

For more information about this AD, contact Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3226; email *tom.rodriguez@faa.gov.*

(o) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) European Union Aviation Safety Agency (EASA) AD 2024–0034, dated January 31, 2024.

(ii) [Reserved]

(4) The following service information was approved for IBR on November 2, 2023 (88 FR 66683, September 28, 2023).

(i) European Union Aviation Safety Agency (EASA) AD 2023–0047, dated March 2, 2023.

(ii) [Reserved]

(5) For EASA AD 2024–0034 and AD 2023–0047, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find these EASA ADs on the EASA website at *ad.easa.europa.eu.*

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

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

Issued on April 19, 2024.

Victor Wicklund,

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

[FR Doc. 2024–08861 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1299; Airspace Docket No. 22–AEA–18]

RIN 2120–AA66

Amendment of Very High Frequency (VHF) Omnidirectional Range (VOR) Federal Airway V–469 and Revocation of VOR Federal Airways V–164, V–423, and V–576; Eastern United States

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: The FAA is withdrawing the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on June 15, 2023, proposing to amend Very High Frequency Omnidirectional Range (VOR) Federal Airway V–469; and to revoke VOR Federal Airways V–164, V–423, and V–576; due to the planned decommissioning of the Williamsport, PA (FQM), VOR/Distance Measuring Equipment (DME); Stonyfork, PA (SFK), VOR/DME; Danville, VA (DAN), VOR; Hancock, NY (HNK), VOR/DME; and Delancey, NY (DNY), VOR/DME.

DATES: Effective as of 0901 UTC, April 25, 2024, the proposed rule published June 15, 2023 (88 FR 39204), is withdrawn.

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Reason for Withdrawal

The FAA published a NPRM in the **Federal Register** for Docket No. FAA–2023–1299 (88 FR 39204; June 15, 2023). The NPRM proposed to amend VOR Federal Airway V–469; and to revoke VOR Federal Airways V–164, V–423, and V–576; due to the planned decommissioning of the Williamsport, PA (FQM), VOR/DME; the Stonyfork, PA (SFK), VOR/DME; the Danville, VA (DAN), VOR; the Hancock, NY (HNK), VOR/DME; and the Delancey, NY (DNY), VOR/DME which provides navigation guidance for portions of the affected airways. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received. Subsequent to the NPRM, the Williamsport VOR/DME decommissioning was delayed, and

other airway docket actions rendered this proposal unnecessary.

Conclusion

The FAA determined that the NPRM published on June 15, 2023, is unnecessary. Therefore, the FAA withdraws that NPRM.

Issued in Washington, DC, on April 18, 2024.

Frank Lias,

Manager, Rules and Regulations Group.

[FR Doc. 2024–08671 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–1048; Airspace Docket No. 24–AGL–1]

RIN 2120–AA66

Amendment of Jet Routes J–35 and J–101; Amendment VOR Federal Airways V–9, V–48, V–69, V–227, and V–313; and Revocation of VOR Federal Airway V–586 in the Vicinity of Pontiac, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Jet Routes J–35 and J–101; amend Very High Frequency Omnidirectional Range (VOR) Federal Airways V–9, V–48, V–69, V–227, and V–313; and revoke VOR Federal Airway V–586. The FAA is proposing this action due to the planned decommissioning of the VOR portion of the Pontiac, IL (PNT), VOR/Distance Measuring Equipment (VOR/DME) navigational aid (NAVAID). The Pontiac VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Comments must be received on or before June 10, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2024–1048 and Airspace Docket No. 24–AGL–1 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *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, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at *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, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the National Airspace System as necessary to preserve the safe and efficient flow of air traffic.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

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 *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Incorporation by Reference

Jet Routes are published in paragraph 2004 and VOR Federal Airways are published in paragraph 6010(a) of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order

JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The FAA is planning to decommission the VOR portion of the Pontiac, IL, VOR/DME in December 2024. The Pontiac VOR is one of the candidate VORs identified for discontinuance by the FAA's VOR MON program and listed in the Final policy statement notice, ''Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network),'' published in the **Federal Register** on July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

Although the VOR portion of the Pontiac VOR/DME is planned for decommissioning, the co-located Distance Measuring Equipment (DME) is being retained to continue supporting current and future NextGen PBN flight procedure requirements.

The Air Traffic Service (ATS) routes affected by the planned decommissioning of the Pontiac VOR are Jet Routes J–35 and J–101, and VOR Federal Airways V–9, V–48, V–69, V–227, V–313, and V–586. With the planned decommissioning of the Pontiac VOR, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected routes. As such, proposed modifications to J–35, V–48, V–69, V–227 and V–313 would result in the ATS routes being shortened; to J–101 would result in a gap in the route; to V–9 would result in an existing gap being widened; and to V–586 would result in the airway being revoked.

To address the proposed amendments to the affected ATS routes, instrument flight rules (IFR) traffic could use adjacent Jet Routes J–19, J–26, J–71, J–96, and J–181 in the high-altitude stratum or use VOR Federal Airways V–156, V–173, V–233, V–262, V–429, and V–434 in the low-altitude stratum to navigate around the area affected by the planned decommissioning of the Pontiac VOR. Additionally, IFR pilots equipped with area navigation (RNAV) capabilities could also navigate using RNAV route Q–42 in the high-altitude stratum; RNAV routes T–215, T–325, T–354, and T–478 in the low-altitude stratum; or point-to-point using the existing Fixes and waypoints (WP) that would remain in place to support continued operations though the affected area. Visual flight rules pilots who elect to navigate via the affected ATS routes could also take advantage of the adjacent conventional airways listed above, as well as the listed RNAV routes and point-to-point navigation, if properly equipped. Lastly, all aircraft also have the option to request and receive radar vectors from air traffic control to transit the affected area.

The Proposal

The FAA is proposing to amend 14 CFR part 71 by amending Jet Routes J–35 and J–101; amending VOR Federal Airways V–9, V–48, V–69, V–227, and V–313; and revoking VOR Federal Airway V–586 due to the planned decommissioning of the Pontiac, IL, VOR. The proposed ATS route actions are described below.

J–35: J–35 currently extends between the Leeville, LA, VOR/Tactical Air Navigation (VORTAC) and the Northbrook, IL, VOR/DME. The FAA proposes to remove the route segment between the Spinner, IL, VORTAC and the Joliet, IL, VOR/DME due to the planned decommissioning of the VOR portion of the Pontiac VOR/DME. Additionally, the FAA proposes to also remove the route segments between the Farmington, MO, VORTAC and the St. Louis, MO, VORTAC due to that route segment overlapping J–151; between the St. Louis VORTAC and the Spinner VORTAC due to that route segment overlapping J–101; and between the Joliet VOR/DME and the Northbrook VOR/DME due to that route segment overlapping J–87. The overlapped J–151, J–101, and J–87 route segments would remain charted and provide navigational guidance between the affected NAVAIDs. As amended, the route would be changed to extend between the Leeville VORTAC and the Farmington VORTAC.

J–101: J–101 currently extends between the Humble, TX, VORTAC and the Sault Ste Marie, MI, VOR/DME. The FAA proposes to remove the route segment between the Spinner, IL, VORTAC and the Joliet, IL, VOR/DME due to the planned decommissioning of the VOR portion of the Pontiac VOR/DME. Additionally, the FAA proposes to remove the route segment between the Joliet VOR/DME and the Northbrook, IL, VOR/DME due to that route segment overlapping J–87. As amended, the route would be changed to extend between the Humble VORTAC and the Spinner VORTAC, and between the Northbrook VOR/DME and the Sault Ste Marie VOR/DME. Additional route changes have been proposed in a separate NPRM action.

V–9: V–9 currently extends between the Leeville, LA, VORTAC and the Pontiac, IL, VOR/DME; and between the Janesville, WI, VOR/DME and the Houghton, MI, VOR/DME. The FAA proposes to remove the airway segment between the Spinner, IL, VORTAC and the Pontiac VOR/DME. As amended, the airway would be changed to extend between the Leeville VORTAC and the Spinner VORTAC, and between the Janesville VOR/DME and the Houghton VOR/DME.

V–48: V–48 currently extends between the Ottumwa, IA, VOR/DME and the Pontiac, IL, VOR/DME. The FAA proposes to remove the airway segment between the Peoria, IL, VORTAC and the Pontiac VOR/DME. As amended, the airway would be changed to extend between the Ottumwa VOR/DME and the Peoria VORTAC. Additional airway changes have been proposed in a separate NPRM action.

V–69: V–69 currently extends between the El Dorado, AR, VOR/DME and the Joliet, IL, VOR/DME. The FAA proposes to remove the airway segment between the Spinner, IL, VORTAC and the Joliet VOR/DME. As amended, the airway would be changed to extend between the El Dorado VOR/DME and the Spinner VORTAC.

V–227: V–227 currently extends between the Boiler, IN, VORTAC and the intersection of the Pontiac, IL, 006° and Bradford, IL, 058° radials (PLANO Fix). The FAA proposes to remove the airway segment between the Roberts, IL, VOR/DME and the intersection of the Pontiac, IL, 006° and Bradford, IL, 058° radials (PLANO Fix). As amended, the airway would be changed to extend between the Boiler VORTAC and the Roberts VOR/DME.

V–313: V–313 currently extends between the Centralia, IL, VORTAC and the Pontiac, IL, VOR/DME. The FAA proposes to remove the airway segment between the Adders, IL, VORTAC and the Pontiac VOR/DME. As amended, the airway would be changed to extend between the Centralia VORTAC and the Adders VORTAC.

V–586: V–586 currently extends between the Peoria, IL, VORTAC and the Joliet, IL, VOR/DME via the Pontiac, IL, VOR/DME. The FAA proposes to remove the airway in its entirety.

All NAVAID radials listed in the VOR Federal airway descriptions in the proposed regulatory text of this notice of proposed rulemaking are unchanged and stated in degrees True north.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 2004 Jet Routes.

* * * * *

J–35 [Amended]

From Leeville, LA; Mc Comb, MS; Sidon, MS; Memphis, TN; to Farmington, MO.

* * * * *

J–101 [Amended]

From Humble, TX; Lufkin, TX; Little Rock, AR; St. Louis, MO; to Spinner, IL. From Northbrook, IL; Badger, WI; Green Bay, WI; to Sault Ste Marie, MI.

* * * * *

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–9 [Amended]

From Leeville, LA; Mc Comb, MS; INT Mc Comb 004° and Magnolia, MS, 194° radials; Magnolia; Sidon, MS; Marvell, AR; INT Marvell 326° and Walnut Ridge, AR, 187° radials; Walnut Ridge; Farmington, MO; St. Louis, MO; to Spinner, IL. From Janesville, WI; Madison, WI; Oshkosh, WI; Green Bay, WI; Iron Mountain, MI; to Houghton, MI.

* * * * *

V–48 [Amended]

From Ottumwa, IA; Burlington, IA; to Peoria, IL.

* * * * *

V–69 [Amended]

From El Dorado, AR; Pine Bluff, AR; INT Pine Bluff 038° and Walnut Ridge, AR, 187° radials; Walnut Ridge; Farmington, MO; Troy, IL; to Spinner, IL.

* * * * *

V–227 [Amended]

From Boiler, IN; to Roberts, IL.

* * * * *

V–313 [Amended]

From Centralia, IL; to Adders, IL.

* * * * *

V–586 [Removed]

* * * * *

Issued in Washington, DC, on April 18, 2024.

Frank Lias,

Manager, Rules and Regulations Group.

[FR Doc. 2024–08670 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 37 and 38

RIN 3038–AF29

Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On March 19, 2024, the Commodity Futures Trading Commission (''Commission'' or ''CFTC'') published in the **Federal Register** a notice of proposed rulemaking (''Proposed Rule'' or ''NPRM'') titled Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions. The comment period for the Proposed Rule was set to close on April 22, 2024. The Commission is extending the comment period for this NPRM by an additional twenty-one days.

DATES: The comment period for the NPRM titled Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions notice of proposed rulemaking is extended through May 13, 2024.

ADDRESSES: You may submit comments, identified by ''Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions, RIN 3038–AF29,'' by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov/.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (''FOIA''), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review,

[1] 17 CFR 145.9.

pre-screen, filter, redact, refuse, or remove any or all of your submission from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT: Rachel Berdansky, Deputy Director, *rberdansky@cftc.gov,* 202–418–5429; Swati Shah, Associate Director, *sshah@cftc.gov,* 202–418–5042; Caitlin Holzem, Special Counsel, *cholzem@cftc.gov,* 202–418–5557; Division of Market Oversight, Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION: On March 19, 2024, the Commission published proposed amendments [2] to Parts 37 and 38 that would: adopt the existing standards under the Guidance and Acceptable Practices for DCMs implementing Core Principle 15 and Core Principle 16; adopt rules implementing SEF Core Principle 12 rules that are consistent with existing standards under the Guidance and Acceptable Practices for DCM Core Principles 15 and 16; move certain existing conflicts of interest and governance requirements from Part 1 to Part 37 for SEFs and Part 38 for DCMs; adopt Part 38 rules more detailed standards concerning the DCM Chief Regulatory Officer; adopt as Parts 37 and 38 more detailed standards concerning the Regulatory Oversight Committee (''ROC''); amend Part 37 and 38 regulations regarding the notification of a transfer of equity interest in a SEF and DCM. The comment period for the NPRM closes on April 22, 2024.

In a March 24, 2024, Request Letter,[3] commenters express concerns that the originally-allotted 60-day comment period is insufficient. The Commission is extending the comment period by an additional twenty-one days in order to allow interested persons additional time to analyze the proposal and prepare their comments.

Issued in Washington, DC, on April 22, 2024 by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

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

Appendix to Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions—Commission Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, and Pham voted in the affirmative. Commissioner Mersinger voted to concur. No Commissioner voted in the negative.

[FR Doc. 2024–08872 Filed 4–24–24; 8:45 am]

BILLING CODE 6351–01–P

[2] Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions, 89 FR 19646 (Mar. 19, 2024).

[3] *See* Letter from the Joint Compliance Committee (''JCC''), dated March 24, 2024. *Available at https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=35300* (the ''Extension Request Letter''). The requested extension comment period was through June 26, 2024.

POSTAL REGULATORY COMMISSION

39 CFR Part 3006

[Docket No. RM2024–5; Order No. 7052]

RIN 3211–AA38

Freedom of Information Act

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Notice of Proposed Rulemaking seeks comment on a proposal to amend the Commission's Freedom of Information Act (FOIA) regulations. The proposal is designed to improve readability by reorganizing and rephrasing existing content in a more accessible manner. Additionally, the proposal would better align the Commission's existing FOIA regulations with the practices of other agencies subject to the FOIA, as necessarily adapted to the Commission's size and area of regulatory oversight. Finally, the proposal includes amendments to clarify and amplify the information given to the public and improve the efficiency of the Commission's FOIA administration. This document informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* May 23, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *https://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives. The Rule Summary can be found on the Commission's Rule Summary Page at *https://www.prc.gov/rule-summary-page.*

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

I. Background
II. Basis of Proposed Rules
III. Proposed Rules

I. Background

The Commission is an independent Federal agency that regulates the United States Postal Service (''Postal Service''). The Commission's mission is to ensure transparency and accountability of the Postal Service and to foster a vital and efficient universal mail system. The Commission is subject to the FOIA. The Commission is also a micro agency with fewer than 100 employees. Year to year, the bulk of the FOIA requests received by the Commission are intended for the Postal Service and the requester is therefore directed to the Postal Service, as a best practice. The Commission's existing FOIA regulations appear in existing 39 CFR part 3006.

II. Basis of the Proposed Rules

Based on experience with the existing FOIA regulations, the Commission proposes amendments that would improve readability, align the Commission's existing FOIA regulations with the practices of other agencies subject to the FOIA (with appropriate adaptions for the Commission's size and area of regulatory oversight), improve the efficiency of the Commission's FOIA administration, and clarify and amplify the information provided to the public.

To improve readability, the Commission proposes to organize the material currently appearing in existing 39 CFR part 3006, by grouping related material (individual sections of the existing regulations) under three new subparts. The proposed order of the subparts seeks to provide the public with information in a more easily accessible manner. Sections and subparts are organized to provide the most general material first, which likely will be of interest to the widest audience.

The Commission also proposes amendments that would better align content with the practices of other agencies subject to the FOIA (as necessarily adapted to the Commission's size and area of regulatory oversight), improve the efficiency of the Commission's FOIA administration, and amplify the usefulness of the information provided to the public.

Accordingly, much of the proposed content is modeled upon the sample language appearing in the U.S. Department of Justice, Office of Information Policy's Template for Agency FOIA Regulations.

III. Proposed Rules

List of Subjects in 39 CFR Part 3006

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements, Sunshine Act.

For the reasons stated in the preamble, the Commission proposes to amend 39 CFR part 3006 as follows:

PART 3006—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT

■ 1. The authority citation for part 3006 continues to read as follows:

Authority: 5 U.S.C. 552; 39 U.S.C. 407, 503, 504.

■ 2. Revise part 3006 to read as follows:

PART 3006—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT

Subpart A—General Provisions

Sec.
3006.100 Applicability and scope.
3006.101 Commission policy.
3006.102 Proactive disclosures.
3006.103 Reading room.
3006.104 Chief Freedom of Information Act Officer.
3006.105 Freedom of Information Act Public Liaison.
3006.106 Commission procedure when served a subpoena.

Subpart B—Procedures for Freedom of Information Act Requests

Sec.
3006.200 Procedures for submitting requests.
3006.201 Timing of responses to requests.
3006.202 Responses to requests.
3006.203 Appeals.
3006.204 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.
3006.205 Consultations, referrals, and coordinations.
3006.206 Submission of non-public materials by a person other than the Postal Service.

Subpart C—Fees for Freedom of Information Act Requests

Sec.
3006.300 Definitions applicable to this subpart.
3006.301 Request category.
3006.302 General provisions.
3006.303 Fee schedule.
3006.304 Procedure for assessing and collecting fees.

Subpart A—General Provisions

§ 3006.100 Applicability and scope.

(a) The rules in this part apply to requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines).

(b) Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the Commission's Privacy Act regulations appearing in part 3005 of this chapter and § 3006.204.

§ 3006.101 Commission policy.

(a) The Commission shall be proactive and timely in identifying and posting public records and other frequently requested records to its website.

(b) It is the stated policy of the Commission that FOIA requests shall be administered with a clear presumption of openness. The Commission will only withhold information if it reasonably foresees that disclosure would harm an interest protected by a FOIA exemption, such as information specifically exempted from disclosure by statute (for example 39 U.S.C. 410(c)), or disclosure is otherwise prohibited by law.

(c) This Commission policy does not create any right enforceable in court.

§ 3006.102 Proactive disclosures.

(a) Except as provided in § 3006.101(b) and in part 3011 of this chapter, Commission records, required by the FOIA to be made available, will be made available on the Commission's website, *http://www.prc.gov.*

(b) Descriptions of the Commission's organization, its methods of operation, statements of policy and interpretations, and procedural and substantive rules, are published in the **Federal Register** publication system, and are available on the Commission's website, *http://www.prc.gov.*

§ 3006.103 Reading room.

(a) The Commission maintains an electronic reading room at *http://www.prc.gov.*

(b) The records available for public inspection include, for example, decisions; reports; opinions; orders; notices; findings; determinations; statements of policy; copies of selected records released under FOIA; indexes required to be maintained under FOIA; and records relating to any matter or proceeding before the Commission.

(c) The Commission shall make available, in an electronic form, records previously released under FOIA and which the Commission determines are or are likely to become of significant public interest.

(d) Commission records that have been requested three or more times will be made available on the Commission's website, *http://www.prc.gov.*

§ 3006.104 Chief Freedom of Information Act Officer.

The Commission designates the General Counsel of the Commission as the Chief FOIA Officer. The Chief FOIA Officer shall be responsible for the administration of and reporting on the Commission's Freedom of Information Act program. The Chief FOIA Officer (and any individual(s) designated by the Chief FOIA Officer to communicate with FOIA requesters) may be contacted via email at *FOIA@prc.gov* or telephone at 202–789–6800.

§ 3006.105 Freedom of Information Act Public Liaison.

The Commission designates the Director of the Office of Public Affairs and Government Relations or the individual's designee as the FOIA Public Liaison who shall assist in the resolution of any dispute between a requester and the Commission. The FOIA Public Liaison may be contacted via email at *PRC-PAGR@prc.gov* or telephone at 202–789–6800.

§ 3006.106 Commission procedure when served a subpoena.

If an officer or employee of the Commission is served with a subpoena duces tecum, material that is not part of the public files and records of the Commission shall be produced only as authorized by the General Counsel. Service of such a subpoena shall immediately be reported to the General Counsel with a statement of all relevant facts. The General Counsel will thereupon enter such order or give such instructions as it deems advisable.

Subpart B—Procedures for Freedom of Information Act Requests

§ 3006.200 Procedures for submitting requests.

(a) *Electronic submission requirements.* A request will receive the quickest possible response if it is submitted electronically. An electronic request may be submitted via the Commission's online FOIA request form that is accessible through the Commission's website (*http://www.prc.gov*), emailing *FOIA@prc.gov,* or the web portal at *http://*

www.foia.gov/. Each electronic request must:

(1) Reasonably describe the records sought,

(2) Identify the request category under § 3006.301, and

(3) Include the requester's name, daytime telephone number, and a valid email or mailing address to receive records and written communications from the Commission regarding the request.

(b) *Hard copy submission requirements.* A requester may also submit a request for records via hard copy. Each hard copy request must:

(1) Be in writing,

(2) Be clearly identified as ''Freedom of Information Act Request'' both in the text of the request and on the envelope,

(3) Be submitted to the Commission's office (901 New York Avenue NW, Suite 200, Washington, DC 20268–0001),

(4) Reasonably describe the records sought, and

(5) Include the requester's name, daytime telephone number, and a valid email or mailing address to receive records and written communications from the Commission regarding the request.

(c) *Content of request.* Each request must describe the records sought in sufficient detail to enable Commission personnel to locate them with a reasonable amount of effort. Whenever possible, the request should include specific information about each record sought that might assist the Commission in responding to the request, such as the type of record (*e.g.,* contract, report, memorandum, etc.); the title or docket number of a specific document or report; the topic or subject matter; the name of the office and/or employees most likely to possess the record; the date or general timeframe of the record's creation; and any details related to the purpose of the record. Requests for email records should specify the likely senders and recipients, keywords, and a range of dates. Before submitting requests, a requester may contact the Chief FOIA Officer (or the individual's designee) or the FOIA Public Liaison to discuss the records sought and to receive assistance in describing the records. The request may also specify the requester's preferred method of communication (telephone, email, or mailing address) and the preferred form or format (including electronic formats) of the requested records.

(d) *Improper requests.* A request that does not reasonably describe the records sought or does not comply with the published rules regarding the procedures to be followed for submitting a request will be deemed to be an improper FOIA request. If the Commission does not receive the additional information needed that reasonably describes the records to enable their location by the Commission with a reasonable amount of effort, then the Commission will administratively close the file.

(1) If after receiving a request, the Commission determines that it is improper, the Chief FOIA Officer or the individual's designee will provide one written notification to the requester using the contact information included in the request. The notification will inform the requester of all the following:

(i) The reason(s) why the request is improper;

(ii) The additional information needed from the requester that would reasonably describe the records to enable their location by the Commission with a reasonable amount of effort;

(iii) The Commission will not be able to comply with the request unless the Commission receives such additional information in writing within the specified timeframe and if the Commission does not receive a written response containing the additional information needed within the specified timeframe, then it will presume that the requester is no longer interested in the records and will administratively close the file on the request;

(iv) The preferred method for the requester to provide the additional information is by emailing *FOIA@prc.gov;*

(v) The requester may also provide the additional information by mailing or by hand delivery during regular business hours (which are from 8 a.m. to 4:30 p.m. Eastern Time, except for Saturdays, Sundays, and Federal holidays) to the Office of Secretary and Administration, Postal Regulatory Commission, 901 New York Avenue NW, Suite 200, Washington, DC 20268–0001); and

(vi) The contact information for the Chief FOIA Officer (or the individual's designee) and the FOIA Public Liaison, each of whom is available to assist the requester in reasonably describing the records sought.

(2) If the requester provides the additional information needed that reasonably describes the records to enable their location by the Commission with a reasonable amount of effort by the timeframe specified in the notification, then the Commission will confirm receipt of the information and process the request.

(3) After administrative closure, if the Commission receives the additional information needed that reasonably describes the records to enable their location by the Commission with a reasonable amount of effort, then the Commission will notify the requester that the request will be processed as a new request.

(e) *Expedited processing.* At any time, a requester that has satisfied all applicable requirements of paragraphs (a) through (c) of this section may seek expedited processing of a request or an administrative appeal. To seek expedited processing, the requester must:

(1) Include ''Expedited Freedom of Information Act Request'' or ''Expedited Freedom of Information Act Appeal'' in the body of the submission;

(2) For any hard copy submission, include ''Expedited Freedom of Information Act Request'' or ''Expedited Freedom of Information Act Appeal'' on the envelope;

(3) Demonstrate a compelling need as defined in 5 U.S.C. 552(a)(6)(E)(v); and

(4) Certify the statement of compelling need to be true and correct to the best of the requester's knowledge and belief. The Commission has discretion to waive the certification requirement.

§ 3006.201 Timing of responses to requests.

(a) *In general.* Requests will ordinarily be responded to according to their order of receipt.

(b) *Multitrack processing.* (1) Unless expedited processing has been granted, the Commission places each request in simple or complex tracks based on the amount of work and time involved in processing the request. Factors considered in assigning a request into the complex track may include one or more of the following:

(i) The request involves voluminous documents;

(ii) The complexity of the material;

(iii) The request involves record searches at multiple facilities or locations;

(iv) The request requires consultation among the Commission or other agencies; or

(v) The number of open requests submitted by the same requester.

(2) Within each track, the Commission processes requests in the order in which they are received. When appropriate, the Chief FOIA Officer or the individual's designee will notify the requester of placing a request in the ''Complex'' track and provide the requester with an opportunity to limit the scope of the request. If the requester limits the scope of the request, it may result in faster processing.

(c) *Expedited processing.* (1) Requests and appeals shall be processed on an expedited basis whenever it is determined that they involve the following:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(2) Within 10 calendar days of the receipt of a request for expedited processing, the Chief FOIA Officer or the individual's designee will notify the requester of the decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited requests, and shall be processed as soon as practicable. If a request for expedited processing is denied, the Chief FOIA Officer or the individual's designee will inform the requester of the denial in writing, the right to appeal the denial to the Commission in writing, and the procedures for appealing the denial. Any request for records that has been denied expedited processing will be processed in the same manner as a request that did not seek expedited processing.

(3) Where a compelling need is not shown in an expedited request as specified in § 3006.200(e), the Commission may grant the request for expedited processing at its discretion.

(d) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of ''unusual circumstances'', as defined in 5 U.S.C. 552(a)(6)(B)(iii), and the Commission extends the time limit on that basis, the Commission shall, before the expiration of the 20 business day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. If an extension will exceed 10 business days, the Commission will:

(1) Provide the requester with an opportunity to modify the request or arrange an alternative timeframe for processing; and

(2) Make its FOIA Public Liaison available to the requester and apprise the requester of their right to seek dispute resolution services from the Office of Government Information Services.

(e) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, the Commission may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a single requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. Multiple requests that involve unrelated matters shall not be aggregated.

§ 3006.202 Responses to requests.

(a) *In general.* To the extent practicable and unless the request indicates a different preferred method of communication, the Commission will communicate with the requester electronically (such as via email). In determining which records are responsive to a request, the Commission will include only records in its possession and control on the date that it begins its search. If any other date is used, the Commission shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c) is not considered responsive to the request.

(b) *Acknowledgments of requests.* The Commission shall acknowledge the request and assign it an individualized tracking number if it will take longer than 10 days (excluding Saturdays, Sundays, and legal holidays) to process. The acknowledgment must include a brief description of the records sought to allow requesters to keep track of their requests more easily.

(c) *Grants of requests.* Once the Commission makes a determination to grant a request in full or in part, the Chief FOIA Officer or the individual's designee shall notify the requester in writing. The Commission also shall inform the requester of any fees charged and shall disclose the requested records to the requester promptly upon payment of any applicable fees. The Commission must inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(d) *Adverse determinations of requests.* If the Commission makes an adverse determination denying a request in any respect, then the Chief FOIA Officer or the individual's designee shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(e) *Content of denials.* The denial shall be signed by the Chief FOIA Officer or the individual's designee and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the Commission in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A statement that the denial may be appealed under § 3006.203, and a description of the requirements; and

(5) A statement notifying the requester of the assistance available from the Commission's FOIA Public Liaison and the dispute resolution services offered by the Office of Government Information Services.

(f) *Markings on released documents.* Markings on released documents must be clearly visible to the requester. Records disclosed in part shall be marked to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted shall also be indicated on the record, if technically feasible.

(g) *Use of record exclusions.* (1) If the Commission identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the Commission must confer with the Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

(2) Upon invoking an exclusion, the Commission must maintain an administrative record of the process of invocation and approval of exclusion by OIP.

§ 3006.203 Appeals.

(a) *Discretionary review.* The Commission (on its own initiative) may review any decision of the Chief FOIA Officer or the individual's designee within 90 calendar days.

(b) *Requirements for making an appeal.* A requester may appeal an adverse decision on their FOIA request rendered by the Commission by submitting a hard copy to the Commission's office (901 New York Avenue NW, Suite 200, Washington, DC

20268–0001) or by emailing *FOIA@prc.gov.* The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the Commission's response. To facilitate handling, the requester must mark both the appeal letter and envelope or the subject line of the electronic transmission ''Freedom of Information Act Appeal.'' The appeal must include, as applicable:

(1) A copy of the request, of any notification of denial or other action, and of any other related correspondence;

(2) The FOIA tracking number assigned to the request;

(3) A description of the action (or failure to act) which is being challenged;

(4) If challenging specific redactions made to responsive records, a statement identifying the specific redactions being challenged;

(5) A statement of the relief sought; and

(6) A statement of the reasons why the requester believes the action or failure to act is erroneous.

(c) *Adjudication of appeals.* (1) The decision of the Commission constitutes the final decision on the issue being appealed. The Commission will give prompt consideration to an appeal for expedited processing of a request. All other decisions normally will be made within 20 days (excluding Saturdays, Sundays, and legal holidays) from the time of the receipt by the Commission. The 20-business day response period may be extended by the Commission for a period not to exceed an additional 10 business days when reasonably necessary to permit the proper consideration of an appeal, under one or more of the ''unusual circumstances'', as defined in 5 U.S.C. 552(a)(6)(B)(iii). The aggregate number of additional business days used, however, may not exceed 10 business days.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the Commission must take appropriate action to ensure compliance with applicable classification rules.

(d) *Decisions on appeals.* A decision on an appeal must be made in writing. A decision that upholds the adverse determination in whole or in part will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the adverse determination is remanded or modified on appeal, the requester will be notified in writing and the Chief FOIA Officer or the individual's designee will further process the request in accordance with that appellate decision and respond directly to the requester. If not prohibited by or under law, the Commission may direct the disclosure of a record even though its disclosure is not required by law or regulation.

(e) *Engaging in dispute resolution services provided by OGIS.* Dispute resolution is a voluntary process. If the Commission agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(f) *When an appeal is required.* Before seeking judicial review of an adverse determination rendered by the Commission on a FOIA request, a requester generally must first submit a timely administrative appeal.

§ 3006.204 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.

(a) *Coverage.* FOIA applies to all Commission records and provides the public with access to government records.

(b) *Requesting records subject to the Privacy Act.* A request by an individual for the individual's own records contained in a system of records is governed by the Privacy Act. Release will first be considered under the Privacy Act pursuant to part 3005 of this chapter. However, if there is any record that the Commission need not release under the Privacy Act, the Commission will also consider the request under FOIA, and will release the record if FOIA requires it.

(c) *Requesting another individual's record.* Request for records of individuals which may not be granted under the Privacy Act shall be considered under FOIA.

(1) If the Commission makes a disclosure in response to a request and the disclosure is permitted by the Privacy Act's disclosure provision, 5 U.S.C. 552a(b), the Commission will rely on the Privacy Act to govern the disclosure.

(2) In some circumstances, the Privacy Act may prohibit the Commission's ability to release records which may be released under FOIA.

(d) *Requesting a Postal Service record.* The Commission maintains custody of records that are both Commission and Postal Service records. Except when the Postal Service submits materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A), in all other instances that the Postal Service submits materials to the Commission that the Postal Service reasonably believes to be exempt from public disclosure, the Postal Service shall follow the procedures described in part 3011, subpart B of this chapter.

(1) A request made pursuant to FOIA for Postal Service records shall be referred to the Postal Service; and

(2) A request made pursuant to part 3011 of this chapter for records designated as non-public by the Postal Service shall be considered under the applicable standards set forth in that part.

(e) *Requesting a record submitted by a person other than the Postal Service.* The Commission maintains records of a confidential nature submitted by persons other than the Postal Service as non-public materials.

(1) A request made pursuant to FOIA for records submitted by a person other than the Postal Service shall adhere to the applicable procedures of § 3006.205. If such a FOIA request is not referred to a different Federal agency pursuant to § 3006.205(b), the Commission shall consider it in light of all applicable exemptions and in accordance with the following procedures:

(i) If such materials are designated as non-public, the Commission shall follow the procedures appearing in § 3006.206(b) through (d) in determining the FOIA request; or

(ii) In all other instances, the Commission shall determine the FOIA request after notifying the person of the FOIA request and providing the person with an opportunity to respond within 7 days of the date of the notice under the following circumstances:

(A) The records sought contain confidential commercial information that may be protected from disclosure under 5 U.S.C. 552(b)(4); and

(B) The Commission determines that it may be required to disclose the records, provided that at least one of the following applies:

(1) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under 5 U.S.C. 552(b)(4); or

(2) The Commission has a reason to believe that the requested information may be protected from disclosure under

5 U.S.C. 552(b)(4), but has not yet determined whether the information is protected from disclosure.

(2) A request made pursuant to part 3011 of this chapter for records designated as non-public by a person other than the Postal Service shall be considered under the applicable standards set forth in that part.

§ 3006.205 Consultations, referrals, and coordinations.

(a) *Consultations.* If records originated with the Commission but contain within them information of significance to another Federal agency or office, the Commission will typically consult with that other entity prior to making a release determination.

(b) *Referrals.* In addition to referring all requests made pursuant to FOIA for Postal Service records to the Postal Service as specified by § 3006.204(d)(1), if the Commission believes that a different Federal agency is best able to determine whether to disclose the record, the Commission will typically refer responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. Whenever the Commission refers any part of the responsibility for responding to a request to another agency, the Commission will notify the requester of the referral, including the name of the agency and that agency's FOIA contact information.

(c) *Coordinations.* The standard referral procedure is not appropriate where disclosure of the identity of the Federal agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if the Commission locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the Commission will coordinate with the originating agency to seek its views on disclosure of the record. The Commission then will notify the requester of the release determination for the record that is the subject of the coordination.

(d) *Classified information.* On receipt of any request involving classified information, the Commission will determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the Commission must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the Commission must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Commission will be handled according to the date that the first agency received the perfected FOIA request.

(f) *Agreements regarding consultations and referrals.* The Commission may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§ 3006.206 Submission of non-public materials by a person other than the Postal Service.

(a) *Overlap with treatment of non-public materials.* Any person who submits materials to the Commission (submitter) that the submitter reasonably believes to be exempt from public disclosure shall follow the procedures described in part 3011, subpart B of this chapter, except when the submitter submits materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

(b) *Notice of request.* Except as provided in § 3006.204(d), if a FOIA request seeks materials designated as non-public materials, the Commission will provide the submitter with notice of the request. The Commission may also provide notice when it has reason to believe that materials submitted by a person other than the Postal Service are possibly exempt from disclosure and may fall within the scope of any FOIA request.

(c) *Objections to disclosure.* A submitter may file written objections to the request specifying all grounds for withholding the information under FOIA within 7 days of the date of the notice. If the submitter fails to respond to the notice, the submitter will be considered to have no objection, beyond those objections articulated in its application for non-public treatment pursuant to § 3011.201 of this chapter, to the disclosure of the information.

(d) *Notice of decision.* If, after considering the submitter's objections to disclosure the Commission decides to disclose the information, it will give the submitter written notice of the decision and a brief explanation of the reasons for not sustaining the submitter's objections. The actual disclosure will not be made before 3 days after publication of the Commission's decision.

Subpart C—Fees for Freedom of Information Act Requests

§ 3006.300 Definitions applicable to this subpart.

Commercial use means a request from or on behalf of a person seeking information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or person on whose behalf the request is made. In determining the applicability of this term, the use to which a requester will put the document is considered first; where reasonable doubt exists as to the use, the Commission may seek clarification before assigning the request to a category.

Direct costs means the expenditures the Commission incurs in searching for, duplicating, and, where applicable, reviewing documents to respond to a request. They include (without limitation) the salary of the employee(s) performing work (the basic pay rate of such employee(s) plus 16 percent to cover benefits).

Duplication means copying the documents necessary to respond to a request. Such copies may be paper, microform, audiovisual, or machine-readable.

Educational institution means a preschool, a public or private elementary or secondary school, an institution of graduate or undergraduate higher education, an institution of professional education, and an institution of vocational education,

which operates a program or programs of scholarly research.

Noncommercial scientific institution means an institution, not operated on a commercial basis (as referenced above), which is operated solely for the purpose of conducting scientific research whose results are not intended to promote any particular product or industry.

Representative of the news media means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase or by subscription or by free distribution to the general public. These examples are not all inclusive and may include alternate media to disseminate news. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity (*e.g.,* by a publication contract or prior publication record), whether or not the journalist is actually employed by the entity.

Review means examining documents located in response to a request to determine whether any portion is exempt from disclosure, and processing or preparing documents for release, but not determination of general legal or policy issues regarding application of exemptions.

Search includes all time spent looking for material responsive to a request, including identification of pages or lines within documents. The term covers both manual and computerized searching.

§ 3006.301 Request category.

(a) *Fees.* The level of fee charged depends on the request category.

(1) *Commercial use.* A request appearing to be for commercial use will be charged the full direct costs of searching for, reviewing, and duplicating the records sought.

(2) *Educational and noncommercial scientific institutions.* A request from an educational or noncommercial scientific institution will be charged for the cost of duplication only (excluding charges for the first 100 pages). To be eligible for this category, a requester must show that the request is made under the auspices of a qualifying institution and that the records are not sought for commercial use but are in furtherance of scholarly (in the case of educational institutions) or scientific (in the case of noncommercial scientific institutions) research.

(3) *News media.* A request from a representative of the news media will be charged the cost of duplication only (excluding charges for the first 100 pages).

(4) *Other requesters.* A request from any other person will be charged the full direct cost of searching for, reviewing, and duplicating records responsive to the request, except that the first 100 pages of duplication and the first 2 hours of search/review will be furnished without charge.

(b) *Privacy Act.* A request by an individual for the individual's own records in a system of records will be charged fees as provided under the Commission' s Privacy Act regulations in part 3005 of this chapter.

§ 3006.302 General provisions.

(a) The Commission may charge search fees even if no records are found or if the records found are exempt from disclosure.

(b) Except in the case of commercial use requesters, the first 100 pages of duplication and the first 2 hours of search time are provided without charge.

(1) A page for these purposes is a letter- or legal-size sheet, or the equivalent amount of information in a medium other than paper copy.

(2) Search time for these purposes refers to manual searching; if the search is performed by computer, the 2 hours provided without charge will be equal to 2 hours' salary of the person performing the search.

(c) No requester will be charged a fee when the Commission determines that the cost of collecting the fee would equal or exceed the fee itself. In determining whether cost of collection would equal or exceed the fee, the allowance for 2 hours' search or 100 pages of duplication will be made before comparing the remaining fee and the cost of collection.

(d) Records will be provided without charge or at a reduced charge if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(e) No requester will be charged a fee after any search or response which occurs after the applicable time limits as described in §§ 3006.202 and 3006.203, unless:

(1) The Commission extends the time limit for its response due to unusual circumstances, pursuant to § 3006.201(d), and the Commission completes its response within the extension of time provided under that section; or

(2) The Commission extends the time limit for its response due to unusual circumstances and more than 5,000 pages are necessary to respond to the request and the Commission has discussed with the requester how they could effectively limit the scope of the request or made at least three good faith attempts to do so; or

(3) A court has determined that exceptional circumstances exist and excused the Commission from responding by court order.

(f) The Commission may, however, charge fees for review, and in some cases duplication, for a partial grant of a request while it reviews records that may be exempt and may be responsive to the request, so long as the partial grant is made within the applicable time limits.

§ 3006.303 Fee schedule.

(a) Fees will be calculated as follows:

(1) *Manual search.* At the salary rate (basic pay plus 16 percent) of the employee(s) making the search. Search time may be charged for even if the Commission fails to locate records or if records located are exempt from disclosure.

(2) *Computer search.* At the direct cost of providing the search, including computer search time directly attributable to searching for records responsive to the request runs and employee salary apportionable to the search.

(3) *Review (commercial use).* At the salary rate (basic pay plus 16 percent) of the employee(s) conducting the review. Charges are imposed only for the review necessary at the initial administrative level to determine the applicability of any exemption, and not for review at the administrative appeal level of an exemption already applied.

(4) *Duplication.* At 10 cents per page for paper copy, which the Commission has found to be the reasonable direct cost thereof. For copies of records prepared by computer the direct cost of production, including employee time, will be charged.

(5) *Additional services.* Postage, insurance, and other additional services that may be arranged for by the requester will be charged at actually incurred cost.

(b) In addition to the fee waiver provisions of § 3006.302(d), fees may be

waived at the discretion of the Commission.

§ 3006.304 Procedure for assessing and collecting fees.

(a) Advance payment may be required if the requester failed to pay previous bills in a timely fashion or when the fees are likely to exceed $250.

(1) Where the requester has previously failed to pay within 30 days of the billing date, the Commission may require the requester to pay an advance payment of the estimated fee together with either the past due fees (plus applicable interest) or proof that the past fees were paid.

(2) When advance payment is required, the administrative time limits prescribed in 5 U.S.C. 552(a)(6) (§ 3006.201) begin only after such payment has been received.

(b) Interest at the rate published by the Secretary of the Treasury as prescribed in 31 U.S.C. 3717 will be charged on unpaid fee bills starting on the 31st day after the bill was sent. Receipt of a fee by the Commission, whether processed or not, will stay the accrual of interest.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2024–08715 Filed 4–24–24; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2022–0295; FRL–10162–06–R5]

Air Plan Approval; Michigan; Revisions to Part 1 and 2 Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to Michigan Air Pollution Control rules Part 2 Air Use Approval for inclusion in the Michigan State Implementation Plan (SIP).

DATES: Comments must be received on or before May 28, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2022–0295 at *https://www.regulations.gov,* or via email to *damico.genevieve@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Constantine Blathras, Air Permit Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–0671, *blathras.constantine@epa.gov.* The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background

Section 110(a)(2)(C) of the Clean Air Act (CAA) requires that the SIP include a program to provide for the ''regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that National Ambient Air Quality Standards (NAAQs) are achieved.'' This includes a program for permitting construction and modification of both major and minor sources that the state deems necessary to protect air quality. The State of Michigan's minor source permit to install rules are contained in Part 2, Air Use Approval, R. 336.1201 to R. 336.1299 of the Michigan Administrative Code. Changes to the Part 2 rules were submitted on November 12, 1993; May 16, 1996; April 3, 1998; September 2, 2003; March 24, 2009; February 28, 2017; and March 8, 2022. EPA approved changes to the Part 2 rules most recently in a final approval dated April 27, 2023 (88 FR 25498).

On September 27, 2022 (87 FR 58471), EPA proposed approval, via a direct final rule, of the Michigan SIP revisions submitted on March 8, 2022. During the public comment period, EPA received an adverse comment on the Michigan rule revisions to R 336.1285 ''Permit to install exemptions; miscellaneous'' and R 336.1291, ''Permit to install exemptions; emission units with 'de minimis' emissions''. On November 14, 2022 (87 FR 68634), EPA withdrew the direct final rule. EPA approved the revisions to the Michigan rule revision which did not receive adverse comment (88 FR 25498, April 27, 2023). As explained in that action, we did not consider the comments received to be germane or relevant to EPA's proposal to approve portions of Michigan's Part 1 and Part 2 rules beyond the permit exemption rules, and therefore not adverse to approving them into the Michigan SIP.

EPA is now proposing to approve Michigan's rules R 336.1285(2)(oo) and R 336.1291 into the Michigan SIP. On November 14, 2023, Michigan submitted a supplement to the original March 8, 2022, submittal by supplying additional information regarding the approval of Michigan rules R 336.1285(2)(oo) and R 336.1291 in response to comments we received on the rulemaking. These rules exempt certain processes and/or equipment from Michigan's minor New Source Review permitting program. The November 14, 2023, Michigan supplemental submittal as well as the original March 8, 2022, submittal are available with the docket for this rulemaking action.

Michigan Rule R 336.1285(2)(oo)

Michigan rule R 336.1285(2)(oo) exempts vapor intrusion mitigation systems. Specifically, this exemption applies to equipment or systems, or both, used exclusively to mitigate vapor intrusion of an indoor space that is not on the property where the release of the hazardous substance occurred, and which has an exhaust that meets all of the following requirements:

i. Unobstructed vertically upward.

ii. At least 12 inches above the nearest eave of the roof or at least 12 inches above the surface of the roof at the point of penetration.

iii. More than 10 feet above the ground.

iv. More than 2 feet above or more than 10 feet away from windows, doors, other buildings, and other air intakes.

Michigan Rule R 336.1291

Michigan rule R 336.1291 exempts emission units with ''de minimis'' emissions. Specifically, rule R 336.1291 requires that records be maintained providing a description of the emission unit(s), and documentation and/or calculations identifying the quality, nature, and quantity of the air contaminant emissions are maintained in sufficient detail to demonstrate that the potential emissions are less than those listed in the table of air contaminants applicable to this exemption. Michigan's rule R 336.1291 exemption is based on the units' potential to emit. Potential to emit is defined in Michigan's rule 336.2801(hh) as:

''(T)he maximum capacity of a stationary source to emit a pollutant under its physical and operational design. A physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is legally enforceable and enforceable as a practical matter by the state, local air pollution control agency, or United States Environmental Protection Agency. Secondary emissions do not count in determining the potential to emit of a stationary source.''

In Michigan's November 14, 2023, supplemental submittal, Michigan provides an analysis of the rule revisions and addresses comments raised in the October 27, 2022, letter. Michigan's analysis included responses to the commenter's points including: 1) the section 110(l) analysis must consider the program as a whole; 2) Michigan cannot rely on the Tribal rule thresholds; 3) Michigan did not demonstrate that annual potential to emit limitations sufficiently protect short-term NAAQS; 4) Michigan's justification for not having more stringent thresholds in non-attainment areas does not hold up; and 5) Michigan's representation of its actual emission exemptions are insufficient.

To demonstrate that the two exemptions would not interfere with any applicable requirement concerning the attainment and reasonable further progress, or any other applicable requirement, Michigan reviewed its Michigan Air Emissions Reporting System (MAERS). The Michigan rule 291 exemption has been in effect in the state since 2016. The MAERS data contains information on a specific subset of emission units that are exempt. As described in the table of emission unit and pollutant levels for various exemptions in Michigan's supplemental submittal, of those facilities that are reporting, Michigan rule 291 emission units are responsible for less than 0.9 percent of volatile organic compound emissions from all units reported to MAERS, and less than 3.6 percent of volatile organic compound emissions from exempt units reported in MAERS. Requiring Michigan to permit these exempt units would not contribute to Michigan's plan for attainment or reasonable further progress, but would rather divert Michigan air permitting program resources from addressing other more significant air pollutant emitters. The air permit exemptions have been in effect for several years and have had no measurable impact on attainment or reasonable further progress.

Section 110(l) Demonstration

As part of the SIP revision request supplemental submittal, Michigan submitted a 110(l) demonstration. Section 110(l) of the CAA governs the submittal of SIP revisions. Each revision to an implementation plan submitted by a State shall be adopted by the State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning the attainment and reasonable further progress (as defined by 40 CFR 7501), or any other applicable requirement of this chapter.

As part of its 110(l) demonstration, Michigan provided an analysis of the emission exemptions impacts, using the Modeled Emission Rates for Precursors as a Tier 1 Demonstration Tool to demonstrate ozone and fine particulate ($PM_{2.5}$) impacts from single sources on secondary pollutants for the Prevention of Significant Deterioration (PSD) permitting program, from the sources using Michigan rule 291 exemption air emissions.

Michigan evaluated the air quality impact that Michigan Rule 291 would have on ozone and secondary $PM_{2.5}$ formation. Michigan used the method set forth in EPA's April 30, 2019, *Guidance on the Development of Modeled Emission Rates for Precursors (MERPs) as a Tier 1 Demonstration Tool for Ozone and $PM_{2.5}$ under the PSD Permitting Program* (MERPs guidance) to estimate source specific contributions to ozone and secondary $PM_{2.5}$ formation.

As part of its analysis, Michigan utilized hypothetical source modeling that EPA used to illustrate the framework established in the MERPs guidance. Hypothetical sources, modeled emission rates, and modeled air quality impacts were obtained using EPA's MERPs View Qlik tool. For its analysis, Michigan considered hypothetical sources located in Michigan. A hypothetical source was selected for this analysis if the hypothetical source has the lowest MERP for a given precursor pollutant. For a given precursor pollutant, a lower MERP suggests that the precursor pollutant more readily forms the secondary pollutant. As a result, choosing a lower MERP more conservatively estimates the air quality impacts for the secondary pollutant since the source has a higher modeled air quality impact for a given modeled emission rate. For all precursor pollutants except VOC as a precursor to ozone, Michigan utilized modeling results from the Montcalm County, Michigan hypothetical source. For VOC as a precursor to ozone, Michigan utilized the Marquette County, Michigan, hypothetical source. For all precursor pollutants, Michigan chose the hypothetical source in Michigan with the lowest MERP for a given precursor pollutant. Using the modeled results for the Marquette and Montcalm County, Michigan, hypothetical sources, Michigan evaluated the air quality impacts associated with the emission thresholds for Michigan Rule 291 using a method that was consistent with the framework recommended in the MERPs guidance.

For the single emission unit impact analysis, Michigan evaluated a proposed project that would emit 10 tons per year of sulfur dioxide (SO_2), 10 tons per year of nitrogen oxides (NO_X), and 5 tons per year of volatile organic compounds (VOC). This is the maximum emission rate that would be allowed for a single emission unit under Michigan Rule 291. Based on its single emission unit impact analysis, Michigan determined that ozone impacts would be 0.047 parts per billion (ppb), annual $PM_{2.5}$ impacts would be 0.000413 micrograms per cubic meter (μg/m^3), and 24-hour $PM_{2.5}$ impacts would be 0.0155 μg/m^3.

For the multiple emission unit impact analysis, Michigan evaluated a proposed project that would emit 40 tons of SO_2, 40 tons per year of NO_X, and 40 tons per year of VOC. This is the maximum emission rate that would be allowed for multiple emission units that are part of the same project without being considered significant as defined under Michigan Rule 119(e). Based on its multiple emission unit impact analysis, Michigan determined that 8-hour ozone

impacts would be 0.20 ppb, annual $PM_{2.5}$ impacts would be 0.00165 µg/m^3, and 24-hour $PM_{2.5}$ impacts would be 0.062 µg/m^3.

EPA believes that Michigan's goal of reducing permitting workload on Michigan permitting staff by utilizing these permit exemptions would not interfere with Michigan's air program since any permitting of these exempt units would not impose any additional air pollution controls due to the de minimus level of the exempted unit's air emissions. The amount of emissions from these exempt units do not interfere with continued Michigan's attainment nor reasonable further progress, or any other applicable requirement of the NAAQs.

The 110(l) demonstration in the SIP revision request adequately addresses this requirement and will have no effect on Michigan's NAAQS attainment status, or any backsliding on achieved improvements. The Michigan air permit exemptions do not apply to any activity that is subject to PSD of air quality regulations or new source review for major sources in non-attainment areas regulations. As Michigan has stated in its supplemental submittal, the exemptions have not had any measurable or discernable impact on attainment. The exemptions specified do not apply to the construction, modification, or reconstruction of a new major source of hazardous air pollutants as defined in the Federal requirements of 40 CFR parts 61 and 63, or any other applicable requirement or existing program limitation. By including such language in Michigan's minor source regulations, Michigan has attempted to address any sources that may have significant emissions and the potential to negatively impact ambient air quality. This approach ensures that sources that might otherwise be exempt from permitting are subject to minor NSR permitting. States must develop minor NSR programs to attain and maintain the NAAQS and the Federal requirements for state minor NSR programs are outlined in 40 CFR 51.160 through 51.164. These Federal requirements for minor NSR programs are considerably less prescriptive than those for major sources and, as a result, there is a larger variation of requirements across the state minor NSR programs. The air permit exemptions allow Michigan to allocate its limited resources to address sources in air permitting by avoiding the permitting of small sources with no perceivable impact on attainment. Michigan's November 14, 2023, supplemental submittal demonstrates that its minor NSR program will adequately protect the NAAQs with the additional exemptions to the already approved air permit rule exemptions in its SIP.

II. What Action is EPA Taking?

EPA is proposing approval of revisions to Michigan's Part 2 regulations, specifically Michigan Air Pollution Control Rules R 336.1285(2)(oo) and R 336.1291.

III. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Michigan rules R 336.1285(2)(oo) and R 336.1291, effective 1/2/2019 and 12/20/2016 respectively, discussed in section I. of this preamble. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993), and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

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

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

EGLE did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 18, 2024.

Debra Shore,

Regional Administrator, Region 5.

[FR Doc. 2024–08798 Filed 4–24–24; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 206

[Docket DARS–2024–0014]

RIN 0750–AL65

Defense Federal Acquisition Regulation Supplement: Modification of Prize Authority for Advanced Technology Achievements (DFARS Case 2022–D014)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2022 that provides procedures and approval and reporting requirements for contracts awarded as prizes for advanced technology achievements.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before June 24, 2024, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2022–D014, using either of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for DFARS Case 2022–D014. Select ''Comment'' and follow the instructions to submit a comment. Please include ''DFARS Case 2022–D014'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2022–D014 in the subject line of the message.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. Jon Snyder, telephone 703–945–5341.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117–81), which amends 10 U.S.C. 4025. Section 822 provides the authority to carry out advanced technology prize programs to award contracts to recognize outstanding achievements in basic, advanced, and applied research; technology development; and prototype development. Section 822 specifies the award of a contract as a prize is a competitive procedure if the solicitation is widely advertised. Section 822 also requires approval of such awards that exceed $10,000 and congressional reporting for contracts that exceed $10 million.

II. Discussion and Analysis

This proposed rule includes changes to the DFARS to implement section 822 of the NDAA for FY 2022. Changes are proposed to DFARS 206.102–70, Other competitive procedures, to provide that the award of a contract, for the competitive selection of prize recipients, is a competitive procedure, when the solicitation is widely advertised including through the Governmentwide point of entry (*https://sam.gov*).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), and for Commercial Services

This proposed rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

IV. Expected Impact of the Rule

Prior to the enactment of the NDAA for FY 2022, 10 U.S.C. 4025 (formerly 10 U.S.C. 2374a) did not provide for the award of contracts as prizes for outstanding achievements in basic, advanced, and applied research; technology development; and prototype development. This proposed rule will implement the authority to award contracts as prizes under certain conditions.

DoD expects this proposed rule, when finalized, may increase participation in prize competitions and decrease the lead time to deliver to the warfighter achievements in basic, advanced, and applied research; technology development; and prototype development. This proposed rule may help to expand the defense industrial base by providing a way for entities that are new to DoD procurement to obtain DoD contracts. It may also streamline the competitive process, which could reduce Government administrative costs associated with competitive negotiated acquisitions. For this reason, the difference in the cost of managing a contract instead of another type of prize is expected to be negligible.

Data provided from the Office of the Under Secretary of Defense for Research and Engineering indicates there were a total of 809 cash prizes awarded from FY 2021 to FY 2023, or approximately 270 per year, worth a total of about $3.5 million annually. DoD estimates 20 percent of these 270 historical cash prize awards, or 54 cash prize awards worth a total of approximately $700,000, would be converted to contracts. Therefore, DoD estimates that approximately 54 entities per year would be awarded contracts or a combination of contracts, other agreements (*e.g.,* grants, cooperative agreements, other transaction agreements), and cash prizes as a result of the changes in this proposed rule.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule, when finalized, to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because DoD estimates that

approximately 127 small businesses would be awarded contracts or a combination of contracts and other prizes. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117–81), which amends 10 U.S.C. 4025, Prizes for advanced technology achievements. Section 822 provides advanced technology prize programs authority to award contracts to recognize outstanding achievements in basic, advanced, and applied research; technology development; and prototype development. This proposed rule also provides that the award of a contract as a prize is a competitive procedure if the prize program solicitation is widely advertised. Section 822 also requires approval of such awards exceeding $10,000 and congressional reporting for contracts exceeding $10 million.

The objective of the proposed rule is to implement section 822 of the NDAA for FY 2022, which is the legal basis for the rule.

DoD does not have data on contracts awarded as prizes to recognize outstanding achievements in basic, advanced, and applied research; technology development; and prototype development. Contracts were not authorized as a prize. However, analyzing data provided from the Office of the Under Secretary of Defense for Research and Engineering, there were 809 cash prizes awarded from FY 2021 to FY 2023. During this three-year period, DoD awarded a total of 636 cash prizes to small businesses, which is an average of 212 per year. DoD estimates 20 percent of the 212 historical cash prize awards per year would be converted to contracts. Therefore, DoD estimates that approximately 42 small businesses per year would be awarded contracts or a combination of contracts and other prizes as a result of this proposed rule. Therefore, DoD does not anticipate that this proposed rule, when finalized, will have a significant impact on small entities.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2022–D014), in correspondence.

VII. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 206

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 206 is proposed to be amended as follows:

PART 206—COMPETITION REQUIREMENTS

■ 1. The authority citation for 48 CFR part 206 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 206.102–70 by—

■ a. Designating the text as paragraph (a); and

■ b. Adding a new paragraph (b) to read as follows:

206.102–70 Other competitive procedures.

(a) * * *

(b) The award of a contract as a prize resulting from a competitive selection of prize recipients for advanced technology achievements is a competitive procedure (10 U.S.C. 4025(f)), when the solicitation is widely advertised, including through the Governmentwide point of entry (see FAR part 5). See PGI 206.102–70 for approval requirements.

[FR Doc. 2024–08437 Filed 4–24–24; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 242, 247, and 252

[Docket DARS–2024–0013]

RIN 0750–AL38

Defense Federal Acquisition Regulation Supplement: Preference for United States Vessels in Transporting Supplies by Sea (DFARS Case 2021–D020)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 intended to increase compliance with military cargo preference requirements.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before June 24, 2024, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2021–D020, using either of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for DFARS Case 2021–D020. Select ‘‘Comment’’ and follow the instructions to submit a comment. Please include ‘‘DFARS Case 2021–D020’’ on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2021–D020 in the subject line of the message.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: David Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 1024 of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 1024 amends 10 U.S.C. 2631 to,

among other things, clarify circumstances in which DoD may seek a waiver from the basic requirement for DoD supplies to be transported by sea in either vessels belonging to the United States or vessels of the United States. In particular, section 1024 specifies that DoD may waive this requirement, where such vessels are either not available at a fair and reasonable rate for commercial vessels of the United States or otherwise not available. Section 1024 also modifies the requirement for reflagging or repair work in the United States for vessels used under time charter contracts for the transportation of supplies, and it adds a requirement to ensure contractor compliance with 10 U.S.C. 2631.

II. Discussion and Analysis

This proposed rule includes modifications at DFARS 247.572(a)(1) and the contract clause at 252.247–7023, Transportation of Supplies by Sea, including its alternates, to specify that DoD may waive the requirement for DoD supplies to be transported by sea in either vessels belonging to the United States or vessels of the United States. Under this proposed rule, waivers may be granted, where such vessels are either not available at a fair and reasonable rate for commercial vessels of the United States or otherwise not available.

This proposed rule contains changes to DFARS 247.572(c) and the clause at 252.247–7025, Reflagging or Repair Work, to update requirements for reflagging or repair work in the United States for vessels used under time charter contracts for the transportation of supplies. This rule also includes modifications at DFARS 247.573(b) and DFARS 242.1502(g) to specify DoD procedures for increasing contractor compliance with the requirements of the clause at 252.247–7023, including its alternates.

This proposed rule adds a definition of ''corrective and preventive maintenance or repair'' both to DFARS 247.571 and to the clause at 252.247–7025. Further, this proposed rule updates the definitions of ''foreign shipyard,'' ''ocean transportation,'' ''supplies'' and ''U.S.-flag vessel'' at DFARS 247.571 and at the clause at 252.247–7023, including its alternates, and the solicitation provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade. Additionally, this proposed rule deletes the definition of ''shipyard'' from the provision at 252.247–7026 because the common definition of this term suffices for this rule. The definition of ''Department of Defense'' is deleted from the clause at 252.247–7023, including its alternates, because the definition of this term at DFARS 2.101 suffices for purposes of this proposed rule.

This proposed rule clarifies the submission requirements in paragraph (d)(7) of the clause at 252.247–7023, including its alternates, where a contractor requests use of foreign-flag vessels.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), and for Commercial Services

This proposed rule amends the clauses at DFARS 252.247–7023, including alternates, 252.247–7025, and the provision at 252.247–7026. However, this proposed rule does not impose any new requirements on contracts at or below the SAT, for commercial products including COTS items, or for commercial services. The clauses will continue to apply to acquisitions at or below the SAT, to acquisitions of commercial products including COTS items, and to acquisitions of commercial services.

IV. Expected Impact of the Rule

This proposed rule is intended to increase compliance with military cargo preference requirements, in accordance with section 1024 of the NDAA for FY 2021. These changes are largely clarifying in nature, including clarification of operational requirements internal to DoD. Therefore, this proposed rule, when finalized, is not expected to have a significant impact on the public.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule, when finalized, to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule does not create any new requirements or significantly change any existing requirements for contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 1024 of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021. Section 1024 modifies 10 U.S.C. 2631 to add a requirement to ensure contractor compliance with 10 U.S.C. 2631 and otherwise updates the listed circumstances in which DoD may waive the requirement that DoD supplies be transported by sea in vessels belonging to the United States or vessels of the United States. It also modifies the requirement for reflagging or repair work in the United States for vessels used under time-charter contracts.

The objective of this rule is to implement section 1024 of the NDAA for FY 2021. Section 1024 is the legal basis for the rule.

This proposed rule will apply to small entities that have contracts that include DFARS clauses 252.247–7023, Transportation of Supplies by Sea, and 252.247–7025, Reflagging or Repair Work. DoD obtained data from the Procurement Business Intelligence Service (PBIS) for all contracts and modifications that include DFARS clauses 252.247–7023 and 252.247–7025 for fiscal years 2020 through 2022. DoD awarded on average 649,016 contract actions per year that included either DFARS clause 252.247–7023 or 252.247–7025, or both, to 31,665 unique entities, of which approximately 363,260 contract awards (56 percent) were made to 21,737 unique small entities (69 percent).

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD will also consider comments from small entities concerning the

existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2021–D020), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this proposed rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0245, titled: Defense Federal Acquisition Regulation Supplement (DFARS) Part 247, Transportation, and Related Clauses at 252.247.

List of Subjects in 48 CFR Parts 242, 247, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 242, 247, and 252 are proposed to be amended as follows:

■ 1. The authority citation for parts 242, 247, and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 2. Amend section 242.1502—

■ a. In paragraph (g)(i) by removing ''Program); and'' and adding ''Program);'' in its place;

■ b. In paragraph (g)(ii) by removing ''(B)).'' and adding ''(B)); and'' in its place; and

■ c. By adding paragraph (g)(iii) to read as follows:

242.1502 Policy.

(g) * * *

(iii) In accordance with 10 U.S.C. 2631(d), shall include information on contractor compliance with requirements of the clause at 252.247–7023, Transportation of Supplies by Sea (see 10 U.S.C. 2631(a), (b), and (c)).

PART 247—TRANSPORTATION

■ 3. Amend section 247.570—

■ a. By revising paragraph (a)(1);

■ b. In paragraph (a)(2) by removing ''(Pub. L. 109–364)'' and adding ''(Pub. L. 109–364) (10 U.S.C. 2631 note)'' in its place;

■ c. In paragraph (a)(3) by removing ''(Pub. L. 110–417)'' and ''chapter 121, title 46 U.S.C.'' and adding ''(Pub. L. 110–417) (10 U.S.C. chapter 257 note)'' and ''46 U.S.C. chapter 121'' in their places, respectively;

■ d. By adding a new paragraph (a)(4).

■ e. In paragraph (b) by removing ''46 U.S.C. 1241(b)'' and adding ''46 U.S.C. chapter 553'' in its place; and

■ f. By revising paragraph (c).

The revisions read as follows:

247.570 Scope.

* * * * *

(a) * * *

(1) The Military Cargo Preference Act of 1904 (''the 1904 Act''), 10 U.S.C. 2631, which applies to the ocean transportation of cargo owned by, destined for use by, or otherwise transported by DoD;

* * * * *

(4) Section 1024 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283), which updates the listed circumstances where DoD may waive the requirement that DoD supplies be transported by sea in vessels belonging to the United States or vessels of the United States, and it modifies the requirement for reflagging or repair work in the United States for vessels used under time-charter contracts.

* * * * *

(c) Does not implement—

(1) Section 27 of the Merchant Marine Act, 1920 (46 U.S.C. chapters 121 and 552), commonly known as the ''Jones Act,'' for the application of coastwise trade; or

(2) Waivers thereof pursuant to 46 U.S.C. 501.

■ 4. Revise section 247.571 to read as follows:

247.571 Definitions.

As used in this subpart—

Corrective and preventive maintenance or repair means—

(1) Maintenance or repair actions performed as a result of a failure in order to return or restore equipment to acceptable performance levels; and

(2) Scheduled maintenance or repair actions to prevent or discover functional failures.

Covered vessel means a vessel—

(1) Owned, operated, or controlled by the offeror; and

(2) Qualified to engage in the carriage of cargo in the coastwise or noncontiguous trade under 46 U.S.C. 12112 and 50501 and 46 U.S.C. chapter 551.

Foreign-flag vessel means any vessel that is not a U.S.-flag vessel.

Foreign shipyard means a shipyard that is not located in the United States.

Ocean transportation means any water-borne transportation aboard a ship, vessel, boat, barge, ferry, or the like outside the internal waters of the United States (as defined in 33 CFR 2.24).

Overhaul, repair, and maintenance work means work requiring a shipyard period greater than or equal to 5 calendar days.

Reflagging or repair work means work performed on a vessel—

(1) To enable the vessel to meet applicable standards to become a vessel of the United States; or

(2) To convert the vessel to a more useful military configuration.

Supplies means supplies that are clearly identifiable for eventual use by or owned by DoD at the time of transportation by sea, or are otherwise transported by DoD, regardless of ownership or use by DoD. An item is clearly identifiable for eventual use by DoD if, for example, the contract documentation contains a reference to a DoD contract number or a military destination.

U.S.-flag vessel means either a vessel belonging to the United States or a vessel of the United States as that term is defined in 46 U.S.C. 116.

■ 5. Revise section 247.572 to read as follows:

247.572 Policy.

(a) In accordance with 10 U.S.C. 2631(a), DoD contractors shall transport supplies exclusively on U.S.-flag vessels. In accordance with 10 U.S.C. 2631(b), DoD (see 247.573(a)) may waive this requirement when a U.S.-flag vessel—

(1) Is not available at a fair and reasonable rate for commercial vessels of the United States; or

(2) Is not otherwise available.

(b) Contracts must provide for the use of vessels belonging to the United States when security classifications prohibit the use of other than vessels belonging to the United States.

(c) In accordance with 10 U.S.C. 2631(c)—

(1) Any vessel used under a time charter contract for the transportation of supplies under this section shall have the following work performed in the United States or its outlying areas:

(i) Reflagging or repair work, if the reflagging or repair work is performed—

(A) On a vessel for which the contractor submitted an offer in response to the solicitation for the contract; and

(B) Prior to acceptance of the vessel by the Government.

(ii) Corrective and preventive maintenance or repair work for the duration of the contract, to the greatest extent practicable.

(2) The Secretary of Defense may waive this requirement if the Secretary determines that such waiver is critical to the national security of the United States. In accordance with 10 U.S.C. 2631(c)(2), DoD shall immediately submit, in writing, a notice to the congressional committees listed at 10 U.S.C. 2631(e) of such a waiver and the reason for the waiver.

(d) In accordance with section 1017 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), when obtaining carriage requiring a covered vessel, the contracting officer shall consider the extent to which offerors have had overhaul, repair, and maintenance work for covered vessels performed in shipyards located in the United States or Guam.

(e) In accordance with section 3504 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), DoD may not award, renew or extend, or exercise an option under a charter of, or contract for carriage of cargo by, a U.S.-flag vessel documented under 46 U.S.C. chapter 121, unless the contract contains the clause at 252.247–7027.

■ 6. Amend section 247.573—
■ a. By revising paragraph (a);
■ b. In paragraph (b)—
■ i. By revising paragraph (3);
■ ii. In paragraph (4) by removing ''Procedures are provided at'' and adding ''Follow the procedures at'' in its place; and
■ iii. By adding a new paragraph (5).

The revisions and addition read as follows:

247.573 General.

(a) *Delegated authority.* Pursuant to 10 U.S.C. 2631(b)(2), the Secretary of Defense has delegated (see PGI 247.573) the authority to make determinations either that a U.S.-flag vessel is not available at a fair and reasonable rate for commercial vessels of the United States or is otherwise not available to—

(1) The Commander, United States Transportation Command; and

(2) The Secretary of the Navy.

(b) * * *

* * * * *

(3) See PGI 247.573(b)(3) for agency and department procedures relating to annual reporting requirements of waivers granted for nonavailability of U.S.-flag vessels.

* * * * *

(5)(i) In accordance with 10 U.S.C. 2631(d), contracting officers shall exercise appropriate contractual rights and remedies against contractors who fail to comply. Such remedies may include the determination that a contractor is ineligible for award of future contracts, termination of an existing contract, or suspension or debarment of the contractor. Also see 242.1502 regarding assessments of the contractor's past performance.

(ii) In the event of a contractor's unauthorized use of foreign-flag vessels in the performance of a contract, the contracting officer is authorized to consider an equitable adjustment.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 252.247–7023—
■ a. Revising the date of the clause;
■ b. By revising paragraph (a);
■ c. By revising paragraph (c);
■ d. In paragraph (d) introductory text by revising the second sentence and paragraph (7);
■ e. In paragraph (e)(10) by removing ''the steamship company'' and adding ''the carrier'' in its place;
■ f. In paragraph (f)(3) by removing ''had the written consent of the Contracting Officer'' and adding ''had received a prior-approved waiver for U.S.-flag vessels'' in its place;
■ g. In paragraph (f)(4) by removing ''of the Contracting Officer'' and adding ''of DoD'' in its place;
■ h. Amend Alternate I—
■ i. Revising the date of the clause;
■ ii. By revising paragraph (a);
■ iii. By revising paragraph (c);
■ iv. In paragraph (d) introductory text by revising the second sentence and paragraph (7);
■ v. In paragraph (e)(10) by removing ''steamship company'' and adding ''the carrier'' in its place;
■ vi. In paragraph (f)(3) by removing ''had the written consent of the Contracting Officer'' and adding ''had received a prior-approved waiver for U.S.-flag vessels'' in its place;
■ vii. In paragraph (f)(4) by removing ''of the Contracting Officer'' and adding ''of DoD'' in its place;
■ i. Amend Alternate II—
■ i. Revising the date of the clause;
■ ii. By revising paragraph (a);
■ iii. By revising paragraph (c);
■ iv. In paragraph (d) introductory text by revising the second sentence and paragraph (7);
■ v. In paragraph (e)(10) by removing ''steamship company'' and adding ''the carrier'' in its place;
■ vi. In paragraph (f)(3) by removing ''had the written consent of the Contracting Officer'' and adding ''had received a prior-approved waiver for U.S.-flag vessels'' in its place; and
■ vii. In paragraph (f)(4) by removing ''of the Contracting Officer'' and adding ''of DoD'' in its place.

The revisions read as follows:

252.247–7023 Transportation of Supplies by Sea.

* * * * *

Transportation of Supplies by Sea—Basic (Date)

(a) *Definitions.* As used in this clause—

Foreign-flag vessel means any vessel that is not a U.S.-flag vessel.

Ocean transportation means any water-borne transportation aboard a ship, vessel, boat, barge, ferry, or the like outside the internal waters of the United States as defined in 33 CFR 2.24.

Subcontractor means a supplier, materialman, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract.

Supplies means supplies that are clearly identifiable for eventual use by or owned by DoD at the time of transportation by sea, or are otherwise transported by DoD, regardless of ownership or use by DoD. An item is clearly identifiable for eventual use by DoD if, for example, the contract documentation contains a reference to a DoD contract number or a military destination.

U.S.-flag vessel means either a vessel belonging to the United States or a vessel of the United States as that term is defined in 46 U.S.C. 116.

* * * * *

(c) The Contractor and its subcontractors may request, via the Contracting Officer, a waiver of the requirement to use a U.S.-flag vessel, or identification of any available U.S.-flag vessels, if the Contractor or a subcontractor sufficiently explains that—

(1) U.S.-flag vessels are not available at a fair and reasonable rate for commercial vessels of the United States; or

(2) U.S.-flag vessels are otherwise not available.

(d) * * * The Contracting Officer will process requests submitted after such date(s) as expeditiously as possible, however, if a DoD waiver is not approved prior to the shipper's sailing date, this will not of itself constitute a compensable delay under this or any other clause of this contract. * * *

* * * * *

(7) A documented description of current, diligent efforts made to secure U.S.-flag vessels, including points of contact (with names and telephone numbers) with at least two U.S.-flag

carriers contacted. Copies of quotes will suffice for this purpose. Copies of telephone notes, emails, and other relevant communications will otherwise be considered for this purpose.

* * * * *

Transportation of Supplies by Sea—Alternate I (Date)

(a) *Definitions.* As used in this clause—

Foreign-flag vessel means any vessel that is not a U.S.-flag vessel.

Ocean transportation means any water-borne transportation aboard a ship, vessel, boat, barge, ferry, or the like outside the internal waters of the United States as defined in 33 CFR 2.24.

Subcontractor means a supplier, materialman, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract.

Supplies means supplies that are clearly identifiable for eventual use by or owned by DoD at the time of transportation by sea, or are otherwise transported by DoD, regardless of ownership or use by DoD. An item is clearly identifiable for eventual use by DoD if, for example, the contract documentation contains a reference to a DoD contract number or a military destination.

U.S.-flag vessel means either a vessel belonging to the United States or a vessel of the United States as that term is defined in 46 U.S.C. 116.

* * * * *

(c) The Contractor and its subcontractors may request, via the Contracting Officer, a waiver of the requirement to use a U.S.-flag vessel, or identification of any available U.S.-flag vessels, if the Contractor or a subcontractor sufficiently explains that—

(1) U.S.-flag vessels are not available at a fair and reasonable rate for commercial vessels of the United States; or

(2) U.S.-flag vessels are otherwise not available.

(d) * * * The Contracting Officer will process requests submitted after such date(s) as expeditiously as possible, however, if a DoD waiver is not approved prior to the shipper's sailing date, this will not of itself constitute a compensable delay under this or any other clause of this contract. * * *

* * * * *

(7) A documented description of current, diligent efforts made to secure U.S.-flag vessels, including points of contact (with names and telephone numbers) with at least two U.S.-flag carriers contacted. Copies of quotes will suffice for this purpose. Copies of telephone notes, emails, and other relevant communications will otherwise be considered for this purpose.

* * * * *

Transportation of Supplies By Sea—Alternate II (Date)

(a) *Definitions.* As used in this clause—

Foreign-flag vessel means any vessel that is not a U.S.-flag vessel.

Ocean transportation means any water-borne transportation aboard a ship, vessel, boat, barge, ferry, or the like outside the internal waters of the United States as defined in 33 CFR 2.24.

Subcontractor means a supplier, materialman, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract.

Supplies means supplies that are clearly identifiable for eventual use by or owned by DoD at the time of transportation by sea, or are otherwise transported by DoD, regardless of ownership or use by DoD. An item is clearly identifiable for eventual use by DoD if, for example, the contract documentation contains a reference to a DoD contract number or a military destination.

U.S.-flag vessel means either a vessel belonging to the United States or a vessel of the United States as that term is defined in 46 U.S.C. 116.

* * * * *

(c) The Contractor and its subcontractors may request, via the Contracting Officer, a waiver of the requirement to use a U.S.-flag vessel, or identification of any available U.S.-flag vessels, if the Contractor or a subcontractor sufficiently explains that—

(1) U.S.-flag vessels are not available at a fair and reasonable rate for commercial vessels of the United States; or

(2) U.S.-flag vessels are otherwise not available.

(d) * * * The Contracting Officer will process requests submitted after such date(s) as expeditiously as possible, however, if a DoD waiver is not approved prior to the shipper's sailing date, this will not of itself constitute a compensable delay under this or any other clause of this contract. * * *

(7) A documented description of current, diligent efforts made to secure U.S.-flag vessels, including points of contact (with names and telephone numbers) with at least two U.S.-flag carriers contacted. Copies of quotes will suffice for this purpose. Copies of telephone notes, emails, and other relevant communications will otherwise be considered for this purpose.

* * * * *

■ 8. Revise section 252.247–7025 to read as follows:

252.247–7025 Reflagging or Repair Work.

As prescribed in 247.574(c), use the following clause:

Reflagging or Repair Work (Date)

(a) *Definitions.* As used in this clause—

Corrective and preventive maintenance or repair means—

(1) Maintenance or repair actions performed as a result of a failure in order to return or restore equipment to acceptable performance levels; and

(2) Scheduled maintenance or repair actions to prevent or discover functional failures.

Reflagging or repair work means work performed on a vessel—

(1) To enable the vessel to meet applicable standards to become a vessel of the United States; or

(2) To convert the vessel to a more useful military configuration.

(b) *Requirement.* Unless DoD waives this requirement, the Contractor shall ensure performance of the following in the United States or its outlying areas:

(1) Reflagging or repair work, if the reflagging or repair work is performed—

(i) On a vessel for which the Contractor submitted an offer in response to the solicitation for this contract; and

(ii) Prior to acceptance of the vessel by the Government.

(2) Corrective and preventive maintenance or repair work for the duration of the contract, to the greatest extent practicable.

(End of clause)

■ 9. Amend section 252.247–7026—

■ a. By removing the provision date ''Nov 2008'' and adding ''Date'' in its place;

■ b. In paragraph (a) by revising the definitions of ''Covered vessel'' and ''Foreign shipyard'' and removing the definition of ''Shipyard'';

■ c. In paragraphs (b) and (c) by removing ''offeror'' and adding ''Offeror'' in its place;

■ d. In paragraph (e) removing ''Section 1017 of Public Law 109–364'' and adding ''section 1017 of Public Law 109–364 (10 U.S.C. 2631 note)'' in its place.

The revisions read as follows:

252.247–7026 Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade.

* * * * *

(a) * * *

Covered vessel means a vessel—

(1) Owned, operated, or controlled by the offeror; and

(2) Qualified to engage in the carriage of cargo in the coastwise or noncontiguous trade under 46 U.S.C. 12112 and 50501 and 46 U.S.C. chapter 551.

Foreign shipyard means a shipyard that is not located in the United States.

* * * * *

[FR Doc. 2024–08436 Filed 4–24–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

[Docket DARS–2022–0030]

RIN 0750–AL67

Defense Federal Acquisition Regulation Supplement: Update of Challenge Period for Validation of Asserted Restrictions on Technical Data and Computer Software (DFARS Case 2022–D016)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2012, which addresses the validation of proprietary data restrictions. In addition to the request for written comments, DoD will hold a public meeting to hear the views of interested parties.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before June 24, 2024, to be considered in the formation of a final rule.

Public Meeting: A virtual public meeting will be held on May 17, 2024, from 1:00 p.m. to 5:00 p.m. Eastern time. The public meeting will end at the stated time, or when the discussion ends, whichever comes first.

Registration: Registration to attend the public meeting must be received no later than close of business on May 9, 2024. Information on how to register for the public meeting is provided under the **SUPPLEMENTARY INFORMATION** section of this proposed rule.

ADDRESSES: *Public Meeting:* A virtual public meeting will be held using Zoom video conferencing software.

Submission of Comments: Submit comments identified by DFARS Case 2022–D016, using either of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for DFARS Case 2022–D016. Select ''Comment'' and follow the instructions to submit a comment. Please include ''DFARS Case 2022–D016'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2022–D016 in the subject line of the message.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: David Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 815(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Pub. L. 112–81). Section 815(b) amended 10 U.S.C. 2321 (currently 10 U.S.C. 3782) by increasing the validation period for asserted restrictions from three years to six years. Section 815(b) also amended 10 U.S.C. 2321 to provide an exception to the prescribed time limit for validation of asserted restrictions if the technical data involved are the subject of a fraudulently asserted use or release restriction.

DoD published an advance notice of proposed rulemaking (ANPR) in the **Federal Register** on December 16, 2022, at 87 FR 77055, providing draft DFARS revisions and requesting written public comments. DoD hosted a public meeting to obtain the views of interested parties regarding the ANPR on January 26, 2023.

The preamble to the ANPR provided detailed explanations of revisions related to—

• The validation period for asserted restrictions; and

• The new statutory exception to the prescribed time limit for validation of asserted restrictions.

One respondent submitted public comments in response to the ANPR.

II. Public Meeting

DoD is interested in continuing a dialogue with experts and interested parties in the Government and the private sector regarding amending the DFARS to implement section 815(b) of the NDAA for FY 2012.

Registration: Individuals wishing to participate in the virtual meeting must register by May 9, 2024, to facilitate entry to the meeting. Interested parties may register for the meeting by sending the following information via email to *osd.dfars@mail.mil* and include ''Public Meeting, DFARS Case 2022–D016'' in the subject line of the message:

• Full name.

• Valid email address, which will be used for admittance to the meeting.

• Valid telephone number, which will serve as a secondary connection method. Registrants must provide the telephone number they plan on using to connect to the virtual meeting.

• Company or organization name.

• Whether the individual desires to make a presentation.

Pre-registered individuals will receive instructions for connecting using the Zoom video conferencing software not more than one week before the meeting is scheduled to commence.

Presentations: Presentations will be limited to 5 minutes per company or organization. This limit may be subject to adjustment, depending on the number of entities requesting to present, in order to ensure adequate time for discussion. If you wish to make a presentation, please submit an electronic copy of your presentation via email to *osd.dfars@mail.mil* no later than the registration date for the meeting. Each presentation should be in PowerPoint to facilitate projection during the public meeting and should include the presenter's name, title, organization affiliation, telephone number, and email address on the cover page.

Correspondence, Comments, and Presentations: Please cite ''Public Meeting, DFARS Case 2022–D016'' in all correspondence related to the public meeting. There will be no transcription at the meeting. The submitted presentations will be posted to the following website at the conclusion of the public meeting: *https://www.acq.osd.mil/dpap/dars/technical_data_rights.html.*

III. Discussion and Analysis

DoD reviewed the public comments in response to the ANPR in the development of the proposed rule. No changes are made in this proposed rule text as a result of the public comments. A discussion of the comments is provided, as follows:

A. Analysis of Public Comments

1. Virtual Public Meetings

Comment: The respondent thanked DoD for the opportunity to participate in the rulemaking process and provide input.

Response: DoD acknowledges the respondent's comment.

2. Definition of Fraud

Comment: The respondent requested clarification with respect to when a use or release restriction would be considered ''fraudulently asserted.'' In particular, the respondent asked whether there is a knowledge requirement on behalf of the contractor asserting restrictions.

Response: The statutory revisions being implemented in DFARS Case 2022–D016 do not establish a specialized definition of ''fraudulently asserted'' or a knowledge requirement. DoD will rely upon the common meaning of the terminology used in the statute and regulatory implementation, informed by applicable procurement statutes, other applicable statutes, and case precedent.

3. Deferred Ordering and the Challenge Period

Comment: The respondent requested clarification regarding applicability to deferred ordering situations. The respondent asked if the period related to final payment resets when a payment is made on a deferred ordering basis.

Response: The proposed rule includes the following language related to technical data: ''During the period within 6 years of final payment on a contract or within 6 years of delivery of the technical data to the Government, whichever is later, the Contracting Officer may review and make a written determination to challenge the restriction.'' It also includes the following language regarding software: ''the Government may exercise this right only within 6 years after the date(s) the software is delivered or otherwise furnished to the Government, or 6 years following final payment under this contract, whichever is later.''

Invocation of the deferred ordering clause institutes new technical data or software delivery requirements; these deliverables may be delivered under the original contract (in which the clause was incorporated) or another contract. Accordingly, the expiration of the challenge period will depend upon the date the data is furnished or the date of final payment under the contract where the technical data or software is delivered, whichever is later.

B. Other Changes

The proposed rule includes other changes to align the language in the clauses at DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software, and DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data. In addition, editorial changes were made, including updates to comport with DFARS content and drafting conventions. For example, the proposed rule includes changes to the clauses to consistently refer to validation of ''asserted restrictions'' (rather than ''restrictive markings''), thereby aligning this language with the scope and purpose of the clauses and the underlying statutes (10 U.S.C 3781–3786). In addition, the proposed rule includes revisions to the clauses to ensure consistent syntax in instances where the clause refers to striking or correcting a restrictive marking. Furthermore, the proposed rule corrects all references to the ''United States Claims Court'' to read as the ''United States Court of Federal Claims'', to reflect the correct name of the applicable court.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Products (Including Commercially Available Off-the-Shelf Items), and for Commercial Services

This proposed rule amends the clauses at DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software, and DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data. However, this proposed rule does not impose any new requirements on contracts at or below the SAT, for commercial products including COTS items, or for commercial services. The clause will continue to apply to acquisitions at or below the SAT, to acquisitions of commercial products including COTS items, and to acquisitions of commercial services.

V. Expected Impact of the Rule

The proposed rule includes changes to lengthen the validation period for asserted restrictions from three years to six years. The proposed rule also provides an exception to the prescribed time limit for validation of asserted restrictions if the technical data or computer software involved are the subject of a fraudulently asserted restriction. Therefore, the proposed rule, when finalized, may increase the number of challenges to which contractors must respond. However, DoD cannot quantify the estimated number of the additional challenges at this time.

VI. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, as amended.

VII. Regulatory Flexibility Act

DoD does not expect this proposed rule, when finalized, to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the statutory requirements only lengthen the challenge period for asserted restrictions. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 815(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012, which addresses the time period for validation of proprietary data restrictions.

The objective of the rule is to implement section 815(b) of the NDAA for FY 2012 (Pub. L. 112–81), which is the legal basis for the rule. Section 815(b) amended 10 U.S.C. 2321 (currently 10 U.S.C. 3782) by increasing the validation period for asserted restrictions from three years to six years. Section 815(b) also amended 10 U.S.C. 2321 to provide an exception to the prescribed time limit for validation of asserted restrictions if the technical data involved are the subject of a fraudulently asserted use or release restriction. This proposed rule, when finalized, will ensure that the Government has adequate opportunity to challenge discrepancies or inaccuracies in contractor assertions of data and software rights.

This proposed rule will apply to small entities that have contracts with DoD requiring delivery of data, including

technical data and computer software. DoD obtained data for fiscal years 2020 through 2022 from the Procurement Business Intelligence Service for all contracts and modifications that include one or more of the following DFARS clauses: 252.227–7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services; 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation; 252.227–7015, Technical Data—Commercial Products and Commercial Services; and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program. DoD awarded on average 54,255 contract actions per year that included one or more of the listed clauses to 9,550 unique entities, of which 28,657 contract awards (53 percent) were made to 6,033 unique small entities (63 percent).

This proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2022–D016), in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this proposed rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved by the Office of Management and Budget (OMB) under OMB Control Number 0704–0369, entitled ''DFARS Subpart 227.71, Rights in Technical Data; and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses.''

List of Subjects in 48 CFR Part 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is proposed to be amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 252.227–7019—
■ a. By revising the date of the clause;
■ b. By revising paragraph (b);
■ c. In paragraph (d)(2)(i)(B) by revising the second sentence;
■ d. In paragraph (e)(1) by revising the second sentence;
■ e. In paragraph (f)(1)(ii) by removing ''within sixty (60)'' and adding ''in writing within 60'' in its place;
■ f. In paragraph (f)(1)(iv) by removing ''three-year'' and adding ''3-year'' in its place;
■ g. In paragraph (g)(1)(i) by removing ''ninety (90)'' and adding ''90'' in its place;
■ h. In paragraph (g)(1)(ii) by removing ''one'' and ''ninety (90)'' and adding ''1'' and ''90'' in their places, respectively;
■ i. In paragraph (g)(1)(iii) by removing ''suit an appropriate'', ''ninety (90)'' wherever it appears, and ''one'' and adding ''suit in an appropriate'', ''90'', and ''1'' in their places, respectively;
■ j. In paragraph (g)(2)(i) and (ii) by removing ''ninety (90)'' and adding ''90'' in its place;
■ k. In paragraph (g)(2)(iii) removing ''one'' and ''ninety (90)'' and adding ''1'' and ''90'' in their places, respectively; and
■ l. In paragraph (g)(3) removing ''government'' wherever it appears and ''non-disclosure'' and adding ''Government'' and ''nondisclosure'' in their places, respectively.

The revisions read as follows:

252.227–7019 Validation of Asserted Restrictions-Computer Software.

* * * * *

Validation Of Asserted Restrictions—Computer Software (DATE)

* * * * *

(b) *Justification.* The Contractor shall maintain records sufficient to justify the validity of any asserted restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered, required to be delivered, or otherwise provided to the Government under this contract and shall be prepared to furnish to the Contracting Officer a written justification for such asserted restrictions in response to a request for information under paragraph (d) of this clause or a challenge under paragraph (f) of this clause.

* * * * *

(d) * * *

(2) * * *

(i) * * *

(B) * * * If the Contractor fails to correct or strike the unjustified marking and return the corrected software to the Contracting Officer within 60 days following receipt of the software, the Contracting Officer may correct the strike the marking at the Contractor's expense.

* * * * *

(e) * * *

(1) * * * Except for software that is publicly available, has been furnished to the Government without restrictions, has been otherwise made available without restrictions, or is the subject of a fraudulently asserted use or release restriction, the Government may exercise this right only within 6 years after the date(s) the software is delivered or otherwise furnished to the Government, or 6 years following final payment under this contract, whichever is later.

* * * * *

■ 3. Amend section 252.227–7037—
■ a. By revising the section heading, and the heading and date of the clause;
■ b. By revising paragraphs (c), and (d);
■ c. By revising paragraph (e)(1) introductory text;
■ d. In paragraph (e)(1)(i) removing ''services,'' and adding ''services, with'' in its place;
■ e. By revising paragraph (e)(1)(iii);
■ f. In paragraph (e)(4) by removing ''restrictive markings'' and adding ''asserted restrictions'' in its place;
■ g. By revising paragraph (g)(1);
■ h. In paragraph (g)(2)(i) by removing ''restrictive marking'' and ''In order to'' and adding ''asserted restriction'' and ''To'' in their places, respectively;
■ i. By revising paragraphs (g)(2)(ii), (iii), and (iv);
■ j. In paragraph (h)(1)(i) by removing ''marking'' and adding ''marking that is based on the asserted restriction'' in its place;
■ k. In paragraph (h)(1)(ii) by removing ''restrictive marking'' wherever it appears and ''marking'' and adding ''asserted restriction'' in their places;
■ l. By revising paragraph (i); and
■ m. In paragraph (k) by removing ''restrictive marking'' and ''subcontractors'' and adding

''restrictions'' and ''subcontractor'' in their places, respectively.

The revisions read as follows:

252.227–7037 Validation of Asserted Restrictions on Technical Data.

* * * * *

Validation of Asserted Restrictions on Technical Data (DATE)

* * * * *

(c) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its asserted restrictions on the rights of the Government and others to use, duplicate, release, or disclose technical data delivered, required to be delivered, or otherwise provided to the Government under the contract or subcontract. Except as provided in paragraph (b) of this clause, the Contractor or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such asserted restrictions in response to a challenge under paragraph (e) of this clause.

(d) *Prechallenge request for information.*

(1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any asserted restriction on the right of the United States or others to use, disclose, or release technical data. If, upon review of the explanation submitted, the Contracting Officer cannot determine the basis of the asserted restriction, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any asserted restriction on technical data delivered, to be delivered, or otherwise provided to the Government under the contract or subcontract (*e.g.,* a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (d)(1) of this clause, or any other available information pertaining to the validity of an asserted restriction, determines that reasonable grounds exist to question the current validity of the asserted restriction and that continued adherence to the asserted restriction would make impracticable the subsequent competitive acquisition of the item or process to which the technical data relates, the Contracting Officer will follow the procedures in paragraph (e) of this clause.

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (d)(1) of this clause, and the Contracting Officer determines that continued adherence to the asserted restriction would make impracticable the subsequent competitive acquisition of the item or process to which the technical data relates, the Contracting Officer may challenge the validity of the asserted restriction as described in paragraph (e) of this clause.

(e) * * *

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the asserted restriction is warranted, the Contracting Officer will send a written challenge notice to the Contractor or subcontractor making the asserted restriction. The challenge notice and all related correspondence shall be subject to handling procedures for classified information and controlled unclassified information. Such challenge shall—

* * * * *

(iii) State that a Contracting Officer's final decision, issued pursuant to paragraph (g) of this clause, sustaining the validity of a prior asserted restriction identical to the current asserted restriction, within the 3-year period preceding the current challenge, shall serve as justification for the current asserted restriction if the prior validated restriction was asserted by the same Contractor or subcontractor (or any licensee of such Contractor or subcontractor) to which such notice is being provided; and

* * * * *

(g) * * *

(1) If the Contracting Officer determines that the Contractor or subcontractor has justified the validity of the asserted restriction, the Contracting Officer will issue a final decision to the Contractor or subcontractor that sustains the validity of the asserted restriction and that states that the Government will continue to be bound by the asserted restriction. The Contracting Officer will issue this final decision within 60 days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor that the Government will require. The Contracting Officer will provide notification of any longer period for issuance of a final decision within 60 days after receipt of the response to the challenge notice.

(2) * * *

(i) * * *

(ii) The Government agrees that it will continue to be bound by the asserted restriction for a period of 90 days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. The Contractor or subcontractor agrees that, if it intends to file suit in the United States Court of Federal Claims, it will provide a notice of intent to file suit to the Contracting Officer within 90 days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. If the Contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the 90-day period, the Government may cancel or ignore the restrictive markings that are based on the asserted restrictions, and the failure of the Contractor or subcontractor to take the required action constitutes agreement with such Government action.

(iii) The Government agrees that it will continue to be bound by the asserted restriction where a notice of intent to file suit in the United States Court of Federal Claims is provided to the Contracting Officer within 90 days from the issuance of the final decision under paragraph (g)(2)(i) of this clause. The Government will no longer be bound, and the Contractor or subcontractor agrees that the Government may strike or ignore the restrictive marking that is based on the asserted restriction, if the Contractor or subcontractor fails to file its suit within 1 year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances will not permit waiting for the filing of a suit in the United States Court of Federal Claims, the Contractor or subcontractor agrees that the agency may, following notice to the Contractor or subcontractor, authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its asserted restrictions are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(iv) The Government agrees that it will be bound by the asserted restrictions where an appeal or suit is filed pursuant to the Contract Disputes

statute until final disposition by an agency Board of Contract Appeals or the United States Court of Federal Claims. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, following notice to the Contractor that urgent or compelling circumstances will not permit awaiting the decision by such Board of Contract Appeals or the United States Court of Federal Claims, the Contractor or subcontractor agrees that the agency may authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its asserted restrictions are ultimately upheld or to pursue other relief, if any, as may be provided by law.

* * * * *

(i) *Duration of right to challenge.*

(1) The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by the Contractor or subcontractor. During the period within 6 years of final payment on a contract or within 6 years of delivery of the technical data to the Government, whichever is later, the Contracting Officer may review and make a written determination to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure, or use of technical data at any time if such technical data—

(i) Are publicly available;

(ii) Have been furnished to the United States without restriction;

(iii) Have been otherwise made available without restriction; or

(iv) Are the subject of a fraudulently asserted use or release restriction.

(2) Only the Contracting Officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes ''validation'' as addressed in 10 U.S.C. 3785(c).

* * * * *

[FR Doc. 2024–08438 Filed 4–24–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 260

[Docket No. 240412–0106]

RIN 0648–BH37

Inspection and Certification of Establishments, Fishery Products, and Other Marine Ingredients

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

ACTION: Proposed rule; request for comments.

SUMMARY: The NMFS Office of International Affairs, Trade, and Commerce proposes to revise its current implementing regulations to improve the uniformity and reliability of seafood inspection services by adopting recognized best practices for inspection. NMFS has not significantly revised or updated the existing regulations since first issuing them in 1971, though it has modified many operating procedures since implementation of the current regulations. NMFS anticipates that these revisions will benefit the seafood industry by streamlining seafood inspection services and providing improved, more accurate inspection results, as described below.

DATES: Written comments must be received by May 28, 2024.

ADDRESSES: Written comments on this action, identified by NOAA–NMFS–2024–0022, may be submitted by either of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to *http://www.regulations.gov/document/NOAA-NMFS-240412-0106,* click the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Steven Wilson, Chief, Seafood Inspection Program, Office of International Affairs, Trade, and Commerce, 1315 East-West Highway, Silver Spring, MD 20910. All comments received are a part of the public record and will generally be posted to *https://www.regulations.gov* without change. All personal identifying information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Enter N/A in the required fields if you wish to remain anonymous. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (PDF) formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to the NMFS Office of International Affairs, Trade, and Commerce and by email to: *OIRA_Submission@omb.eop.gov* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Steven Wilson, Chief, Seafood Inspection Program, by email at *Steven.Wilson@noaa.gov* or by phone at 301–427–8312.

SUPPLEMENTARY INFORMATION:

Background

Under the authority of the Agricultural Marketing Act (AMA) of 1946 (7 U.S.C. 1621 *et seq.*), and in accordance with the Reorganization Plan Number 4 of 1970 (84 Stat. 2090), NOAA administers a voluntary Seafood Inspection Program (SIP or Program) which offers inspection and grading services for seafood and other marine products, as well as audit and consultative services to domestic and international processors, importers, and international competent food safety authorities. SIP also authorizes the use of certain marks and shields to processors meeting specific safety, quality, and other program requirements. The existing regulations codified at 50 CFR part 260 have not been significantly revised or updated since NMFS first issued them in 1971, 36 FR 21037 (November 3, 1971), and currently do not reflect the changes in industry practices or the expanding role of SIP since that time. On October 15, 2019, NMFS issued an advance notice of proposed rulemaking (ANPR) requesting input from stakeholders and interested parties on focused areas of the Seafood Inspection Program regulations. Based on the eight public comments received and NMFS' overall assessment of the current program, NMFS proposes these comprehensive updates to the existing regulations. NMFS looks forward to receiving comments on the updates and modernizations proposed here.

The revisions proposed herein incorporate the significant changes and updates that SIP has already made and those that it still needs to implement to simplify its administrative, inspection, and certification procedures. These changes and updates will lead to

increased uniformity of and efficiencies associated with inspections, while retaining the reliability and validity of inspection results. In an effort to minimize costs, streamline operations, and enable updates in a cost-effective and timely fashion, SIP is proposing to remove certain provisions from 50 CFR part 260 and place them in the NMFS Fishery Products Inspection Manual (SIP Manual), which can be found online at *https://www.fisheries.noaa.gov/national/seafood-commerce-certification/seafood-inspection-manual.* The proposed rule does not change the way SIP currently operates but removes outdated regulatory text, adds relevant text to incorporate current practices, and moves certain provisions to the SIP Manual so that the regulations would both more accurately reflect current industry practices and allow for adaptation to potential changes in technologies and product requirements. NMFS anticipates that these revisions will benefit the seafood industry by clarifying and simplifying the procedures for obtaining seafood inspection services and providing improved, more accurate and consistent inspection results, as compared with the current published regulations. Table 1 below summarizes the proposed rule's impacts on section number and title changes, as well as identifying provisions that would be deleted from the regulations.

1. Modernize Definitions and Administrative Procedures

With respect to administrative procedures, NMFS proposes to remove specific provisions that are no longer in use, such as the option to request inspection service via telegraph, from the regulatory text. The requirement to request inspection services would be retained, while the specific, detailed procedures for requesting such service would be moved from the regulatory text to the online SIP Manual, where they can more readily be updated and modified as new technologies and procedures are implemented. Putting these strictly procedural matters in the online manual would make implementing cost-neutral and cost-saving procedural changes more timely and efficient for both government and industry.

Definitions

The proposed rule would update definitions in § 260.6 (proposed § 260.2) to reflect the current use and meaning of certain terms used throughout part 260 and in general use in industry. Terms such as ''Approved Establishment,'' ''Fish,'' ''Fishery Product,'' ''Marine Ingredient,'' ''NMFS Fishery Products Inspection Manual (SIP Manual),'' ''Processing,'' and ''Product'' would be added to align with current SIP policies and procedures, as well as current U.S. Standards for Grades (50 CFR part 261), Food and Drug Administration (FDA) Hazard Analysis and Critical Control Point (HACCP) regulations (21 CFR part 123), and Good Manufacturing Practices (GMPs) (21 CFR part 117). Other terms, such as ''Deviant,'' ''Deviation,'' and ''Plant'' would be removed because they are either no longer commonly used in the context of seafood inspection or are more accurately defined in other terms. In general, only terms that pertain specifically to the regulations in this part are defined therein.

Inspection Service and Appeal Inspection

The existing regulations at §§ 260.12–260.41 are out of date and inconsistent with current procedures for requesting inspection services, performance of inspections and product grading activities, issuance of certificates, and appeal of inspection results. The proposed regulations reflect the now-common use of the internet and the online Seafood Inspection Services Portal (online portal) system for requesting SIP inspection services, as well as the use of electronic documents (*e.g.,* inspection certificates), which the current regulations do not address. The online portal, first deployed in 2008 for inspection services requests and issuance of certificates and reports, enables SIP staff to address the needs of industry in a more timely and consistent manner. Tracking service requests through the online portal system also enables SIP management to better allocate resources to meet the needs of its customers. Public comment on the ANPR supported the increased use of the online portal for requesting all inspection services and continued electronic transfer of records. In addition to the increases in efficiency, the use of the online portal for the generation of official inspection certificates, whether printed on water-marked paper or delivered electronically, has reduced government costs by eliminating the need to print and secure the old carbon-copy controlled certificate books, whereby each inspector or office had to secure a log and retain a copy of each certificate type issued.

While the proposed regulations would still allow for inspection services to be requested by fax, the move to the online portal system reduces the cost to seafood businesses by allowing computer access to all services in one account, storing information, reducing the amount of time required to make a request, and eliminating the need to have a separate fax machine, which many smaller businesses do not otherwise use or need. The proposed rule would consolidate the current sections associated with applying for service (§§ 260.14–260.17) into a new § 260.6, with language updated to reflect the current practice of applying for inspection services through the online portal system per the instructions in the SIP Manual, found in part 1, chapter 12. The regulatory language in § 260.21(b)(1–5) (proposed § 260.10(b)(1–4)) would be updated to reflect the current product inspection grade and compliance assessment practices. SIP's intent is to consolidate and harmonize the current U.S. Grade Standards outside of this rulemaking action, and to keep current product inspection and quality assessment procedures detailed in the SIP Manual. This shift will allow SIP to keep current with changes and improvements in inspection techniques, as well as any changes to finished product specifications and the approval process of buyer and customer specifications.

NMFS proposes removing § 260.23, Postponement of Inspection Service, from regulatory text, and placing this procedure in the SIP Manual, part 1, chapter 12. This specific activity is strictly procedural in nature and does not need to be regulated in part 260.

The proposed rule would modify the existing provisions for requesting and performing appeal inspections found in §§ 260.36–260.41 by removing the procedures to file the request for appeal (§ 260.36; proposed § 260.19) and the mechanics of numbering and dating the appeal inspection certificates (§ 260.41; proposed § 260.23) from part 260 and placing them in the SIP Manual, part 1, chapter 14. NMFS proposes to leave the remainder of the appeal process in regulatory text and add provisions for appeals of audits and other services (the current regulations only address appeal of fishery product inspections) to ensure that all customers get equitable and consistent treatment, regardless of their level of participation in SIP. For example, a person requesting one lot inspection would have the same right to appeal as a company with multiple facilities and vessels participating in SIP as an Approved Establishment.

Fees and Charges

NMFS proposes to consolidate the current subgroup Fees and Charges (§§ 260.69—260.81) into a new § 260.30,

Inspection Fees, Payment Guarantees, Charges and Payments, and remove the details of individual fees and charges from regulatory text. The current fees for all SIP services are available in the SIP Manual, part 1, chapter 13 and on the SIP website at *https://www.fisheries.noaa.gov/national/seafood-commerce-trade/inspection-and-analytical-services-fees.* Putting the specific fees and charges in the SIP Manual, rather than in the regulatory text, would allow for annual updates and any modifications to the fee structure to be accurately reflected in a timely manner without additional rulemaking. SIP would continue to provide notice of fee updates and modifications to the fee structure in the **Federal Register** consistent with existing §§ 260.70 and 260.81.

In response to the ANPR, one commenter suggested that travel costs be the same for all participants in SIP and not based on their contract/non-contract type or level of participation. The commenter also suggested that HACCP contract rates have become too high for many small businesses and that when a participant regularly demonstrates compliance and minimal deficiencies in an audit, the frequency of HACCP audits should be reduced to twice yearly. Another comment suggested that with the online portal system, where most certificate information is filled out online by the requestor instead of SIP staff, the cost of certificates should be reduced, while another commenter suggested that the fees charged for scoresheets and duplicate certificates should be re-evaluated. NMFS also received one comment suggesting that SIP clarify its billing processes and activity time charges and make them consistent across the regions and offices. The same commenter expressed concern that any changes made to sampling plans not increase the cost of inspection.

While there may be an incremental cost increase for small entities choosing to participate in the activities of SIP, all of the fees assessed by SIP are analyzed and updated regularly and are set in such a way as to offset the costs of the program while not generating a profit per the Financial Policy outlined in the SIP Manual in part 1, chapter 13. This includes certificate fees, whether or not issued through the online portal. All travel costs incurred with inspection services, including mileage, transportation, travel time, and lodging and per diem when required, are billed to the requestor. Lodging, per diem, and the personal vehicle mileage rate are set annually by the U.S. General Services Administration (GSA) and are applied equally to all users, so any disparity in these charges between regions can be attributed to cost variations in different parts of the country. Billing for travel-related costs is detailed in the SIP Manual, part 4, chapter 18, and in part 1, chapter 14. Any changes proposed to sampling plans resulting from this proposed rule are expected to have a positive impact on associated costs and will be detailed in the SIP Manual, part 4, chapter 19. These positive impacts could include using smaller sample sizes and less destructive sampling, which would decrease both the cost of the samples themselves as well as the time required for sampling and inspecting said samples. The frequency of HACCP and surveillance audits is established and detailed in the SIP Manual in part 3, chapters 11 and 12 and appendix 1. Audit frequency may be increased or tightened based on the results of an audit as determined by the Regional Inspection Branch. NMFS has set the minimum audit frequency at levels appropriate to ensure that federal regulations and Program requirements are being met.

Policies and Procedures

The proposed rule would update the current § 260.84, Policies and procedures (see proposed § 260.34), to reflect that NOAA no longer publishes a hard-copy inspection manual, formerly known as NOAA Handbook 25. All SIP policies and procedures are now contained in the SIP Manual, which is publicly available online at *https://www.fisheries.noaa.gov/national/seafood-commerce-certification/seafood-inspection-manual.* The SIP Manual moved to the online format over a decade ago to allow for updates and corrections in real time. The online version is always current and available to inspection staff, program participants, and the general public at all times and in any location with internet access. Any update to a policy or procedure can be uploaded to the SIP Manual and broadcast to all users within hours. The move to the online format also saves the government money by eliminating the costs of printing and postage, as well as eliminating the need for inspectors to spend time each quarter manually removing old pages and adding new pages to the hard-copy handbook.

NMFS is proposing to remove the section on Political Activity (currently § 260.88), since it is now specifically governed through the Hatch Act, as amended (see 5 U.S.C. 7321–7326), and its inclusion in the updated SIP regulations is redundant.

A few minor updates are proposed to § 260.93, Debarment and suspension (proposed § 260.39), to reflect the use of more modern terms (*i.e.,* ''Grade A Equivalent'' and ''processing establishment'' instead of ''plant''). In addition, the requirement to file five copies of all documents would be removed from § 260.93(h)(1), as that practice is no longer necessary. Any documents filed today are likely to be converted to electronic format, if not submitted electronically.

Approved Establishments

Under the proposed rule, the provisions regarding Approved Establishments would be moved and updated. Requirements for Plants Operating Under Continuous Inspection on a Contract Basis, currently §§ 260.96–260.104, would be renumbered §§ 260.31–260.33 and retitled Requirements for Approved Establishments for purposes of clarity and to reflect current practices. In this proposed format, the requirements for becoming an Approved Establishment are set out prior to specifying the benefits of being an Approved Establishment, such as the ability to use marks and official statements on seafood products, providing a more logical flow for these provisions. Section 260.96, Application for fishery products inspection service on a contract basis at official establishments, would be re-titled Application for SIP Approved Establishment and re-numbered as § 260.31. The requirement to submit an application to SIP for inspection services would remain in the part 260 regulations, but the specific details of the application procedures would be placed into the SIP Manual, part 3, chapter 5. This movement aligns directly with the Agency's goal of keeping the operational requirements and procedures of SIP up to date as technologies and methods of communication change, as well as staying current with industry practices.

Sections 260.97(a) and § 260.97(b) would be modified to reflect that the requirements for receiving inspection services at establishments are based on an establishment's good standing, which is assessed by the Agency through the combination of systems, process and product auditing and inspection activities. Approved Establishments are included in a list published on the Program's website and periodically in hard copy. Inclusion on this list is contingent upon the firm's continued adherence to the Program requirements, which are addressed in detail in the SIP Manual at part 3. They also include FDA and U.S. Department of Commerce (USDC) regulations governing the construction and maintenance of

facilities and equipment, processing techniques, and employee practices, all of which are verified by on-site facility and product audits. The provisions in § 260.97(b) would be retained in proposed § 260.32(c). Sub-sections 260.97(c)(3–6) and (14) regarding the use of labels and other NOAA marks would be addressed in the proposed §§ 260.35 and 260.36. Sub-sections 260.97(c)(1–2), regarding raw materials and lot identification, and 260.97(c)(8–10), regarding office and lab space and laundry service, would be moved to § 260.32(d)(1–4). The procedures currently at § 260.97(c)(7), (12–13), and (15–16) detailing furnishing NOAA with reports, product specifications, label proofs, and other insignia, would also be removed entirely from the regulations in this part and placed in the SIP Manual, parts 3 and 4. Again, this move from regulatory text to the SIP Manual is an effort to align with the Agency's goal of being able to adapt to changes in policies and industry practices in real time. Section 260.97(c)(11) would be removed completely from the rule since the practice of having contracting parties provide clerical and stenographic assistance to the Agency is obsolete.

For purposes of clarity, § 260.97(c)(17) (proposed § 260.32(d)(5)) would be re-worded to cover all inspection services, and § 260.97(d), Termination of Inspection Services, would be moved to § 260.32(f). Current section 260.97(d)(1)(iii) would be separated into two sub-items: § 260.32(f)(1)(iii) would detail how service may be terminated due to failure of the contracting party to meet financial obligations and § 260.32(f)(1)(iv) would detail how service may be terminated due to failure of the contracting party to meet statutory or regulatory requirements, including the provisions of the regulations in this part.

With one exception, §§ 260.98–260.104 would be condensed into one new § 260.33, Compliance with Statutory and Regulatory Requirements, which would read: ''Approved Establishments shall comply with all statutory and regulatory requirements and provisions pertaining to the production of fish and fishery products and other marine ingredients for human or animal consumption.'' This provision would underscore that participation as an Approved Establishment does not exempt an establishment from any statutory or regulatory requirements. The audit criteria for Approved Establishments detailed in the SIP Manual, part 3, encompasses all of the requirements previously covered in regulatory text in these sections regarding premises, buildings and structures, facilities, lavatory accommodations, equipment, effective sanitation programs, and personnel. The Agency is not adopting by reference other agencies' regulations as part of this rulemaking, specifically FDA HACCP regulations (21 CFR part 123) and GMPs (21 CFR part 117), which already cover the requirements for premises, sanitation programs, and personnel.

The current § 260.103(f) detailing the authority of NMFS to reject product and retain equipment would be relocated to § 260.32(e). This move aligns with NMFS' goal of streamlining the regulatory text and consolidating the requirements for Approved Establishments but in no way diminishes the authority of NMFS to identify, isolate, and hold any product that has been deemed mislabeled or unwholesome or any equipment that has been deemed unsanitary or likely to contaminate processed product in any way. Any product or equipment that has been placed on such hold and identified with the word ''RETAINED'' may not be used or disposed of until inspection or testing has been completed and the NMFS inspector has removed the ''RETAINED'' identification.

2. Modernize Sampling Plan and Lot Compliance Determination Procedures

NMFS proposes several adjustments to the current section ''Licensing of Samplers and Inspectors'' (§§ 260.47–260.51). The text currently at § 260.48 regarding the application to become a licensed sampler would be removed. The Agency no longer requires formal application for a person to become a licensed sampler, though the person's qualifications must still meet the standards outlined in the SIP Manual, part 1, chapter 6, and be approved by an authorized employee of the Agency. The current sections on Licensed Sampler (§ 260.47) and Inspectors (§ 260.49) would be reversed in order and renumbered as § 260.24–25. The intent of this renumbering is to emphasize the role of inspectors, NOAA employees who are qualified to perform the full catalog of inspection services, over the role of licensed samplers, who are only authorized to pull samples.

Sampling

The changes proposed to the section Sampling, currently under §§ 260.57–260.63 (proposed §§ 260.28–29), are intended to make sampling less restrictive and more flexible for both industry and government. The opportunity and flexibility to use different sampling plans for lot inspections is detailed in the SIP Manual in part 4, chapter 19, and for grading standards in part 5, chapter 5. The use of more flexible sampling plans is expected to reduce the amount of destructive sampling and the time and costs associated with the act of sampling itself and increase the reliability of the results based on the samples used. Since 1966, when the current sampling plan (§ 260.61) was established, many improvements have been made by both industry and government in terms of sampling and lot compliance determination. NMFS has determined that using a static sample size of six and acceptance number of zero, regardless of the lot size, will both simplify the sampling procedures and maintain the statistical validity of the inspection results. With the current sampling plans, the sample size can range from 3 to over 72 sample units and often involves destruction of the product and packaging. Having a uniform sample size of six would reduce the time needed to select samples in most cases and minimize the destruction and loss of product due to sampling. Determining lot compliance would also be easier, since the assessment of the lowest performing sample unit would apply to the entire lot with an acceptance number of zero. This would mean the lot must have zero non-conforming sample units to be accepted. In other words, if one sample unit does not meet the inspection requirements, the entire lot is rendered non-conforming. Removing the specific sampling procedures and sampling plans from the regulatory text in this part and placing them in the SIP Manual aligns with the Agency's goal of being more adaptable to changes in industry practice and applying new techniques as they become available. It would also allow SIP to keep up to date with the Codex Alimentarius (CODEX) and other internationally agreed upon standards as they are improved and updated without requiring new regulatory action. When finished product inspection is required, a SIP inspector would follow the Sampling Procedures and Sampling Plans set forth in the SIP Manual, part 4, chapters 12 and 19.

The following requirements related to lot identification and sampling are unchanged in the rulemaking updates proposed here (§ 260.60–61; proposed § 260.28–29): all product must be readily identifiable and accessible for sufficient sampling; officially drawn samples shall be marked by the Agency representative so they can be properly identified for inspection; a certificate of sampling shall be prepared and signed

by the inspector or licensed sampler; any lot not readily identifiable shall be marked by the Agency representative in a manner prescribed by the Agency; and any samples that require shipment to an Inspection Office shall be shipped in a manner to avoid, if possible, any material change in the quality or condition of the fish or fishery product or other marine ingredient. All costs associated with furnishing samples for inspection and shipments shall be at the expense of the applicant.

NMFS proposes to remove from regulatory text the single and multiple sampling plans and procedures for determining lot compliance, currently found in § 260.61, and adopt internationally recognized standards and specifications for sampling practices, sample sizes, and lot compliance determinations. These standards and specifications would continue to be housed and detailed in the SIP Manual, part 4, chapter 12 and 19 for lot inspections and in part 5, chapter 5 for grading standards rather than in regulatory text. One comment received on the ANPR suggested that NMFS consult with the National Institute for Standards and Technology (NIST) to ensure that any modified sampling plans align with their procedures and provide uniformity between states' and SIP's inspection results regarding net weight compliance. The commenter also suggested that NMFS use information from the research of the CODEX Committee on Methods of Analysis and Sampling (CCMAS) as a benchmark to align SIP's sample size and lot compliance procedures with other globally accepted methods. NMFS works closely with NIST, agrees with the goal of alignment with other globally accepted procedures, and seeks additional comment specifically on modifications to sampling plans, sample sizes, and lot compliance determination, as found in the SIP Manual, part 4, chapter 19.

3. Modernize Use of Inspection and Certification Marks

The section on marks and official statements (§ 260.86; proposed § 260.35) would be updated to reflect the changes associated with the development of Approved Establishments and their associated marks and statements. Products may bear a mark showing they were processed in an approved facility and/or a mark showing that they meet applicable SIP-approved specifications or inspections as prescribed in part 3, chapter 16, and part 4, chapter 10, of the SIP Manual. The ''USDC Lot Inspected Shield'' would be removed, as it is antiquated and no longer in use. Proposed § 260.36 would be added to clearly identify the terms for revocation of approval to use inspection marks and statements. The outdated mention of any marks referencing the U.S. Department of the Interior would be removed.

One public comment suggested using a special mark to identify product sourced sustainably, such as aquaculture grown in a safe and sustainable manner, stating that certification standards reflecting more sustainable practices would be recognized by consumers and help influence industry guidelines to reflect more sustainable practices. NMFS fully supports sustainability in all aspects of fisheries, but the Agricultural Marketing Act of 1946 only authorizes NMFS to certify the quality, quantity, and condition of products. Sustainability claims are out of the scope and authority of SIP at this time. One commenter suggested that NMFS survey current program users to see what value SIP marks still have, if any, given the numerous third-party program available today, and then develop and implement a new communication effort to improve the understanding among consumers of what the marks actually signify. SIP marks continue to be sought-after by industry participants, and the agency publicizes the value of SIP-inspected products as resources permit.

Another commenter added that the value of existing labeling would be increased if it was simplified and made clearer to consumers and included an assessment of the facility(ies) involved. While NMFS appreciates the suggestions for making SIP marks more effective and recognizable to the consumer, we believe the Approved Establishment marks and statements already convey such an assessment. In order to qualify to bear these marks, a facility must comply with all the requirements spelled out in the SIP Manual, part 3, regarding approved establishments and maintain a level of compliance assessed through regular auditing.

4. Extension of Services to Product Forms Beyond Those for Human Consumption

The proposed rule expands the scope of service to include certain foods for animal consumption such as fishmeal, fish bone meal, fish for bait and some types of pet food for cats and dogs, but it does not include products such as food for aquarium fish. This proposed expansion also covers other products of marine origin, such as seaweed, kelp, algae, fish-based fertilizers, and other fishery by-products whether or not intended for human consumption. The expansion of SIP to non-consumer and other marine products is an expansion of opportunity and markets and helps to facilitate trade for U.S. businesses. By including non-human-consumption fish and fishery products and other marine ingredients to the program, U.S. businesses are better able to compete with industry members from other countries in providing these valuable resources to the worldwide marketplace. Some countries, such as China and the Republic of Korea, already require both physical product inspection and participation in SIP in order to export fish and fishery products to those countries, including items such as fish meal and fishery by-products. At the request of industry, SIP has been providing these services for several years, so there is little to no cost increase to the Agency or industry to include these products through this proposed rule. Specifically, adding inspection and certification services for non-food, by-products, and other marine ingredients in the revised SIP regulations would enable SIP to provide services to businesses trading in marine products that traditionally the FDA and the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) do not provide. While NMFS does propose to expand inspection and certification services to include fish food for aquaculture operations, the Agency does not propose to expand services to pet foods, such as fish food for aquarium fish, or to ornamental/brood stock/research animals, as these products fall under the regulatory authority of the USDA Animal and Plant Health Inspection Service (APHIS).

The fish oil market is growing at 5.8 percent annually and is expected to reach $3.34 billion by 2030 (Reports and Data, February 2023). To facilitate trade with foreign nations, U.S. suppliers must effectively identify the sourcing history of their products, which could be satisfied if NMFS continued and expanded its support for the trade and certification of fishery by-products, including fish oils. Multiple commenters supported and encouraged the efforts of SIP to provide certification services for inedible fishery products, including aquatic fish food, the latter of which the Agency lacks the authority to inspect.

5. Modernize U.S. Grade Standards

In the ANPR (84 FR 55130, October 15, 2019), NMFS also requested comment on the modernization of the U.S. Grade Standards found in 50 CFR part 261. Comments from industry

members generally support the maintenance of U.S. Grade Standards in the SIP Manual, currently in part 5, and encourage the development of simplified grading documentation and harmonizing of the grading standards across regions, stakeholders, and products. Based on comments received and NMFS' internal review, the Agency has decided not to update the U.S. Grade Standards as part of this proposed rulemaking but may address changes to 50 CFR part 261 in future rulemaking. Currently, NMFS intends to reduce the existing grade standards down to seven or eight consolidated U.S. Standards for fishery products and to adopt a uniform sample size of six with zero non-conformities for lot acceptance. This means that for all lot sizes, six sample units would be selected for inspection, and each sample unit must meet the regulatory or quality criteria for the lot to be accepted.

The changes proposed to ''Basis of inspection, grade, and compliance assessment'' currently at § 260.21 (proposed § 260.10) would enable SIP to perform finished product inspections based on specifications and procedures found in the SIP Manual, parts 4 and 5, and compliance would be determined according to the inspection and assessment procedures outlined in the SIP Manual in parts 4 and 5.

General public comments on the ANPR also included a request for NMFS to continue its outreach to program participants, including hosting webinars and public meetings where industry could provide more input on the efforts to modernize the SIP. NMFS encourages and actively seeks public comment on all of the modernization efforts proposed here. Any public meetings and/or webinars will be posted on our website and announced through the current communication channels to all program participants and interested industry members. See table 1 below for details of all the proposed section number and title changes.

TABLE 1—PROPOSED RE-ORDERING OF PART 260

PART 260—INSPECTION AND CERTIFICATION

Current Subpart A—Inspection and Certification of Establishments and Fishery Products for Human Consumption

Proposed Subpart A—Inspection and Certification of Establishments, Fishery Products, and Other Marine Ingredients

Current section	Current section title	Proposed section	Proposed section title
260.1	Administration of regulations.	260.1	Administration of regulations.
Definitions 260.6–260.7		Definitions 260.2–260.3	
260.6	Terms defined.	260.2	Terms defined.
260.7	Designation of official certificates, memoranda, marks, other identifications, and devices for purposes of the Agricultural Marketing Act.	260.3	Designation and use of official certificates, memoranda, marks, other identifications, and devices for purposes of the Agricultural Marketing Act.
Inspection Service 260.12–260.30		Inspection Service 260.4–260.18	
260.12	Where inspection service is offered.	260.4	Where inspection service is offered.
260.13	Who may obtain inspection service.	260.5	Who may obtain inspection service.
260.14	How to make application.	260.6	Application for inspection service.
260.15	Information required in connection with application.		Deleted.
260.16	Filing of application		Deleted.
260.17	Record of filing time.		Deleted.
260.18	When application may be rejected.	260.7	Rejection of application for inspection service.
260.19	When application may be withdrawn.	260.8	Withdrawal of an application for inspection service.
260.20	Disposition of inspected sample.	260.9	Disposition of inspected samples.
260.21	Basis of inspection and grade or compliance determination.	260.10	Basis of inspection grade and compliance assessment.
260.22	Order of inspection service.	260.11	Order of inspection service.
260.23	Postponing inspection service		Deleted.
260.24	Financial interest of inspector.	260.12	Financial interest of inspector.
260.25	Forms of certificates.	260.13	Official forms for inspection services.
260.26	Issuance of certificates.	260.14	Issuance of certificates.
260.27	Issuance of corrected certificates.	260.15	Issuance of corrected certificates.
260.28	Issuance of an inspection report in lieu of an inspection certificate.	260.16	Issuance of an inspection report in lieu of an inspection certificate.
260.29	Disposition of inspection certificates.	260.17	Retention and provision of inspection certificates.
260.30	Report of inspection results prior to issuance of formal report.	260.18	Report of inspection results prior to issuance of formal report.
Appeal Inspection 260.36–260.41		Appeal Service 260.19–260.23	
260.36	When appeal inspection may be requested.	260.19	Requesting an appeal.
260.37	Where to file for an appeal inspection and information required.		Deleted.
260.38	When an application for an appeal inspection may be withdrawn.	260.20	Withdrawing an appeal application.
260.39	When appeal inspection may be refused.	260.21	Declining an appeal application.
260.40	Who shall perform appeal inspection.	260.22	Appeal inspector selection protocol.
260.41	Appeal inspection certificate.	260.23	Appeal documentation.
Licensing of Samplers and Inspectors 260.47–260.51		Licensing of Inspectors and Samplers 260.24–260.27	
260.47	Who may become licensed sampler.	260.25	Licensed sampler.
260.48	Application to become a licensed sampler.		Deleted.
260.49	Inspectors.	260.24	Inspectors.
260.50	Suspension or revocation of license of licensed sampler or licensed inspector.	260.26	Suspension or revocation of license of licensed inspector or licensed sampler.
260.51	Surrender of license.	260.27	Surrender of license.

TABLE 1—PROPOSED RE-ORDERING OF PART 260—Continued

PART 260—INSPECTION AND CERTIFICATION

Current Subpart A—Inspection and Certification of Establishments and Fishery Products for Human Consumption

Proposed Subpart A—Inspection and Certification of Establishments, Fishery Products, and Other Marine Ingredients

Current section	Current section title	Proposed section	Proposed section title
Sampling 260.57–260.63		Sampling 260.28–260.29	
260.57	How samples are drawn by inspectors or licensed samplers.		Deleted.
260.58	Accessibility for sampling.		Deleted.
260.59	How officially drawn samples are to be identified.		Deleted.
260.60	How samples are to be shipped.	260.29	Shipment of samples.
260.61	Sampling plans and procedures for determining lot compliance.	260.28	Sampling plans and procedures.
260.62	Issuance of certificate of sampling.		Deleted.
260.63	Identification of lots sampled.		Deleted.
Fees and Charges 260.69–260.81		Fees and Charges 260.30	
260.69	Payment fees and charges.	260.30	Inspection fees, payment guarantees, charges and payments.
260.70	Schedule of fees.		Deleted.
260.71	*[Reserved]*		Deleted.
260.72	Fees for inspection service performed under cooperative agreement.		Deleted.
260.73	Disposition of fees for inspections made under cooperative agreement.		Deleted.
260.74	Fee for appeal inspection.		Deleted.
260.76	*[Reserved]*		Deleted.
260.77	Fees for score sheets.		Deleted.
260.78	Fees for additional copies of inspection certificates.		Deleted.
260.79	Travel and other expenses.		Deleted.
260.80	Charges for inspection service on a contract basis.		Deleted.
260.81	Readjustment and increase in hourly rates of fees.		Deleted.
Miscellaneous 260.84–260.93		Miscellaneous 260.34–260.39	
260.84	Policies and procedures.	260.34	Policies and procedures.
260.86	Approved identification.	260.35	Approved marks, shields, stamps and official statements.
		260.36	Revocation of approval to use inspection marks and statements.
260.88	Political activity.		Deleted.
260.90	Compliance with other laws.	260.37	Compliance with other laws.
260.91	Identification.	260.38	Identification.
260.93	Debarment and suspension.	260.39	Debarment and suspension.
Requirements for Plants Operating Under Continuous Inspection on a Contract Basis 260.96–260.104		Requirements for Approved Establishments 260.31–260.33	
260.96	Application for fishery products inspection service on a contract basis at official establishments.	260.31	Application for SIP Approved Establishment.
260.97	Conditions for providing fishery products inspection service at official establishments.	260.32	Requirements for the provision of inspection services for Approved Establishments.
260.98	Premises.		Deleted.
260.99	Buildings and structures.		Deleted.
260.100	Facilities.		Deleted.
260.101	Lavatory accommodations.		Deleted.
260.102	Equipment.		Deleted.
260.103	Operations and operating procedures shall be in accordance with an effective sanitation program.	260.33	Compliance with statutory and regulatory requirements.
260.104	Personnel		Deleted.
Labeling Requirements 260.200		Deleted	
260.200–260.201	*[Reserved]*		Deleted.

Classification

This proposed rule is published under the authority of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*). The NMFS Assistant Administrator has determined that this proposed action is consistent with the provisions of this and other applicable laws, subject to further consideration after public comment.

Executive Order 12866

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866.

Regulatory Flexibility Act

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. A description of the factual basis for this determination follows.

The regulatory action being considered is described in the preamble of this proposed rule and includes updates, deletions, and additions to the regulations currently found at 50 CFR part 260. The proposed action reflects the significant changes and updates SIP

has already made to simplify its administrative, inspection, and certification procedures, which will result in increased uniformity of inspection results and efficiencies associated with inspection effort, while retaining the reliability and validity of inspection results, detailed in the above sections. Many of the changes proposed here are not actual changes to the way SIP currently operates, but merely a removal of outdated regulatory text, so the regulations both more accurately reflect current Program and industry practices and remain adaptable to potential future changes in technologies and product requirements.

Even though SIP operates as a fee-for-service program, it must adhere to the regulatory authority of the FDA under which all seafood processors in the United States operate, regardless of their status or participation in SIP. The proposed rule clarifies the authority SIP has to provide services for fishery products, regardless of intended end-use, and allows SIP the flexibility to keep its policies and operational procedures current with both industry practices and international standards by housing the day-to-day operational details in the online SIP Manual versus in regulatory text.

The entities affected by this rulemaking include all seafood harvesters, processors, brokers, importers, exporters, storage facilities, and other entities who utilize the fee-based services provided by the SIP. This group includes both businesses that choose to contract with the Agency for certain services and those who wish to export seafood products that require certification that only SIP can provide. SIP services both domestic and foreign businesses. Per the RFA's definition of small business and regulations issued by the SBA, impacts on "a business entity organized for profit, with a place of business located in the United States, and which operates primarily with the United States or which makes a significant contribution to the U.S. economy though payment of taxes or use of American products, material or labor" will be analyzed below.

Small entities include "small businesses," "small organizations," and "small governmental jurisdictions." The SBA has established size standards for all major industry sectors using the North American Industry Classification System (NAICS). Size thresholds can be based on either a company's number of employees or its sales, depending on SBA's criteria for that industry. On December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for RFA compliance purposes only (80 FR 81194). The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. NAICS 114111, 114112, and 114119 sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. Id. at 81194.

Based on the list of SIP businesses requesting services in 2021, 64 NAICS industries were identified. This analysis applies those SBA/NMFS small business definitions to the 64 6-digit NAICS industries. For the purposes of this analysis, it is assumed that the choice to participate in SIP is not correlated with business size, and thus the estimated number of small entities is the fraction of that NAICS industry that is considered small multiplied by the number of entities in that industry participating in SIP. The total number of entities that are small for NAICS with employment-based small entity definitions is calculated using the 2021 Statistics of U.S. Businesses (SUSB) by detailed employment size (U.S. Census Bureau 2023). In some cases, the small business threshold is somewhere in the middle of a SUSB bracket, in which case an adjustment is necessary. Assuming that firms are uniformly distributed within an employment size bracket, the number of small firms from the sub-divided bracket is estimated based on the proportion of the bracket below the threshold. For example, if the small business threshold is 125 employees and SUSB reports 40 businesses in the 100–149 employee bracket, it is assumed that 20 of the businesses are small because half of the bracket is below the 125-employee threshold. However, if the small business threshold is in the top bracket (*e.g.* a threshold of 750 employees with a top bracket of 500+ employees), then a conservative estimate is made that all the affected entities are small. The percentage of businesses that are small for NAICS with revenue-based small business definitions is calculated using the 2017 SUSB by revenue,[1] with revenues inflated to 2022 dollars using the Consumer Price Index Inflator. The same proportional rules are applied here when the threshold lies somewhere in the data bracket.

A complete list of the NAICS codes, NAICS descriptions, the corresponding SBA size standard thresholds, total entities and the number of entities determined to be small entities affected by this rule is provided in table 2.

TABLE 2—NAICS CODES, SMALL BUSINESS THRESHOLDS AND ENTITY TOTALS

NAICS Code	NAICS description	Small business threshold	Total entities by NAICS	Estimated small entities
11411	Commercial Fishing Industry	11 million	18	18
112511	Finfish Farming and Fish Hatcheries	3.75 million	4	4
112519	Other Aquaculture	3.75 million	2	2
311119	Other Animal Food Manufacturing	650 employees	4	4
311412	Frozen Specialty Food Manufacturing	1250 employees	5	5
311423	Dry and Dehydrated Food Manufacturing	750 employees	2	2
311615	Poultry Processing	1250 employees	3	3
311710	Seafood Product and Preparation and Packaging	750 employees	80	78
311942	Spice and Extract Manufacturing	650 employees	1	1
311999	All Other Miscellaneous Food Manufacturing	700 employees	5	5
325311	Nitrogenous Fertilizer Manufacturing	1050 employees	1	1
325411	Medicinal and Botanical Manufacturing	1000 employees	3	3
325412	Pharmaceutical Preparation Manufacturing	1300 employees	4	4
325414	Biological Product (except Diagnostic) Manufacturing	1250 employees	1	1
325612	Polish and Other Sanitation Good Manufacturing	900 employees	1	1

[1] The 2019 and 2021 SUSB updates do not include data by revenue, so this is the most recent available.

TABLE 2—NAICS CODES, SMALL BUSINESS THRESHOLDS AND ENTITY TOTALS—Continued

NAICS Code	NAICS description	Small business threshold	Total entities by NAICS	Estimated small entities
325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing.	650 employees	2	2
333241	Food Product Machinery Manufacturing	500 employees	1	1
333998	All Other Miscellaneous General Purpose Machinery Manufacturing.	700 employees	3	3
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers.	200 employees	1	1
423740	Refrigeration Equipment and Supplies Merchant Wholesalers.	125 employees	1	1
424210	Drugs and Druggists' Sundries Merchant Wholesalers.	250 employees	3	3
424410	General Line Grocery Merchant Wholesalers	250 employees	18	17
424420	Packaged Frozen Food Merchant Wholesalers	200 employees	15	14
424440	Poultry and Poultry Product Merchant Wholesalers	150 employees	4	4
424460	Fish and Seafood Merchant Wholesalers	100 employees	233	228
424470	Meat and Meat Product Merchant Wholesalers	150 employees	10	10
424480	Fresh Fruit and Vegetable Merchant Wholesalers	100 employees	2	2
424490	Other Grocery and Related Products Merchant Wholesalers.	250 employees	16	16
424910	Farm Supplies Merchant Wholesalers	200 employees	1	1
424990	Other miscellaneous nondurable goods merchant wholesalers.	100 employees	15	15
445110	Supermarkets and Other Grocery (except Convenience) Stores Retailers.	40 million	3	3
445210	Meat Markets Retailers	500 employees	2	2
445250	Fish and Seafood Markets Retailers	9 million	11	11
445298	All Other Specialty Food Retailers	10 million	4	4
456110	Pharmacies and Drug Stores Retailers	37.5 million	1	1
456191	Food Health Supplement Stores Retailers	22.5 million	5	5
459110	Sporting Goods Stores Retailers	26.5 million	1	1
459910	Pet and Pet Supplies Stores Retailers	32 million	2	2
455219	All Other General Merchandise Stores Retailers	40 million	2	2
483111	Deep Sea Freight Transportation	1050 employees	1	1
483113	Coastal and Great Lakes Freight Transportation	800 employees	1	1
484110	General Freight Trucking, Local	34 million	1	1
488210	Support Activities for Rail Transportation	34 million	1	1
488320	Marine Cargo Handling	47 million	1	1
488510	Freight Transportation Arrangement	20 million	29	27
488999	All Other Support Activities for Transportation	25 million	2	2
493110	General Warehousing and Storage	34 million	7	5
493120	Refrigerated Warehousing and Storage	36.5 million	5	5
523160	Commodity Contracts Dealing Intermediation	47 million	1	1
523910	Miscellaneous Intermediation	47 million	1	1
523991	Trust, Fiduciary, and Custody Activities	47 million	1	1
541611	Administrative Management and General Management Consulting Services.	24.5 million	3	3
541890	Other Services Related to Advertising	19 million	1	1
541990	All Other Professional, Scientific, and Technical Services.	19.5 million	1	1
561110	Office Administrative Services	12.5 million	3	3
561499	All Other Business Support Services	21.5 million	5	5
561510	Travel Agencies	25 million	2	2
561910	Packaging and Labeling Service	19.5 million	1	1
561990	All Other Support Services	16.5 million	1	1
721199	All Other Traveler Accommodation	9 million	1	1
721214	Recreational and Vacation Camps (except Campgrounds).	9 million	1	1
722511	Full-Service Restaurants	11.5 million	15	15
813319	Other Social Advocacy Organizations	18 million	1	1
	Non-classifiable Establishments	n/a	1	1
	TOTAL		577	553

Source: U.S. Small Business Administration Table of Small Business Size Standards (Effective date January 1, 2022). Available at: *https://www.sba.gov/document/support--table-size-standards*.

Based on the information above, NMFS expects approximately 553 small entities ranging across 64 NAICS sectors would be directly affected by this rule upon implementation. As more entities participate in the services, including those expanded services proposed in the rule, the number of entities is likely to increase marginally over time.

This proposed action would not establish any new reporting,

recordkeeping, or other compliance requirements for small entities. The proposed rule would add or amend definitions, clarify the authority SIP has to provide services for fishery products (regardless of intended end-use), and allow SIP the flexibility to keep its policies and operational procedures current with both industry practices and international standards by housing the day-to-day operational details in the online SIP Manual versus in regulatory text. The actions proposed would not change the way SIP currently operates but merely remove outdated regulatory text so the regulations both more accurately reflect current industry practices and remain adaptable to potential changes in technologies and product requirements. Thus, no small business or local government would be required to undertake any additional reporting, recordkeeping, or other affirmative actions in order to comply with the proposed rule. No duplicative, overlapping, or conflicting federal rules have been identified.

Using the 2021 SUSB by detailed employment size (U.S. Census Bureau 2023) and 2017 SUSB by revenue, most of the entities affected represent less than one percent of the total number of firms in their NAICS sector. Those industries in NAICS code sectors that had five or fewer entities participating in the SIP programs were assumed to be well below one percent of the total number of firms in the sector since sectors generally contain many hundreds of entities.

Only two NAICS sectors exceeded one percent, Seafood Product Preparation and Packaging (311710) with 13.6 percent and Fish and Seafood Merchant Wholesalers (424460) with 11.2 percent. The affected small entities do not represent a large portion of their sectors, but the total number of affected small entities (78 and 228, respectively) could be considered a substantial number.

NMFS anticipates some small entities affected by the rule would likely incur some compliance cost associated with familiarizing themselves with the relocated text in the online manual. The SIP Manual was moved online over a decade ago, allowing for updates and corrections to be made in real time. The online version is routinely updated and available to inspection staff, program participants, and the general public at all times, and in any location with internet access. Based on existing participants' knowledge and current use of the online manual, NMFS anticipates small entities will likely incur 2 burden hours associated with rule, definition, and online manual familiarization associated with changes proposed in the rule. Table 3 provides the most common services and the occupation title most associated with those requesting services. Wage rates for Office Clerks (General) and Food Service Managers are from the U.S. Bureau of Labor Statistics' (BLS) Employer Costs for Employee Compensation (ECEC) historical data for May 2022 (BLS 2022a). The estimate and cost per firm is provided in table 4. The affected small businesses subject to the rule are likely to incur 2 burden hours at an average cost of $59.54 per firm, for a total of $32,925.62.

TABLE 3—SUMMARY OF ESTIMATED BURDEN HOURS AND COST FOR USERS REQUESTING COMMON SERVICES

Common services	Type of user (*e.g.,* occupational title)	Average burden (hour)	Mean hourly wage rate [1] (for type of user)	Total annual wage burden costs
§ 260.15 (prop. § 260.6) Application for Inspection Services.	Office Clerks, General (43–9061)	2.00	$19.78	$39.56
§ 260.36 (prop. § 260.19) Application for appeal	Food Service Managers (11–9051)	2.00	32.27	64.54
§ 260.96 (prop. § 260.31) Contract Completion	Food Service Managers (11–9051)	2.00	32.27	64.54
§ 260.97(c)(12), (13), and (15) (prop. § 260.32) Label and Specification Submission.	Food Service Managers (11–9051)	2.00	32.27	64.54
HACCP Participants	Food Service Managers (11–9051)	2.00	32.27	64.54
Average per Firm			29.77	59.54

[1] Source: BLS 2022.

TABLE 4—SUMMARY OF COMPLIANCE COST BY ACTIVITY

Activity	Number of affected firms	Average burden per firm (hours)	Total burden (hours)	Average cost per firm (2022$)	Total cost (2022$)
Rule Familiarization	553	0.5	276.5	$14.89	$8,231.41
Definition Familiarization	553	0.5	276.5	14.89	8,231.41
SIP Online Manual Familiarization	553	1	553	29.77	16,462.81
Total Cost for all activities				59.55	32,925.62

While NMFS does not have firm level information on profit, an annual cost of $59.55 can reasonably be assumed to be well below 1 percent of total profit for the affected entities. For the 553 small entities subject to the rule, 100 percent are expected to have cost impacts of less than 1 percent of their annual revenues. Therefore, NMFS does not expect the cost associated with the proposed rule to represent a significant impact to small entities.

NMFS believes the actions contained in this rule would not create a competitive disadvantage for small entities vis-a-vis large entities. The proposed rule, if finalized, would help ensure that all entities regardless of size get equitable and consistent treatment, regardless of their level of participation in the SIP. A person requesting one lot inspection has the same access to information and available services, as well as the equal right to an appeal inspection, as a company with multiple facilities and vessels.

While unable to quantify cost savings, NMFS assumes the overall impact of the rule to be neutral to marginally positive on profitability for all entities, is not expected to significantly reduce profits for a substantial number of small entities, and does not create a significant competitive disadvantage to small entities. While it is debatable if the number of affected small entities may qualify as ''substantial,'' the economic impact of this rule is very small. Therefore, NMFS does not expect the proposed rule, if finalized, to have a significant economic impact on a substantial number of small entities. An initial regulatory flexibility analysis is not required, and none has been prepared.

National Environmental Policy Act

Under NOAA Administrative Order (NAO 216–6A), the promulgation of regulations that are administrative, financial, legal, technical or procedural in nature are categorically excluded from the requirement to prepare an Environmental Assessment. These proposed regulations to update 50 CFR part 260 are procedural and administrative in nature, in that they merely reflect the actual operations of the SIP today. Neither fishing activity nor trade in seafood products are further restricted relative to any existing laws or regulations, either foreign or domestic. Given the procedural and administrative nature of this rulemaking, an Environmental Assessment was not prepared.

Paperwork Reduction Act

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: 0648–0266, Seafood Inspection and Certification Requirements.

List of Subjects in 50 CFR Part 260

Inspection, Inspection Services, Certification, Approved Establishment, Sampling, Imports, Exports, Fish and Fisheries Products, Marine Ingredients, Grade Standards, Marks.

Dated: April 18, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NOAA proposes to revise part 260 of title 50 of the Code of Federal Regulations to read as follows:

PART 260—INSPECTION AND CERTIFICATION

Subpart A—Inspection and Certification of Establishments, Fishery Products, and Other Marine Ingredients

Sec.
260.1 Administration of regulations.

Definitions

260.2 Terms defined.
260.3 Designation and use of official certificates, memoranda, marks, other identifications, and devices for purposes of the Agricultural Marketing Act.

Inspection Service

260.4 Where inspection service is offered.
260.5 Who may obtain inspection service.
260.6 Application for inspection service.
260.7 Rejection of application for inspection service.
260.8 Withdrawal of an application for inspection service.
260.9 Disposition of inspected samples.
260.10 Basis of inspection, grade and compliance assessment.
260.11 Order of inspection service.
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Authority: Sec. 6, 70 Stat. 1122, 16 U.S.C. 742e; secs. 203, 205, 60 Stat. 1087, 1090 as amended; 7 U.S.C. 1622, 1624; Reorganization Plan No. 4 of 1970 (84 Stat. 2090).

Subpart A—Inspection and Certification of Establishments, Fishery Products, and Other Marine Ingredients

§ 260.1 Administration of regulations.

The Secretary of the Department of Commerce is charged by the Agricultural Marketing Act of 1946 with the administration of the regulations in this part, except that they may delegate any or all of such functions to any officer or employee of the National Marine Fisheries Service (the *Agency*) of the Department at their discretion.

Definitions

§ 260.2 Terms defined.

Words in the regulations in this part in the singular form shall be deemed to import the plural and vice versa, as the case may demand. For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:

Acceptance number means the number in a sampling plan that indicates the maximum number of nonconformities permitted in a sample of a lot that meets a specific requirement.

Act means the applicable provisions of the Agricultural Marketing Act of 1946 (60 Stat. 1087 *et seq.,* as amended; 7 U.S.C. 1621 *et seq.*) or any other act of Congress conferring like authority.

Administrator means the Administrator of NOAA (Under Secretary of Commerce for Oceans and Atmosphere) or a designee.

Agency means the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce.

Applicant means any interested party who requests inspection service under the regulations in this part.

Approved Establishment means an establishment which has been approved by the Agency pursuant to this Part and the NMFS Fishery Products Inspection Manual (SIP Manual) and utilizes inspection service on a contract basis.

Certificate of loading means an official certificate or document that makes a statement relative to check-loading of a fish or fishery product or other marine ingredient subsequent to inspection thereof issued pursuant to the regulations in this part.

Certificate of sampling means an official certificate or document that makes a statement pursuant to the regulations in this part identifying officially drawn samples and may include a description of the condition of containers and the condition under which the fish or fishery product or other marine ingredient is stored.

Class means a grade or rank of quality.

Condition means the degree of soundness of the product that may affect its merchantability and includes but is not limited to those factors that are subject to change due to age, improper preparation and processing, improper packaging, improper storage, or improper handling.

Cross-Licensed Inspector means a qualified person employed and licensed by the agency to perform specified inspection services under a joint Federal-State inspection service arrangement.

Department means the U.S. Department of Commerce.

Director means the Assistant Administrator for Fisheries, NOAA, or a designee.

Establishment means the premises, buildings, structures, facilities, and equipment (including machines, utensils, fixtures and transit vehicles) used with respect to the receipt, processing and transport of fish and fishery products and other marine ingredients.

Fish means a fresh or saltwater finfish, crustaceans, other forms of aquatic animal life (including, but not limited to, alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals, and including all mollusks, where such animal life is intended for human or animal consumption or for other non-food uses.

Fishery product means any human food product in which fish is a characterizing ingredient.

Inspection certificate means a statement, either written or printed, issued pursuant to the regulations in this part, setting forth the quality and condition of the product, or any part thereof, in addition to appropriate descriptive information relative to a fish, fishery product, or other marine ingredient, and the container thereof. It may also include a description of the conditions under which the product is stored.

Inspection service means:

(1) The performance of sampling pursuant to the regulations in this part;

(2) The determination pursuant to the regulations and requirements in this part:

(i) Assessing compliance with statutory and regulatory requirements pertaining to the interstate commerce of fish and fishery products or other marine ingredients for human or animal food;

(ii) Identifying the essential characteristics such as style, type, size, or identity of any fish or fishery product or other marine ingredient; or

(iii) Assessing the class, quality, and condition of any fish or fishery product or other marine ingredient, including the condition of the container thereof by the examination of appropriate samples;

(3) The issuance of any certificates of sampling, inspection certificates, or certificates of loading of a fish or fishery product or other marine ingredient, or any report relative to any of the foregoing; or

(4) The performance by an inspector of any related services, such as:

(i) Observing the preparation of the product from its raw state through each step in the entire process;

(ii) Observing the conditions under which the product is being harvested, prepared, handled, stored, processed, packed, preserved, transported, or held;

(iii) Observing the sanitation conditions as a prerequisite to the inspection of the processed product, either on a contract basis or periodic basis;

(iv) Check-loading the inspected processed product in connection with the marketing of the product; or

(v) Conducting any other type of service of a consultative or advisory nature related herewith as outlined in the NMFS Fishery Products Inspection Manual.

Inspector means any employee of the Department authorized by the Secretary or any other person licensed by the Secretary to investigate, sample, inspect, and certify in accordance with the regulations in this part to any interested party the class, quality and condition of processed products covered in this part and to perform related duties in connection with the inspection service.

Interested party means any person who has a financial interest in the fish or fishery product or other marine ingredient involved.

Licensed sampler means any person who is authorized by the Secretary to draw samples of fish and fishery products or other marine ingredients for inspection service, to confirm the identification and condition of containers in a lot, and may, when authorized by the Secretary, perform other related services under the act and the regulations in this part.

Lot means a defined quantity of product accumulated under conditions considered uniform for sampling purposes.

(1) For processors who manufacture fish and fishery products or other marine ingredients, a lot is a production unit as defined by mutual agreement between the processor and SIP, consisting of fish or fishery products or other marine ingredients of the same type, style, form and size, which have been marked or labeled as such and produced under conditions as nearly uniform as possible, during a single 8 hour shift (or as defined and approved) on an individual processing line.

(2) For establishments that receive fish or fishery products or other marine ingredients and perform no additional processing, such as distribution warehouses and foodservice distributors, a lot is defined by mutual agreement between the establishment and SIP and must consist of fish or fishery products or other marine ingredients located in a discrete grouping that consists of fish or fishery products or other marine ingredients of the same type, style and size and are marked or labeled as such. Except that: Fish or fishery products or other marine ingredients located in separate groups that differ from each other as to grade or other factors may be deemed as separate lots in some cases, for example:

(i) Fish or fishery products or other marine ingredients located in the same group bearing an identification mark different from other containers in that group may be deemed as separate lots;

(ii) Containers of fish or fishery products or other marine ingredients in a group bearing an identification mark different from other containers in that group, if determined to be of lower grade or deficient in other factors, may be deemed as separate lots; or

(iii) If the applicant requests more than one inspection certificate covering different portions of a lot, the quantity of the product covered by each certificate shall be deemed a separate lot.

Marine ingredient means any product of marine origin, whether or not intended for human consumption, including, but not limited to, fishmeal, fish oil, fish-based fertilizer, seaweed, kelp, and algae.

NMFS Fishery Products Inspection Manual (SIP Manual) means the online handbook, housed at *https://www.fisheries.noaa.gov/national/seafood-commerce-certification/seafood-inspection-manual,* that provides procedures of how services shall be scheduled, planned, conducted, and documented and describes services that conform to global activities that harmonize inspection protocols.

Officially drawn sample means any sample that has been selected from a particular lot by an inspector, licensed sampler, or by any other person authorized by the Secretary pursuant to the regulations in this part.

Person means any individual, partnership, association, business trust, corporation, any organized group of persons (whether incorporated or not); the United States (including, but not limited to, any corporate agencies thereof) any State, county, or municipal government; any common carrier; and any authorized agent of any of the foregoing.

Processing means, with respect to fish and fishery products and other marine ingredients, activities that an establishment engages in including handling, storing, preparing, heading, eviscerating, shucking, freezing, changing into different market forms, manufacturing, preserving, packing, labeling, dockside unloading, or holding. *Product* means any fish or fishery product or other marine ingredient, whether or not destined for human consumption, presented to NMFS for inspection and/or certification service.

Quality means the inherent properties of any processed product that determine the relative degree of excellence of such product, includes the effects of preparation and processing, and may or may not include the effects of packing media or added ingredients.

Rejection number means the smallest number of nonconformities, defectives (or defects) in the sample or samples under consideration that will require rejection of the lot.

Sample means the number of sample units drawn from a lot for purposes of inspection to reach a decision regarding acceptance of the lot and for purposes of quality to reach a conclusion regarding conformity of the lot.

Sample unit means a ''unit of product'', a primary container and its contents that makes up the sample that is inspected to determine whether it complies with regulatory criteria and that is quality assessed to determine whether it conforms to quality criteria.

Sampling means the process of selecting sample units that comprise the sample for the purpose of inspection and quality assessment under the regulations of this part.

Seafood Inspection Program (SIP) means the program within the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, which offers inspection and grading services for seafood and other marine products as well as audit and consultative services to domestic and international processors, importers, and international competent food safety authorities.

Secretary means the Secretary of the Department of Commerce or any other officer or employee of the Department authorized to exercise the powers and to perform the duties of the Secretary with respect to the matters covered by the regulations in this part.

Shipping container means an individual container designed for shipping a number of packages or cans ordinarily packed in a container for shipping or designed for packing unpackaged fish or fishery products or other marine ingredients for shipping.

Unofficially drawn sample means any sample that has been selected by any person other than an inspector or licensed sampler.

Wholesome means the minimum basis of acceptability for human food purposes of any fish or fishery product or other marine ingredient as defined in section 402 of the Federal Food, Drug, and Cosmetic Act, as amended.

§ 260.3 Designation and use of official certificates, memoranda, marks, other identifications, and devices for purposes of the Agricultural Marketing Act.

Section 203(h) of the Agricultural Marketing Act of 1946 provides criminal penalties for various specified offenses relating to the misuse of official certificates, memoranda, marks or other identifications and devices for making such marks or identifications, issued or authorized under section 203 of said Act, and certain misrepresentations concerning the inspection or grading of agricultural products under said section. For the purposes of said section and the provisions in this part, the terms listed below shall have the respective meanings specified:

Official certificate means any form of written, printed or electronic certification, including those defined in § 260.2, used under this part to document and/or certify the compliance of fish or fishery products and other marine ingredients to applicable specifications with respect to inspection compliance and conformity to class, grade, quality, size, quantity, or condition requirements.

Official device means a mechanically or manually operated tool, appliance or other means approved by the Agency to apply an official mark or other identification to any product or the packaging material thereof that is approved by the Director, including, but not limited to, a stamping appliance, branding device, stencil, or printed label.

Official identification means any designation of class, grade, quality, size, quantity, condition, or attribute specified by this part or any symbol, stamp, label, seal, or official statement indicating that the product has been inspected or graded using specifications deemed appropriate by SIP or otherwise evaluated for any buyer specified attribute.

Official insignia means a grade mark, inspection mark, combined inspection and grade mark, shield, stamp, other emblem, and/or official statement approved by the Secretary, authorized by the Agency, and used in accordance with the NMFS Fishery Products Inspection Manual (SIP Manual).

Official document means a record of findings made by an authorized person having performed any inspection, certification, grading, audit or any other service pursuant to this part.

Inspection Service

§ 260.4 Where inspection service is offered.

Inspection services may be furnished where an inspector, cross-licensed inspector, or licensed sampler is available and when the establishment's facilities and conditions are appropriate for the conduct of such service. This location can include, but is not limited to, SIP regional and field offices, warehouses, processing facilities, docks, and vessels, as detailed in the SIP Manual.

§ 260.5 Who may obtain inspection service.

Any person engaged in the processing, shipping or receiving of fish and fishery products or other marine ingredients in interstate commerce may apply for inspection service.

§ 260.6 Application for inspection service.

Prospective service participants must submit an application for inspection service per the Application for Inspection Services procedures in the SIP Manual. To be considered for approval, applications for inspection service must be complete and conform to all SIP inspection service requirements as specified in the SIP Manual.

§ 260.7 Rejection of application for inspection service.

Applicants will be notified if an Application for Inspection Service is rejected. Inspection Service applications may be rejected when: (a) the application is incomplete or in contravention of regulations and/or policy; (b) there is a noncompliance with NOAA financial policy, such as

nonpayment for previous inspection services rendered; (c) the fish or fishery product or other marine ingredient is not properly identified; or (d) it appears that the performance of the inspection service would not be in the best interests of the Government.

§ 260.8 Withdrawal of an application for inspection service.

The applicant may withdraw an Application for Inspection Service at any time before the inspection is performed, provided that the applicant shall pay for all costs and expenses which have been incurred by the inspection service in connection with such application.

§ 260.9 Disposition of inspected samples.

Any product sample that has been used for inspection may be returned to the applicant, at its request and expense; otherwise it shall be destroyed or, when appropriate, diverted to a charitable institution.

§ 260.10 Basis of inspection, grade and compliance assessment.

(a) Finished product inspection and certification services shall be performed on the basis of the specifications deemed appropriate by SIP.

(b) Unless otherwise approved by SIP, compliance with the appropriate specifications shall be determined by evaluating the product, or sample, in accordance with the product inspection and quality assessment procedures outlined in the SIP Manual. *Provided,* That:

(1) Such sample complies with the applicable standards of quality promulgated under the Federal Food, Drug, and Cosmetic Act;

(2) Such sample complies with the product description;

(3) Such sample meets the indicated grade with respect to factors of quality which are not rated by score points; and

(4) The number of sample units classed as deviants does not exceed the applicable acceptance number indicated in the sampling plans approved and used. A ''deviant,'' as used in this paragraph, means a sample unit that falls below the indicated grade or specification parameter.

§ 260.11 Order of inspection service.

Inspection services shall be performed, insofar as practicable, in the order in which Application for Inspection Service is made, except that precedence is given first to the United States (including, but not limited to, any instrumentality or agency thereof); second, to an inspection contract holder; and third, to an interested party without an inspection contract.

§ 260.12 Financial interest of inspector.

No inspector shall inspect any product in which s/he has a direct or indirect financial interest.

§ 260.13 Official forms for inspection services.

Inspection certificates, memoranda, reports and other documents associated with inspection services shall only be issued on forms approved by the Agency.

§ 260.14 Issuance of certificates.

Inspection Certificates and Certificates of Loading may be issued by an inspector authorized by the Agency to affix their signature to a certificate that has been prepared in accordance with the documented evidence in connection with the inspection service provided.

§ 260.15 Issuance of corrected certificates.

When an issued inspection certificate contains errors or otherwise requires revision, the inspector who issued the original document or another employee of the Agency may issue a corrected inspection certificate. The corrected certificate will supersede the original document, which will become null and void after the issuance of the corrected certificate.

§ 260.16 Issuance of an inspection report in lieu of an inspection certificate.

A written report in lieu of an inspection certificate may be issued by an inspector when such action appears to be more suitable than an inspection certificate.

§ 260.17 Retention and provision of inspection certificates.

Inspection certificate copies or other documents issued under the regulations in this part shall be retained by the Agency in accordance with Agency record retention policies. The original certificate (electronic or other) or copy is provided to the inspection service requester, and copies may be provided to other interested parties as identified by the Agency.

§ 260.18 Report of inspection results prior to issuance of formal report. Upon request by any interested party and approval by the Agency, the interim inspection findings may be provided.

Appeal Service

§ 260.19 Requesting an appeal.

(a) An application for an appeal may be made by any interested party who has cause to disagree with the results of a product inspection or audit finding. An official appeal inspection of a product inspection may only be performed when the lot of fish or fishery products or other marine ingredients can be positively identified by the inspection service as the lot from which officially drawn samples were previously inspected.

(b) Such application shall be made in adherence with the SIP Manual and shall be made within 30 days following the day on which the previous result was communicated, except that upon approval by SIP the time may be extended.

§ 260.20 Withdrawing an appeal application.

An application for appeal may be withdrawn by the applicant at any time before the appeal service is performed, provided that the applicant shall pay for all costs and expenses which have been incurred by the inspection service in connection with such application.

§ 260.21 Declining an appeal application.

A request for an appeal may be declined when:

(a) The reasons for the appeal are frivolous or not substantial;

(b) The quality or condition of the product has undergone a material change since the inspection covering the product on which an appeal inspection is requested;

(c) The lot relative to which an appeal inspection is requested is not, or cannot be made, accessible for the selection of officially drawn samples;

(d) The lot relative to which an appeal inspection is requested cannot be positively identified by the inspector as the lot from which officially drawn samples were previously inspected; or

(e) There is noncompliance with the regulations in this part. The applicant shall be notified promptly if a request for appeal is declined, as outlined in the SIP Manual.

§ 260.22 Appeal inspector selection protocol.

(a) An inspector who did not perform the original product inspection shall be assigned to perform the appeal service; provided that the inspector who made the original product inspection on which an appeal is requested may be authorized to draw the samples when another inspector or licensed sampler is not available in the area where the product is located.

(b) Whenever practical, the appeal service shall be conducted jointly by two inspectors.

§ 260.23 Appeal documentation.

(a) After an appeal service has been completed, the results will be recorded on an appropriate document, as outlined in the SIP Manual. Any appeal

document shall supersede the certificate or report previously issued for the product or establishment involved.

(b) The superseded document shall become null and void upon the issuance of the appeal document and shall no longer represent the quality or condition of the product, system, or establishment described therein.

(c) If the original document and all copies have not been returned to the inspector(s) performing the appeal service, the appeal document shall be issued to the person(s) the inspector(s) considers necessary to prevent misuse of the superseded document.

(d) All provisions in this regulation concerning the use, issuance and disposition of inspection certificates shall apply to appeal inspection certificates, except that electronic copies of the appeal inspection certificates shall be furnished to all interested parties who received the superseded certificate.

Licensing of Inspectors and Samplers

§ 260.24 Inspectors.

(a) Federal Government employees licensed or authorized as inspectors will perform inspections.

(b) In addition, qualified persons may be employed and licensed (Cross-Licensee) by the Agency to perform specified inspection services under a joint Federal-State inspection service arrangement.

(c) An Inspector or Cross-Licensee shall perform their duties pursuant to the regulations in this part as directed by the Director.

§ 260.25 Licensed sampler.

(a) Any person deemed to have the necessary qualifications may be approved as a licensed sampler.

(b) Licensed samplers are authorized to draw samples, to confirm the identity of the lot, and assess the condition of containers in the lot.

(c) Licensed samplers are not authorized to inspect fish or fishery products or other marine ingredients.

§ 260.26 Suspension or revocation of licensed inspector or licensed sampler.

In adherence to Federal and Agency requirements, the Agency may suspend or revoke the license of a licensed inspector or licensed sampler when deemed necessary, as outlined in the SIP Manual.

§ 260.27 Surrender of license.

Upon suspension, revocation and/or termination of the services of a licensed inspector and/or licensed sampler, or in the case of an expired license, the licensee shall surrender their license to the Agency.

Sampling

§ 260.28 Sampling plans and procedures.

(a) When finished product inspections of fish and fishery products and other marine ingredients are performed, the Sampling Plans and Sampling Procedures set forth in the SIP Manual will be followed.

(b) Defined lots of product must be accessible, allowing thorough and proper sampling in accordance with the regulations of this part. Failure to make lots accessible for proper sampling shall be sufficient cause for postponing or canceling inspection service.

(c) Lots must be readily identifiable; if lots to be sampled are not suitably identified, the inspector or licensed sampler will mark the lot in a manner prescribed by the agency in the regulations and in the SIP Manual.

(d) Samples shall be furnished for inspection at no cost to the Agency.

(e) A certificate of sampling shall be prepared and signed by the inspector or licensed sampler.

(f) Officially drawn samples shall be marked by the Agency representative so such samples can be properly identified for inspection.

§ 260.29 Shipment of samples.

Samples that require shipment to an Inspection Office shall be shipped in a manner to avoid, if possible, any material change in the quality or condition of the product. Costs associated with shipments shall be at the expense of the applicant.

Fees and Charges

§ 260.30 Inspection fees, payment guarantees, charges and payments.

(a) A schedule of fees, charges, payment guarantees and payments for inspection services shall be made in accordance with the applicable provisions of the regulations in this part and the Financial Policy provided in the SIP Manual.

(b) The Schedule of Fees to be charged and collected for any inspection service performed under the regulations of this part will be determined annually, or as required, and published as a Notice in the **Federal Register**.

(c) Fees for inspection under a cooperative agreement with any State or person shall be transferred and collected in accordance with the terms of such agreement. Such portion of the fees collected under a cooperative agreement as may be due the United States shall be remitted in accordance with this section and the Financial Policy as provided in the SIP Manual.

(d) Charges may be made to cover the cost of travel and other expenses incurred in connection with the performance of any inspection service, including appeal inspections, as provided in the SIP Manual.

(e) Inspection services may be made on a contract basis or via a memorandum of understanding with other Federal and State entities pursuant to the Agricultural Marketing Act of 1946, provided the Agency is reimbursed for the full cost of such service.

(f) For each calendar year, SIP will calculate the rate for services, per hour per program employee, using the following formulas:

(1) *Regular rate.* The total SIP inspection program personnel direct pay divided by direct hours, which is then multiplied by the next year's percentage of cost of living increase, plus the benefits rate, plus the operating rate, plus the allowance for bad debt rate. If applicable, travel expenses may also be added to the cost of providing the service. The regular rate shall be the contract rate.

(2) *Overtime rate.* The total SIP inspection program personnel direct pay divided by direct hours, which is then multiplied by the next year's percentage of cost of living increase and then multiplied by 1.5 plus the benefits rate, plus the operating rate, plus an allowance for bad debt. If applicable, travel expenses may also be added to the cost of providing the service.

(3) *Holiday rate.* The total SIP inspection program personnel direct pay divided by direct hours which is then multiplied by the next year's percentage of cost of living increase and then multiplied by 2, plus benefits rate, plus the operating rate, plus an allowance for bad debt. If applicable, travel expenses may also be added to the cost of providing the service.

(g) For each calendar year, based on previous fiscal year/historical actual costs, SIP will calculate the benefits, operating, and allowance for bad debt components of the regular, overtime and holiday rates as follows:

(1) *Benefits rate.* The total SIP inspection program direct benefits costs divided by the total hours (regular, overtime, and holiday) worked, which is then multiplied by the next calendar year's percentage cost of living increase. Some examples of direct benefits are health insurance, retirement, life insurance, and Thrift Savings Plan (TSP) retirement basic and matching contributions.

(2) *Operating rate.* The total SIP inspection program operating costs divided by total hours (regular, overtime, and holiday) worked, which is

then multiplied by the percentage of inflation.

(3) *Allowance for bad debt rate.* Total allowance for bad debt divided by total hours (regular, overtime, and holiday) worked.

(h) The calendar year cost of living expenses and percentage of inflation factors used in the formulas in this section are based on the most recent Office of Management and Budget's Presidential Economic Assumptions.

(1) When an inspection is delayed because product is not available or readily accessible, a charge for waiting time shall be determined using the formulas in this section.

Requirements for Approved Establishments

§ 260.31 Application for SIP Approved Establishment.

Any person desiring to process and pack fish and fishery products and other marine ingredients as an SIP Approved Establishment must receive approval of their written and implemented food management system per the application procedures which are detailed in the SIP Manual.

§ 260.32 Requirements for the provision of Inspection Services for Approved Establishments.

All establishments must remain in good standing in order to receive services per this Part.

(a) The determination as to the inspection effort required to adequately provide inspection service at any establishment will be made by NMFS. The person-hours required may vary at different establishments due to factors such as, but not limited to, size and complexity of operations, volume and variety of products produced, and adequacy of control systems and cooperation. The inspection effort requirement may be reevaluated when the contracting party or NMFS deems there is sufficient change in production, equipment and change of quality control input to warrant reevaluation. Inspectors will not be available to perform any of the employee or management duties; however, they will be available for consultation purposes. NMFS reserves the right to reassign inspectors as it deems necessary.

(b) Assessment of an establishment's good standing will be made by the Agency through systems, process, and product auditing and inspection activities, which are further specified in the SIP manual.

(c) The Agency shall not be held responsible:

(1) For damages occurring through any act of commission or omission on the part of its inspectors when engaged in performing services; or

(2) For production errors, such as processing temperatures, length of process, or misbranding of products; or

(3) For failure to supply enough inspection effort during any period of service.

(d) Approved Establishments shall:

(1) Use, handle, process, store and distribute only raw materials and finished products that meet processing and sanitation statutory and regulatory requirements for food safety, wholesomeness and labeling;

(2) Adequately code each primary container and master case of products sold or otherwise distributed from a manufacturing, processing, packing, or repackaging activity to enable lot identification to facilitate, where necessary, the segregation of specific food lots that may have become contaminated or otherwise unfit for their intended use;

(3) Provide adequate office space in the designated establishment, if required by the Agency, and furnish suitable desks, office equipment, internet services access, laboratory facilities and equipment required to perform product verification and inspection, as prescribed by the Agency;

(4) Furnish and provide laundry service for coats, trousers, smocks, and towels used by inspectors during performance of duty in establishments if required by the Agency; and

(5) During all reasonable times, provide representatives of the Agency free and immediate access to the establishment under the applicant's control for the purpose of performing any and all inspection services.

(e) Retention tags:

(1) Any equipment such as, but not limited to, conveyors, tillers, sorters, choppers, and containers which fail to meet appropriate and adequate sanitation requirements will be identified by the inspector in an appropriate and conspicuous manner with the word ''RETAINED.'' Following such identification, the equipment shall not be used until the discrepancy has been resolved, the equipment re-inspected and approved by the inspector and the ''RETAINED'' identification removed by the inspector.

(2) Lot(s) of processed products that may be considered to be mislabeled and/or unwholesome by reason of contaminants, or which may otherwise be in such condition as to require further evaluation or testing to determine that the product is properly labeled and/or wholesome, will be identified by the inspector in an appropriate and conspicuous manner with the word ''RETAINED.'' Such lot(s) of product shall be held for re-inspection or testing. Final disposition of the lot(s) shall be determined by NMFS and the removal of the ''RETAINED'' identification shall be performed by the inspector.

(f) Termination of inspection services:

(1) The fishery products inspection service, including the issuance of inspection reports, shall be rendered from the date of the commencement specified in the contract and continue until suspended or terminated:

(i) by mutual consent;

(ii) by either party giving the other party 60 days' written notice specifying the date of suspension or termination;

(iii) by written notice by the Agency in the event the applicant does not meet financial obligations;

(iv) by written notice by the Agency, terminating service in the event the applicant fails to meet statutory and/or regulatory requirements, or in the event the applicant fails to comply with any provisions of the regulations contained in this part;

(v) by automatic termination in case of bankruptcy, closing out of business, or change in controlling ownership.

(2) In case the contracting party wishes to terminate the fishery products inspection service under the terms of paragraph (f)(1)(i) or (ii) of this section:

(i) the service must be continued until all unused containers, labels, and advertising material on hand or in possession of his supplier bearing official identification marks or reference to the fishery products inspection service have been used;

(ii) all unused containers, labels, and advertising material bearing official identification marks or reference to the fishery products inspection service must be destroyed;

(iii) official identification marks and all other reference to the fishery products inspection service on all unused containers, labels, advertising material must be obliterated; or

(iv) assurance satisfactory to NMFS must be furnished that all unused containers, labels, and advertising material bearing official identification marks or reference to the fishery products inspection service will not be used in violation of any of the provisions of the regulations in the part.

(3) In case the fishery products inspection service is terminated for cause by NMFS under the terms of paragraph (f)(1)(iii) or (iv) of this section, or in case of automatic termination under terms of paragraph (f)(1)(v) of this section, the contracting party must destroy all unused containers, labels, and advertising

material on hand bearing official identification marks or reference to the fishery products inspection service or must obliterate official identification marks and all reference to the fishery products inspection service on said containers, labels and advertising material. After termination of the fishery products inspection service, NMFS may, at such time or times as it may determine to be necessary, during regular business hours, enter the establishment(s) or other facilities in order to ascertain that the containers, labels, and advertising material have been altered or disposed of in the manner provided herein, to the satisfaction of NMFS.

§ 260.33 Compliance with statutory and regulatory requirements.

Approved Establishments shall comply with all statutory and regulatory requirements and provisions pertaining to the production of fish and fishery products and other marine ingredients for human or animal consumption.

Miscellaneous

§ 260.34 Policies and procedures.

The policies and procedures pertaining to the Agency's inspection services are contained within the SIP Manual.

§ 260.35 Approved marks, shields, stamps and official statements.

As prescribed by the SIP Manual, Inspection Service participants meeting the requirements may request approval to utilize specified SIP Grade Marks, Shields, Stamps and Official Statements (collectively *SIP Insignia*).

(a) *Participants as Approved Establishments*

(1) Fish and Fishery products and other marine ingredients that are processed under Federal inspection to assure compliance with all applicable regulatory requirements through the SIP Approved Establishments Program may be eligible to bear an:

(i) Approved Establishment inspection mark; and/or,

(ii) Approved Establishment Official Statement.

Figure 1 to Paragraph (a)(1)(ii)—USDC Approved Establishment Inspection Mark

(2) Fish and Fishery products and other marine ingredients that are (1) processed under Federal inspection to ensure compliance with all applicable regulatory requirements through the SIP Approved Establishments Program and (2) certified by an inspector as meeting the requirements of the applicable Approved Specification additionally may be eligible to bear (as applicable):

(i) Grade A shield;

(ii) Processed Under Federal Inspection (PUFI) mark; and/or

(iii) Other official statements and/or marks, as approved by SIP, *e.g.*

Figure 2 to Paragraph (a)(2)(i)—U.S. Grade A Shield

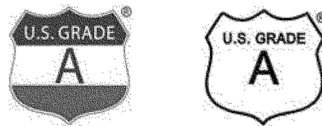
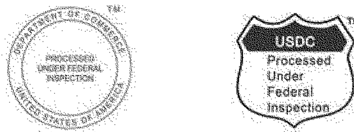


Figure 3 to Paragraph (a)(2)(ii)—Processed Under Federal Inspection (PUFI) Mark



(3) Approved Establishments will not make deceptive, fraudulent, or unauthorized use in advertising, or otherwise, of the fishery products inspection service marks, the inspection certificates or reports issued, or the containers on which official identification marks are embossed or otherwise identified, in connection with the sale of any processed products;

(b) *Lot Inspection Marks*

(1) Fish and fishery products and other marine ingredients that have not been processed under Federal inspection may not be approved for the use of Grade or Inspection Marks. Such products may, however, be inspected on a Lot Inspection basis.

(2) Master cases and inspection certificates for products that are (1) submitted for inspection through the lot inspection process identified in the SIP Manual and are (2) certified by an inspector as meeting the requirements of the applicable USDC Approved Specification corresponding with the shield, may bear one or more of the following:

(i) USDC Accepted Per Specifications shield;

(ii) Officially Sampled shield, *e.g.*

Figure 4 to Paragraph (b)(2)(i)—USDC Accepted Per Specifications Shield

Figure 5 to Paragraph (b)(2)(ii)—Officially Sampled Shield

§ 260.36 Revocation of approval to use inspection marks and statements.

(a) Approval for use of SIP inspection marks, statements, and insignia will be rescinded when evidence indicates that processing conditions and/or product lots do not meet applicable regulatory, inspection and/or quality requirements per the SIP Manual.

(b) Any affected lot(s) shall be retained and may not enter commerce unless the lot meets minimum regulatory requirements to enter commerce and the SIP insignia is removed.

(c) The establishment or processor shall obtain written clearance from the Agency for the release of product lots that have been put on hold under this part.

§ 260.37 Compliance with other laws.

None of the requirements in the regulations in this part shall excuse failure to comply with any Federal, State, county, or municipal laws applicable to the operation of food processing establishments and to processed food products.

§ 260.38 Identification.

Each inspector and licensed sampler shall have a means of identification furnished by the Agency in his/her possession and, while on duty, present such identification upon request.

§ 260.39 Debarment and suspension.

(a) *Debarment.* Any person may be debarred from using or benefiting from the inspection service provided under the regulations of this subchapter or under the terms of any inspection contract, and such debarment may apply to one or more processing establishments under their control, if such person engages in one or more of the following acts or activities:

(1) Misrepresenting, misstating, or withholding any material or relevant facts or information in conjunction with any application or request for an

inspection contract, inspection service, inspection appeal, lot inspection, or other service provided for under the regulations of this subchapter.

(2) Using on a fish or fishery or other marine ingredient product any label that displays any official identification, official device, or official mark, when the label is not currently approved for use by the Director or his/her delegate.

(3) Using on a fish or fishery product or other marine ingredient any label that displays the words ''USDC Approved Establishment'' or ''Processed Under Federal Inspection, U.S. Department of Commerce''; any official mark, official device, or official identification; or a facsimile of the foregoing, when such product has not been inspected under the regulations of this subchapter.

(4) Making any statement or reference to the U.S. Grade of any product or any inspection service provided under the regulations of this subchapter on the label or in the advertising of any product when such product has not been inspected under the regulations of this subchapter.

(5) Making, using, issuing or attempting to issue or use in conjunction with the sale, shipment, transfer or advertisement of a product any certificate of loading, certificate of sampling, inspection certificate, official device, official identification, official mark, official document, or score sheet which has not been issued, approved, or authorized for use with such product by an inspector.

(6) Using any of the terms ''United States,'' ''Officially graded,'' ''Officially inspected,'' ''Government inspected,'' ''Federally inspected,'' ''Officially sampled,'' ''Grade A Equivalent'' or words of similar import or meanings, or using any official device, official identification, or official mark on the label, on the shipping container, or in the advertising of any fish or fishery product or other marine ingredient, when such product has not been inspected under the regulations of this subchapter.

(7) Using, attempting to use, altering or reproducing any certificate, certificate form, design, insignia, mark, shield, device, or figure which simulates in whole or in part any official mark, official device, official identification, certificate of loading, certificate of sampling, inspection certificate or other official certificate issued pursuant to the regulations of this subchapter.

(8) Assaulting, harassing, interfering, obstructing or attempting to interfere with or obstruct any inspector or licensed sampler in the performance of their duties under the regulations of this subchapter.

(9) Violating any one or more of the terms of any inspection contract or the provisions of the regulations of this subchapter.

(10) Engaging in acts or activities which destroy or interfere with the purposes of the inspection program or which have the effect of undermining the integrity of the inspection program.

(b) *Temporary suspension.*

(1) Whenever the Director has reasonable cause to believe that any person has engaged in any act or activity described in paragraph

(a) of this section and such act or activity, in the judgment of the Director, would cause serious and irreparable injury to the inspection program and services provided under the regulations of this subchapter, the Director may, without a hearing, temporarily suspend, either before or after the institution of a debarment hearing, the inspection service provided under the regulations of this subchapter or under any inspection contract for one or more processing establishments under the control of such person. Notice of suspension shall be served by registered or certified mail, return receipt requested, and the notice shall specifically state those acts or activities of such person that are the basis for the suspension. The suspension shall become effective 5 days after receipt of the notice.

(2) Once a person has received a notice of a temporary suspension, a debarment hearing will be set for 30 days after the effective date of the suspension. Within 60 days after the completion of the debarment hearing, the Hearing Examiner shall determine, based upon evidence of record, whether the temporary suspension shall be continued or terminated. A temporary suspension shall be terminated by the Hearing Examiner if they determine that the acts or activities that were the bases for the suspension did not occur or will not cause serious and irreparable injury to the inspection program and services provided under the regulations of this subchapter. This determination of the Hearing Examiner on the continuation or termination of the temporary suspension shall be final, and there shall be no appeal of this determination. The initial decision by the Hearing Examiner on the debarment shall be made in accordance with paragraph (b)(l), *Decisions,* of this section.

(3) After a debarment hearing has been instituted against any person by a suspension, such suspension will remain in effect until a final decision is rendered on the debarment in accordance with the regulations of this section or the temporary suspension is terminated by the Hearing Examiner.

(4) When a debarment hearing has been instituted against any person not under suspension, the Director may, in accordance with the regulations of this paragraph (b), of this section, temporarily suspend such person, and the suspension will remain in effect until a final decision on the debarment is rendered in accordance with the regulations of this section or the temporary suspension is terminated by the Hearing Examiner.

(c) *Hearing Examiner.* All hearings shall be held before a Hearing Examiner appointed by the Secretary or the Director.

(d) *Hearing.* If one or more of the acts or activities described in paragraph

(a) of this section have occurred, the Director may institute a hearing to determine the length of time during which the person shall be debarred and those processing establishments to which the debarment shall apply. No person may be debarred unless there is a hearing, as prescribed in this section, and it has been determined by the Hearing Examiner, based on evidence of record, that one or more of the activities described in paragraph

(a) of this section have occurred. Any debarment or suspension must be instituted within 2 years of the time when such acts or activities described in paragraph (a) of this section have occurred.

(e) *Notice of hearing.* The Director shall notify such person of the debarment hearing by registered or certified mail, return receipt requested. The notice shall set forth the time and place of the hearing, the specific acts or activities which are the basis for the debarment hearing, the time period of debarment being sought, and those processing establishments to which the debarment shall apply. Except for the debarment hearing provided for in paragraph (b) of this section the hearing will be set for a time not longer than 120 days after receipt of the notice of hearing.

(f) *Time and place of hearing.* The hearing shall be held at a time and place fixed by the Director: *Provided,* however, the Hearing Examiner may, upon a proper showing of inconvenience, change the time and place of the hearing. Motions for change of time or place of the hearing must be mailed to or served upon the Hearing Examiner no later than 10 days before the hearing.

(g) *Right to counsel.* In all proceedings under this section, all persons and the Department of Commerce shall have the right to be represented by counsel, in

accordance with the rules and regulations set forth in title 15, Code of Federal Regulations, Part 906.

(h) *Form, execution, and service of documents.*

(1) All papers to be filed under the regulations in this section shall be clear and legible; and shall be dated, signed in ink, contain the docket description and title of the proceeding, if any, and the address of the signatory. Documents filed shall be executed by:

(i) The person or persons filing same;

(ii) An authorized officer thereof if it be a corporation; or

(iii) An attorney or other person having authority with respect thereto.

(2) All documents, when filed, shall show that service has been made upon all parties to the proceeding. Such service shall be made by delivering one copy to each party in person or by mailing by first-class mail, properly addressed with postage prepaid. When a party has appeared by attorney or other representative, service on such attorney or other representative will be deemed service upon the party. The date of service of document shall be the day when the matter served is deposited in the U.S. mail, shown by the postmark thereon, or is delivered in person, as the case may be.

(3) A person is deemed to have appeared in a hearing by filing with the Director a written notice of their appearance or their authority to appear on behalf of one of the parties to the hearing.

(4) The original of every document filed under this section and required to be served upon all parties to a proceeding shall be accompanied by a certificate of service signed by the party making service, stating that such service has been made upon each party to the proceeding. Certificates of service may be in substantially the following form:

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by: (1) Mailing postage prepaid, (2) delivering in person, or (3) electronically delivering a copy to each party.

Dated at ________ this ________ day of ________, 20____

Signature ____________________________

(i) *Procedures and evidence.*

(1) All parties to a hearing shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the Hearing Examiner at the outset of or during the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this section, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary.

(j) *Duties of Hearing Examiner.* The Hearing Examiner shall have the authority to:

(1) Take depositions or cause depositions to be taken;

(2) Regulate the course of the hearings;

(3) Prescribe the order in which evidence shall be presented;

(4) Dispose of procedural requests or similar matters;

(5) Hear and initially rule upon all motions and petitions before them;

(6) Administer oaths and affirmations;

(7) Rule upon offers of proof and receive competent, relevant, material, reliable, and probative evidence;

(8) Prevent the admission of irrelevant, immaterial, incompetent, unreliable, repetitious, or cumulative evidence;

(9) Hear oral arguments if the Hearing Examiner determined such requirement is necessary;

(10) Fix the time for filing briefs, motions, and other documents to be filed in connection with hearings;

(11) Issue the initial decision and dispose of any other pertinent matters that normally and properly arise in the course of proceedings; and

(12) Do all other things necessary for an orderly and impartial hearing.

(k) *The record.*

(1) The Director will designate an official reporter for all hearings. The official transcript of testimony taken, together with any exhibits and briefs filed therewith, shall be filed with the Director. Transcripts of testimony will be available in any proceeding under the regulations of this section at rates fixed by the contract between the United States of America and the reporter. If the reporter is an employee of the Department of Commerce, the Director will fix the rate.

(2) The transcript of testimony and exhibits, together with all briefs, papers, and all rulings by the Hearing Examiner shall constitute the record. The initial decision will be predicated on the same record, as will the final decision.

(l) *Decisions.*

(1) The Hearing Examiner shall render the initial decision in all debarment proceedings before them. The same Hearing Examiner who presides at the hearing shall render the initial decision except when such Examiner becomes unavailable to the Department of Commerce. In such case, another Hearing Examiner will be designated by the Secretary or Director to render the initial decision. Briefs or other documents to be submitted after the hearing must be received not later than 20 days after the hearing unless otherwise extended by the Hearing Examiner upon motion by a party. The initial decision shall be made within 60 days after the receipt of all briefs. If no appeal from the initial decision is served upon the Director within 10 days of the date of the initial decision, it will become the final decision on the 20th day following the date of the initial decision. If an appeal is received, the appeal will be transmitted to the Secretary who will render the final decision after considering the record and the appeal.

(2) All initial and final decisions shall include a statement of findings and conclusions, as well as the reasons or bases therefore, upon the material issues presented. A copy of each decision shall be served on the parties to the proceeding and furnished to interested persons upon request.

(3) It shall be the duty of the Hearing Examiner, and the Secretary where there is an appeal, to determine whether the person has engaged in one or more of the acts or activities described in paragraph (a) of this section, and, if there is a finding that the person has engaged in such acts or activities, the length of time the person shall be debarred and the processing establishments to which the debarment shall apply.

[FR Doc. 2024–08676 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 240417–0110]

RIN 0648–BM67

International Fisheries; Pacific Tuna Fisheries; Safe Handling and Release Practices for Sharks on Longline Vessels and Revision to Vessel Monitoring System Requirements in the Eastern Pacific Ocean

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is proposing regulations under the Tuna Conventions

Act of 1950, as amended, to implement Resolutions C–23–07 (Conservation Measures for the Protection and Sustainable Management of Sharks) and C–23–11 (On the Establishment of a Vessel Monitoring System) adopted by the Inter-American Tropical Tuna Commission (IATTC) at its meeting in August 2023 in Victoria, Canada. This proposed rule would implement provisions of these Resolutions and would require U.S. longline vessels fishing for tuna or tuna-like species in the eastern Pacific Ocean (EPO) that have incidental shark catch to release sharks by leaving them in the water and cutting the branchline so that less than 1 meter remains on each animal. The proposed rule would also require large vessels fishing for tuna or tuna-like species in the EPO to make manual reports every six hours in the event of a malfunctioning vessel monitoring system (VMS) unit. This action is necessary for the United States to satisfy its obligations as a member of the IATTC.

DATES: Comments on the proposed rule and supporting documents must be submitted in writing by May 28, 2024.

ADDRESSES: A plain language summary of this proposed rule is available at *https://www.regulations.gov/docket/NOAA-NMFS-2024-0041.* You may submit comments on this document, identified by NOAA–NMFS–2024–0041, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Visit *https://www.regulations.gov* and type NOAA–NMFS–2024–0041 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Amanda Munro, NMFS West Coast Region Long Beach Office, 501 W Ocean Blvd., Suite 4200, Long Beach, CA 90802. Include the identifier ''NOAA–NMFS–2024–0041'' in the 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).

Copies of the draft Regulatory Impact Review (RIR) and other supporting documents are available via the Federal eRulemaking Portal: *https://www.regulations.gov,* docket NOAA–NMFS–2024–0041 or contact the Highly Migratory Species Branch, Amanda Munro, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802, or *WCR.HMS@noaa.gov.*

Send comments on the collection of information pursuant to the Paperwork Reduction Act (PRA) by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Amanda Munro, NMFS, (619) 407–9284, *Amanda.Munro@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background on the Inter-American Tropical Tuna Commission

The United States is a member of the IATTC, which was established in 1949 and operates under the Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention).

The IATTC consists of 21 member nations and 5 cooperating non-member nations. The IATTC facilitates the conservation, research, and management of tuna and tuna-like species in the IATTC Convention Area (Convention Area). The Convention Area is defined as waters of the EPO within the area bounded by the west coast of the Americas and by 50° N latitude, 150° W longitude, and 50° S latitude. The IATTC maintains a scientific research and fishery monitoring program and regularly assesses the status of tuna, shark, and billfish stocks in the EPO to determine appropriate catch limits and other measures to promote sustainable fisheries and prevent overexploitation.

The text of the Antigua Convention can be found here: *https://www.iattc.org/PDFFiles/IATTC-Instruments/_English/IATTC_Antigua_Convention%20Jun%202003.pdf.*

International Obligations of the United States Under the Convention

As a Party to the Antigua Convention and a member of the IATTC, the United States is legally bound to implement decisions of the IATTC. The Tuna Conventions Act (TCA), 16 U.S.C. 951 *et seq.,* directs the Secretary of Commerce, in consultation with the Secretary of State and, with respect to enforcement measures, the U.S. Coast Guard, to promulgate such regulations as may be necessary to carry out the United States' obligations under the Antigua Convention, including recommendations and decisions adopted by the IATTC. The authority of the Secretary of Commerce to promulgate such regulations has been delegated to NMFS. All Resolutions adopted by the IATTC can be found online: *https://iattc.org/ResolutionsActiveENG.htm.*

IATTC Resolutions on Sharks and VMS

The IATTC held its 101st Meeting in August 2023 in Victoria, Canada. During this meeting, the IATTC adopted several resolutions, including the two that would be implemented by this proposed rule—IATTC Resolutions C–23–07 (Conservation Measures for the Protection and Sustainable Management of Sharks) and C–23–11 (On the Establishment of a Vessel Monitoring System).

IATTC Resolution C–23–07 includes new requirements regarding safe handling and release procedures for sharks caught by longline vessels. Paragraph 11(f) of the Resolution includes the requirements to ''leave the shark in the water, where possible'' and ''use a line cutter to cut the branchline as close to the hook as possible, and so that less than 1 meter remains on the animal, to the extent practicable.'' It also includes provisions applicable to all vessels prohibiting shark finning and requiring sharks be landed with fins naturally attached, which are already required in the United States by the Shark Conservation Act of 2010.

To ensure that vessel locations and identification numbers remain available to relevant authorities at a consistent interval even in the event of a technical failure, IATTC Resolution C–23–11 specifies a manual reporting requirement in the event of a malfunctioning VMS unit for vessels above 24 meters (78.74 feet) in length. The Resolution states in paragraph 4 that ''a fishing vessel with a defective satellite tracking device shall communicate to the . . . relevant competent authority at a minimum every 6 hours, reports containing [vessel identification number, location, date, time, speed, and course] by appropriate telecommunication means (*e.g.,* radio, web-based reporting, electronic mail, telefax or telex).''

Proposed Regulations for Sharks

This proposed rule, if adopted, would amend 50 CFR 300.27(k), which currently contains shark handling and release requirements for purse seine vessels, to also include shark handling and release requirements for longline vessels. No changes are proposed to the

existing requirements for purse seine vessels. Specifically, the proposed rule would require U.S. longline vessel owners and operators to leave live, unretained sharks in the water and cut the branchline so that less than 1 meter of trailing gear remains on the animal. If this procedure is not possible without compromising the safety of any persons, the vessel owner or operator would be required to cut the branchline as close to the hook as possible.

To facilitate the trimming of the branchline to the appropriate length, longline vessel owners or operators would be required to carry a line clipper meeting minimum design standards onboard the vessel and use it to cut branchline. The standards for this line clipper would be the same as those already required for Hawaii-based longline vessels (see 50 CFR 665.812(a)(5)), which make up the majority of longline vessels fishing in the EPO. The standards for the line clipper would include a protected cutting blade with an edge capable of cutting monofilament line or braided mainline that is securely fastened to an extended reach holder of at least 6 feet.

Shark finning (*i.e.,* the practice of removing any fin from the body of a shark at sea) is prohibited in the United States by the Shark Conservation Act of 2010, which was implemented by regulations at 50 CFR part 600, subpart N. The statute and regulations also prohibit the possession, transfer, and landing of any shark fin that is not naturally attached (*i.e.,* attached to the corresponding shark carcass through some portion of uncut skin). As part of this rulemaking, NMFS is proposing to include a cross-reference to these regulations in the regulations governing EPO tuna fisheries, which are found in 50 CFR part 300, subpart C. The cross-reference would make clear the regulations in 50 CFR part 600, subpart N apply to vessel owners and operators fishing for tuna and tuna-like species in the IATTC Convention Area.

Proposed Regulations for VMS

Any U.S. commercial fishing vessel that is 24 meters or more in overall length and engaging in fishing activities for tuna or tuna-like species in the IATTC Convention Area is already required to have a VMS unit installed, per regulations at 50 CFR 300.26(b). In the rare event of a technical failure of a VMS unit while the vessel is at sea, vessel operators are required to notify NOAA Office of Law Enforcement (OLE) and follow OLE's instructions (see 50 CFR 300.26(c)(4)(ii)).

This proposed rule would add the requirement of manual reporting in the event of a malfunctioning VMS unit. NMFS would require vessel owners and operators to provide manual reports to OLE with specific information every 6 hours by appropriate telecommunication means such as radio, email, or telephone. The manual reports would include: the vessel's identification, the vessel's geographical position (latitude and longitude) with an error of less than 100 meters at a confidence level of 98 percent, the date and time of the fixing of the vessel's position, and the vessel's speed and course. NMFS would require these reports to continue until the VMS unit issue is resolved or the vessel is back in port.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Tuna Conventions Act and other applicable laws, subject to further consideration after public comment.

Executive Order 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Paperwork Reduction Act

The VMS section of this proposed rule contains a revision to a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1995 (PRA). *West Coast Region Vessel Monitoring System and Pre-Trip Reporting System Requirements,* OMB Control Number(s): 0648–0498, would be modified to add the manual reporting requirement in the event of a technical VMS unit failure. All VMS and pre-trip reporting requirements under that collection-of-information would continue to apply.

NMFS estimates that the public reporting burden for the collection of information for manual VMS reports will average 5 minutes per report, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

NMFS requests any comments on the addition of the VMS manual reporting data collection to the PRA package, including whether the paperwork would unnecessarily burden any vessel owners and operators. Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the **ADDRESSES** above, and by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–5806.

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.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The rationale for this certification is provided in the following paragraphs.

Background

This action would apply to U.S. commercial fishing vessels of several gear types fishing for tuna and tuna-like species in the IATTC Convention Area. The objectives of the proposed action are: (1) to reduce post-release mortality of incidentally caught shark species, (2) ensure vessel locations and identification numbers remain available to relevant authorities even in the event of a technical VMS unit failure, and (3) fulfill international obligations of the United States as a member of the IATTC.

As described under Proposed regulations for sharks and Proposed regulations for VMS, the proposed rule would require U.S. longline vessels with incidental catch of sharks to leave the shark in the water and cut trailing gear, using a specified line clipper, so that less than 1 meter of trailing gear remains on the animal. It would also require large vessels fishing for tuna or tuna-like species, in the event of a malfunctioning VMS unit, to make manual reports every 6 hours of the vessel's identification, date, time, geographical position, speed, and course. The entities directly affected by the proposed action are: (1) U.S. vessels greater than 24 meters in overall length that fish for tuna or tuna-like species in the IATTC Convention Area, which include purse seine vessels, longline vessels, troll/jig, and

multipurpose vessels; and (2) all other U.S. longline vessels fishing in the IATTC Convention Area.

For RFA purposes only, NMFS has established a small business size standard of $11 million in annual gross receipts for all businesses, including their affiliates, primarily engaged in the commercial fishing industry (see 50 CFR 200.2). This standard applies to all businesses classified under North American Industry Classification System (NAICS) code 11411 for commercial fishing, including all businesses classified as commercial finfish fishing (NAICS 114111), commercial shellfish fishing (NAICS 114112), and other commercial marine fishing (NAICS 114119) businesses.

NMFS prepared analyses for this regulatory action based on this size standard. All of the entities directly regulated by this regulatory action are commercial finfish fishing businesses. Under this size standard, some U.S. fishing vessels affected by this action are considered large businesses, while others are small businesses.

Impacts to Longline Vessels From Proposed Regulations on Sharks

The proposed action would implement shark handling and release requirements for all owners and operators of U.S. longline fishing vessels fishing in the IATTC Convention Area. To estimate the number of affected entities, we utilized landings data from the Pacific Islands Fisheries Science Center (PIFSC), Pacific highly migratory species (HMS) permits (issued under 50 CFR 660.707), Hawaii longline limited access permits (issued under 50 CFR 665.13), and high seas fishing permits (issued under 50 CFR 300.333).

Between 2019 and 2023, an average of 115 U.S. longline vessels fished for HMS in the IATTC Convention Area. The majority of these longline vessels have Hawaii longline limited access permits or both Hawaii and Pacific HMS permits. Three of these longline vessels were based on the West Coast and operated solely under the Pacific HMS permit and high seas permit. U.S. West Coast-based longline vessels operating under the Pacific HMS permit fish primarily in the EPO are currently restricted to fishing with deep-set longline gear outside of the U.S. exclusive economic zone (EEZ) and can only make landings on the U.S. West Coast. Hawaii-based longline vessels fishing in the EPO as well as the Western Central Pacific Ocean (WCPO) can fish with both shallow-set and deep-set longline gear outside of the U.S. EEZ and make landings in Hawaii as well as the West Coast.

According to U.S. logbook and observer data between 2018 and 2023, longline vessels in the EPO interacted with an average of 16 different shark species every year, including Smooth hammerhead shark (*Sphyrna zygaena*), Shortfin mako shark (*Isurus oxyrinchus*), Tiger shark (*Galeocerdo cuvier*), and others. The vessels caught between 5,191 and 10,799 sharks every year with an average of 7,679 sharks per year. The majority of these sharks were released alive, with an average of 6,820 sharks (*i.e.,* 89 percent) released alive per year.

The ultimate fate of sharks post-release is often unobserved, so survivorship is largely unquantified. A growing body of research suggests that post-release mortality of sharks caught by longline vessels varies widely, depending on species and other factors. Research from PIFSC suggests that animals released with a minimum of trailing fishing gear have the highest rates of survival.

Between 2019 and 2023, longline vessels that fished in the IATTC Convention Area had average ex-vessel revenues ranging from $197,301 to $255,985 for total landings, including those in the EPO and WCPO. The maximum ex-vessel revenue of any longline vessel that fished in the IATTC Convention Area was well below the $11 million threshold for finfish harvesting businesses. Therefore, all of the longline vessels impacted by the proposed rule would be considered small business entities.

One economic impact of the proposed action to these entities would be the requirement to carry a specified line clipper to free incidentally caught sharks. Longline vessels with Hawaii longline limited access permits are already required to carry line clippers that meet these same specifications through regulations codified at 50 CFR 665.812. Therefore, it is expected that only the three vessels based on the West Coast would be required to purchase materials and assemble the line clipper. Each line clipper costs between $15 and $30 to make.

Another potential economic impact could be a loss of fishing time due to increased handling and release procedures. The amount of time lost would likely vary depending on crew experience, weather conditions, and shark species, among other factors. However, the time lost is expected to be minimal.

All of these vessels are considered small businesses, so there will not be a disproportionate impact between small and large businesses as a result of this requirement.

Impacts to Vessels Over 24 Meters in Length From Proposed Regulations on VMS

The proposed action would also implement a requirement for manual reporting in the event of a malfunctioning VMS unit for all owners and operators of U.S. commercial fishing vessels 24 meters or more in overall length used to target tuna or tuna-like species in the IATTC Convention Area. To estimate the number of entities affected by this portion of the proposed action, we utilized the number of vessels authorized to fish for HMS in the EPO as a reasonable proxy. The permits used to estimate the number of affected entities were: Pacific HMS permits (issued under 50 CFR 660.707) and high seas fishing permits (issued under 50 CFR 300.333). We obtained revenue data from IATTC, PIFSC, and SWFSC.

As of January 2024, there were 145 vessels of this size authorized to fish for HMS in the EPO on the IATTC Regional Vessel Register. These vessels include purse seine, longline, multipurpose, and troll/jig vessels.

Purse Seine vessels: As of January 2024, there are 15 U.S. purse seine vessels larger than 24 meters in length registered to fish in the IATTC Convention Area. These purse seine vessels target skipjack tuna by fishing on floating objects and unassociated sets; they also catch and retain yellowfin and bigeye tuna. Based on the limited financial information about the affected fishing fleets and using individual vessels as proxies for individual businesses, NMFS analyzed revenue for the 15 currently active vessels within the large purse seine fleet by vessel.

Regional Purse Seine Logbook (RPL) data from NMFS' Pacific Islands Fisheries Science Center (PIFSC), and observer data from the IATTC may be used as a proxy for fish landings by large U.S. purse seiners. Because neither gross receipts nor ex-vessel price information specific to individual fishing vessels are available to NMFS, NMFS applied indicative regional cannery prices—as approximations of ex-vessel prices—to annual catches of individual vessels obtained from RPLs and IATTC observer data to estimate the vessels' annual receipts. Indicative regional cannery prices are available through 2020 (developed by the Pacific Islands Forum Fisheries Agency; available at *https://www.ffa.int*). NMFS estimated vessels' annual receipts during 2019–2020. Using this approach, NMFS estimates that among the affected vessels, the range in annual average

receipts in 2019–2020 was $400,000 to $15 million with an average of approximately $8 million.

Based on this limited financial information about the affected fishing fleets, NMFS believes that over half of the vessels in the purse seine fleet are small entities as defined by the RFA; that is, they are independently owned and operated and not dominant in their fields of operation and have annual receipts of no more than $11 million.

Longline vessels: As stated previously in the previous section of this RFA discussion, all of the longline vessels that fished in the IATTC Convention Area between 2019 and 2023, including vessels longer than 24 meters in length impacted by these proposed VMS provisions, would be considered small businesses.

Troll/Jig and Multipurpose: North Pacific albacore troll is a West Coast fishery that historically operates during the summer months, ranging from Southern California to Canadian waters. Currently, most vessels are based out of Oregon and Washington, with some vessels based out of California. Between 2019 and 2023, 43 troll/jig and multipurpose vessels larger than 24 meters in length made landings on the West Coast. Among these vessels, average ex-vessel revenue ranged from $48 to $942,686, with an average of $140,860. All of these vessels had annual revenues less than $11 million and thus are considered to be small entities.

VMS unit failures: According to NOAA OLE, over the course of 2 years in 2022 and 2023, there were 36.5 VMS unit failures among 1,600 West Coast vessels. Based on these numbers, it is reasonable to estimate that approximately 1 percent of vessels equipped with VMS will experience a VMS unit failure at sea in a given year. Therefore, with a maximum of 145 vessels impacted by the rulemaking, and a 1 percent failure rate, NMFS conservatively estimates that 1.5 vessels per year might experience a failure and be impacted by the proposed action, on average. A failure would require that vessel operator to make a series of 5–10 minute phone calls or emails every 6 hours until the issue is resolved. As the cost of a phone call or email is generally less than a dollar, the economic impact of the new reporting requirements would be minimal. This impact is the same regardless of the type of vessel impacted, so impacts between large and small entities are expected to be the same.

Overall Economic Impacts of Proposed Regulations

In summary, the proposed action, if adopted, is not expected to have a significant adverse economic impact on the profitability of a substantial number of small entities or a disproportionate economic effect on small entities relative to large entities. The entities impacted by the provisions related to VMS are considered large and small businesses, and the entities impacted by the provisions related to sharks are considered small businesses. The impacts of both components of the proposed rule are minor and do not have different impacts on large and small entities. The proposed action, if adopted, is not expected to substantially change the typical fishing practices of the affected vessels. Any impact to the income of U.S. vessels is expected to be minimal.

Therefore, the action is not expected to have a significant economic impact on a substantial number of small entities. As a result, an Initial Regulatory Flexibility Analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: April 18, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 300 as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart C—Eastern Pacific Tuna Fisheries

■ 1. The authority citation for part 300, subpart C, continues to read as follows:

Authority: 16 U.S.C. 951 *et seq.*

■ 2. In § 300.24, revise paragraph (z) to read as follows:

§ 300.24 Prohibitions.

* * * * *

(z) In the event of VMS unit failure or interruption: fail to repair or replace a VMS unit; fail to notify the Assistant Director, NOAA Office of Law Enforcement, Pacific Islands Division (or designee) and follow the instructions provided; fail to manually report as required in § 300.26(c)(4)(ii); or otherwise fail to act as provided in § 300.26(c)(4).

* * * * *

■ 3. In § 300.26, revise paragraph (c)(4)(ii) to read as follows:

§ 300.26 Vessel monitoring system (VMS).

* * * * *

(c) * * *

(4) * * *

(ii) If the vessel is at sea: The vessel owner, operator, or designee must contact the Assistant Director (AD) of NOAA Office of Law Enforcement (OLE) by telephone, facsimile, or email at the earliest opportunity during the AD's business hours and identify the caller and vessel. The vessel operator must follow the instructions provided by the AD which could include, but may not be limited to, ceasing fishing, stowing fishing gear, and/or returning to port. The vessel operator must also manually report to OLE every 6 hours by appropriate telecommunication means reports containing: the vessel's identification, the vessel's geographical position (latitude and longitude) with an error of less than 100 meters at a confidence level of 98 percent, the date and time (UTC) of the fixing of the vessel's position, and the vessel's speed and course. These reports must continue until the vessel returns to port or the VMS unit is once again functioning normally. The vessel operator must repair or replace the VMS unit and ensure it is operable before starting the next trip.

* * * * *

■ 4. In § 300.27, revise paragraph (k) and add paragraphs (m) and (n) to read as follows:

§ 300.27 Incidental catch and tuna retention requirements.

* * * * *

(k) *Shark handling and release requirements.* (1) For purse seine vessels: the crew, operator, or owner of a U.S. commercial purse seine fishing vessel must promptly release unharmed, to the extent practicable, any shark (whether live or dead) caught in the IATTC Convention Area, as soon as it is seen in the net or on the deck, without compromising the safety of any persons. If a shark is live when caught, the crew, operator, or owner must follow these release procedures:

(i) Sharks must be released out of the purse seine net by directly releasing the shark from the brailer into the ocean. Sharks that cannot be released without compromising the safety of persons or the sharks before being landed on deck must be returned to the water as soon as possible, either utilizing a ramp from the deck connecting to an opening on

the side of the boat or through escape hatches. If ramps or escape hatches are not available, the sharks must be lowered with a sling or cargo net, using a crane or similar equipment, if available.

(ii) No shark may be gaffed or hooked, lifted by the head, tail, gill slits or spiracles, or lifted by using bind wire against or inserted through the body, and no holes may be punched through the bodies of sharks (*e.g.,* to pass a cable through for lifting the shark).

(2) For longline vessels: the crew, operator, or owner of a U.S. commercial longline fishing vessel must promptly release unharmed, to the extent practicable, any shark (whether live or dead) caught in the IATTC Convention Area that is not retained, as soon as it is seen on the line, without compromising the safety of any persons. If a shark is live when seen on the line, the crew, operator, or owner must follow these release procedures:

(i) Leave the shark in the water.

(ii) Use a line clipper meeting the minimum design standards in paragraph (m) of this section to cut the branchline so that less than 1 meter (or 3.3 ft) of line remains on the animal. If this is not possible without compromising the safety of any persons, cut the branchline as close to the hook as possible.

* * * * *

(m) *Possession and use of required mitigation gear.* (1) NMFS has established minimum design standards for line clippers. At least one line clipper meeting these design standards must be present onboard any longline vessel fishing in the IATTC Convention Area. The minimum design standards are as follows:

(i) The line clipper must have a protected cutting blade. The cutting blade must be curved, recessed, contained in a holder, or otherwise afforded some protection to minimize direct contact of the cutting surface with animals or users of the cutting blade.

(ii) The cutting blade edge must be capable of cutting 2.0–2.1 mm monofilament line and nylon or polypropylene multi-strand material commonly known as braided mainline or tarred mainline.

(iii) The line clipper must have an extended reach handle or pole of at least 6 ft (1.82 m) for the cutting blade.

(iv) The cutting blade must be securely fastened to the extended reach handle or pole to ensure effective deployment and use.

(2) [Reserved]

(n) *Prohibition on shark finning.* Vessel owners and operators must comply with regulations governing the harvest, possession, landing, purchase, and sale of shark fins found at part 600, subpart N of this title.

[FR Doc. 2024–08702 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 89, No. 81

Thursday, April 25, 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

Agricultural Marketing Service

[Doc. No. AMS–ST–24–0017]

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget (OMB), for an extension of and revision to the currently approved information collection ''Laboratory Approval and Testing Division.''

DATES: Comments on this notice must be received by June 24, 2024 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit comments concerning this notice by using the electronic process available at *https://www.regulations.gov/*. All comments should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this notice will be posted without change, including any personal information provided, at *https://www.regulations.gov/* and will be included in the record and made available to the public.

FOR FURTHER INFORMATION CONTACT: Director (Kerry Smith), Laboratory Approval and Testing Division, Science & Technology Program, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, Room 2912–S, Washington, DC 20250–0272; Phone: (202) 690–4089; or Email: *LAS@usda.gov*.

SUPPLEMENTARY INFORMATION:

Agency: USDA, AMS.

Title: Laboratory Approval and Testing Division.

OMB Number: 0581–0251.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: Under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621–1627), AMS' Laboratory Approval and Testing Division (LATD) provides laboratory testing and approval services to facilitate domestic and international marketing of food and agricultural commodities. The authority for implementing LATD programs appear in regulation 7 CFR part 91.

AMS' Laboratory Approval Service (LAS) approves, or accredits, laboratories to perform testing services in support of domestic and international trade. At the request of industry, other Federal agencies, or foreign governments, AMS develops and administers laboratory approval programs (LAPs) to verify that the analysis of food and agricultural products meet country or customer-specified requirements. LAS ensures the testing of products marketed is conducted by qualified and approved laboratories. Laboratory approval program requirements include good laboratory, quality assurance and control practices; applicable domestic and international standards (such as ISO/IEC 17025); established methods and accepted equipment; and on-site audits. Laboratories voluntarily participate in LAPs and pay program fees.

AMS' National Science Laboratories (NSL) provides chemical, microbiological, and bio-molecular lab analytical testing services to facilitate domestic and international marketing of food and agricultural commodities. NSL provides testing services for AMS commodity programs, other USDA agencies, Federal and State agencies, US Military, research institutions, and private sector food and agricultural industries. Applicants voluntarily submit samples for analytical testing and pay testing fees.

The information collection outlines essential information needed about a customer/business for collecting payment for AMS services; evaluating laboratories for compliance to LAP requirements; and submitting samples for laboratory testing. Only authorized representatives of AMS have access to information provided on the forms.

AMS needs to collect customer business information on form ST–1, Application for Service. The information includes business legal name, Federal Tax ID Number, mailing address, billing address, primary and accounts payable contact, and is used to establish an account and deliver communications for collection of service fees.

AMS needs to collect information from customers for the application process and subsequent evaluations for continued participation for voluntary participation in a LAP. The greatest information collection burden is during the application process, a one-time event, which includes request for service and documented policies, procedures, and records as evidence of compliance to the LAP requirements. Once an applicant is approved into the program, the information collection burden decreases for a participant's continued participation which includes intent to continue participation, records as evidence of ongoing compliance in-between audits (*e.g.,* surveillance), and documented policies, procedures, and records for audits. Occasionally, a participant's scope of approval is reduced, or the participant exits the program. When this happens information about the participant's request is collected. This information is essential to determine fees for service and evaluate the participant's ability to meet the LAP requirements.

AMS needs to collect information about the sample and type of testing requested to conduct voluntary analytical laboratory testing. This information can be submitted by the applicant using their internal format or on form ST–2, National Science Laboratories Sample Submission Form or ST–3, National Science Laboratories Sample Submission Form—Hemp. Such information includes applicant contact information; sample description; sample identifier/lot number, number of items; analyses requested; and inclusions needed on the analytical certificate/report of results.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.50 hours per response.

Respondents: Food and Agricultural Businesses.

Estimated Number of Respondents: 3620.00.

Estimated Total Annual Responses: 4059.00.

Estimated Number of Responses per Respondent: 1.12.

Estimated Total Annual Burden on Respondents: 2023.70 hours.

Comments: Comments are invited on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including completion of analyses related documentation; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Melissa Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–08887 Filed 4–24–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by May 28, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Importation of Animals and Poultry, Animal and Poultry Products, Certain Animal Embryos, Semen, and Zoological Animals.

OMB Control Number: 0579–0040.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 (7 U.S.C. 8301), is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The agency charged with carrying out this disease prevention mission is the Animal and Plant Health Inspection Service (APHIS). Disease prevention is the most effective method for maintain a healthy animal population and enhancing APHIS' ability to compete globally in animal and animal product trade. APHIS' Veterinary Services (VS) unit is responsible for, among other things, preventing the introduction of foreign or certain other communicable animal diseases into the United States; and for rapidly identifying, containing, eradicating, or otherwise mitigating such diseases when feasible. In connection with this mission, APHIS collects information from individuals, businesses, and farms who are involved with importation of animals or poultry, animal or poultry products, or animal germplasm (semen, ooycysts, and embryos, including eggs for hatching) into the United States as well as from foreign countries and States to support these imports.

Need and Use of the Information: APHIS will collect information from foreign animal health authorities as well as U.S. importers; foreign exporters; veterinarians and animal health technicians in other countries; State animal health authorities; shippers; owners and operators of foreign processing plants and farms; USDA-approved zoos, laboratories, and feedlots; private quarantine facilities; and other entities involved (directly or indirectly) in the importation of animal and poultry, animals and poultry products, zoological animals, and animal germplasm.

Information collection activities include: agreements; permits; application and space reservation requests; inspections; registers; declarations of importation; requests for hearings; daily logs; additional requirements; application for permits; export health certificates; letters; written notices; daily record of horse activities; written requests; opportunities to present views; reporting; applications for approval of facilities; certifications; arrival notices; on-hold shipment notifications; reports; affidavits; animal identification; written plans; checklists; specimen submissions; emergency action notifications; refusal of entry and order to dispose of fish; premises information; recordkeeping; application of seals; reports; testing submission forms; summaries; identification and certification; and notices. APHIS needs this information to help ensure that these imports do not introduce foreign animal diseases into the United States.

Description of Respondents: Foreign federal governments; state, local, and tribal governments; business or other for-profit and not-for-profits; farms; and individuals and households.

Number of Respondents: 73,769.

Frequency of Responses: Reporting: On occasion; Recordkeeping.

Total Burden Hours: 600,320.

Rachelle Ragland-Greene,

Acting Departmental Information Collection Clearance Officer.

[FR Doc. 2024–08879 Filed 4–24–24; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including

whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by May 28, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utilities Service

Title: Rural Energy Savings Program.

OMB Control Number: 0572–0151.

Summary of Collection: The Rural Utilities Service (RUS), a Rural Development agency of the United States Department of Agriculture (USDA), provides RESP loans to eligible entities that agree to, in turn, make loans to qualified consumers for energy efficiency measures, including cost effective energy storage and renewable energy systems. These loans are made available under the authority of section 6407 of the Farm Security and Rural Investment Act of 2002, as amended, (section 6407). Eligible energy efficiency measures must be for or at a property or properties served by a RESP borrower, using commercially available technologies that would allow qualified consumers to decrease their energy use or costs through cost-effective energy efficiency investments. Loans made by RESP borrowers under this program are repaid through a recurring bill to the qualified consumer for the property or properties for, or at which, the energy efficiencies measures are or will be implemented.

Since its inception in 2016, the Rural Energy Savings Program (RESP or the Program) has evolved. New and clarifying authorities have been added to the program including changes made by the Agriculture Improvement Act of 2018 (2018 Farm Bill) (Pub. L. 115–334) which reauthorized the implementation of the RESP. Title VI, subtitle C, section 6303 of the Agriculture Improvement Act of 2018 introduced several amendments to section 6407 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 8107a). The amendments include an increase in the maximum amount RUS eligible borrowers may charge to their qualified consumers, streamlining the accounting requirements, and the use of a recurring bill to the qualified consumer as a repayment mechanism for the RUS borrowers. The governing regulation for this program is 7 CFR 1719.

Need and Use of the Information: This collection receives information only from those RUS electric borrowers or eligible entities who submit letters of intent to apply for the Rural Energy Savings Program and those who subsequently are invited to submit applications. Several qualified entities will be invited to submit applications for a RESP loan after notifying the agency of their interest. The information required from the respondents is limited to essential criteria for screening to determine if proposed activities and investment are consistent with the purpose of the statute, determining eligibility, evaluating the likelihood of fulfilling requirements of a complete application, and to make a preliminary assessment of the feasibility of the business model contemplated by the applicant in order to protect the interests of the Government when making the loan. The information collected is consistent with requirements necessary to determine acceptable qualifications and evaluate applications. Some of the relending projects outlined in applications may vary substantially in complexity and administration and so, the individual respondent's burden may vary as well. The information submitted is used by RUS to determine public interest in the program, determine eligibility of applicants for loans under RESP, and to ensure borrowers use the funds for purposes consistent with goals of RESP.

Description of Respondents: Not-for-profit institutions.

Number of Respondents: 9.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 849.

Rural Utilities Service

Title: OneRD Guaranteed Loan Program.

OMB Control Number: 0572–0155.

Summary of Collection: Rural Development is implementing a new consolidated guaranteed loan program. This rule created a new guaranteed loan program that combined four existing guaranteed loan programs under one regulatory platform. These four programs, described below, are: (1) the Community Facilities Program, (2) the Water and Waste Disposal Program, (3) the Business and Industry Program, and (4) the Rural Energy for America Program (formerly known as the Renewable Energy Systems and Energy Efficiency Improvements Program under Title IX, Section 9007 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill).

Community Facilities Program. The Rural Housing Service (RHS) is authorized by Section 306 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926) to make loans to public agencies, nonprofit corporations, and Indian tribes for the development of essential community facilities primarily serving rural residents. RHS has been making guaranteed loans through its Community Programs, which was authorized by Congress in 1990. Community Program guaranteed loans are used to finance many types of projects varying in size and complexity from large general hospitals to small firefighting equipment loans. The guaranteed loan program encourages lender participation and provides specific guidance in the processing and servicing of guaranteed Community Facility loans.

Water and Waste Disposal Program. The Rural Utilities Service is authorized by Section 306 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926) to make loans to public agencies, nonprofit corporations, and Indian tribes for the development of water and waste disposal facilities primarily serving rural residents. Water and Waste Disposal Programs (WW), which has been in existence for approximately 60 years, was authorized with the Appropriations Act of 1990, when Congress appropriated funds, to implement the Water and Waste Disposal guaranteed loan program. Water and waste disposal guaranteed loans are used to finance many types of projects varying in size and complexity. The guaranteed loan program encourages lender participation and provides specific guidance in the

processing and servicing of guaranteed WW loans.

Business and Industry Program. The Business and Industry (B&I) Guaranteed Loan Program was legislated in 1972 under Section 310B of the Consolidated Farm and Rural Development Act, as amended. The purpose of the program is to improve, develop, or finance businesses, industries, and employment and improve the economic and environmental climate in rural communities. This purpose is achieved through bolstering the existing private credit structure through the guaranteeing of quality loans made by lending institutions, thereby providing lasting community benefits.

Rural Energy for America Program. The Rural Energy for America Program is authorized under the 2008 Farm Bill to make loan guarantees and grants to farmers, ranchers, and rural small businesses to purchase renewable energy systems and make energy efficiency improvements. The program is designed to help farmers, ranchers, and rural small business reduce energy cost and consumption, develop new income streams, and help meet the nation's critical energy needs.

In an effort to reduce paperwork and make Rural Development forms more consistent with each other, thereby improving customer service, RD has revised the forms in this burden package to accommodate all four programs.

Need and Use of the Information: Lending entities who wish to participate in this program must submit an application and/or certain information to Rural Development. This information will be used to determine their eligibility for participation in this program.

Eligible lenders and their prospective borrowers who are seeking guaranteed loans will have to submit applications with specified information, certifications, and agreements to the State Office. This information will be used to determine borrower eligibility, to determine project eligibility and feasibility, and to ensure that borrowers operate on a sound basis and use funds for authorized purposes.

Description of Respondents: Business or other for-profit; Not-for-profit institutions.

Number of Respondents: 464.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 64,694.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2024–08884 Filed 4–24–24; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

[Docket No. FPAC–2024–0001]

Federal Award Performance Monitoring and Reporting Form

AGENCY: Farm Production and Conservation Business Center, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act requirements, the Farm Production and Conservation (FPAC) is requesting comments from all interested individuals and organizations on a new information collection request for the FPAC Federal Award Performance Monitoring and Reporting Form in support of the implementation of Performance Measurement.

DATES: We will consider comments that we must be received by June 24, 2024.

ADDRESSES: We invite you to submit comments on this notice. You may submit comments, identified by Docket ID: FPAC–2024–0001, in the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments. Comments will be available for viewing online at *regulations.gov.*

You may also send comments to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Copies of the information collection may be requested by contacting Kenneth James.

FOR FURTHER INFORMATION CONTACT: Kenneth James; telephone: (517) 318–3188; email: *Kenneth.James@usda.gov.* Individuals who require alternative means for communication should contact the USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Title: FPAC Federal Award Performance Monitoring and Reporting Form.

OMB Control Number: 0565–New.

Type of Request: New.

Abstract: FPAC will use the Federal Award Performance Monitoring and Reporting Form to support the implementation of section 301 of 2 CFR part 200, Performance Measurement. This section of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR 200, requires Federal Agencies to measure recipients' accomplishments against performance goals and objectives. Performance reporting allows the Federal Agency to share lessons learned, improve program outcomes, and foster adoption of promising practices. In addition, performance reporting frequency and content is established to not only allow the Federal awarding agency to understand the recipient progress, but also to facilitate identification of promising practices among recipients and build the evidence upon which the Federal awarding agency's program and performance decisions are made.

This information must be collected with the frequency required by the terms and conditions of the Federal award, but no less frequently than annually and not more frequently than quarterly except in unusual circumstances. The information collection, FPAC Federal Award Performance Monitoring and Reporting Form, will support the FPAC Business Center (BC), Farm Service Agency (FSA), Commodity Credit Corporation (CCC), Natural Resources Conservation Service (NRCS), and Risk Management Agency (RMA) in obtaining required Federal award performance information from recipients. This form will replace the discontinued ''Standard Form (SF) Performance Progress Report'' which had previously been used to collect this data.

Applicable award recipients must submit performance data using the FPAC Federal Award Performance Monitoring and Reporting Form. Recipients will use this form to:

1. Show accomplishments, including providing a status of work completed, and comparing accomplishments to the project's goals and objectives;
2. Provide reasons and recommend solutions when differences exist between accomplishments and the project's goals and objectives;
3. Provide a status of expenditures;
4. Describe any problems or adverse conditions that are having a negative impact on the project;
5. Describe any pending or proposed changes to the agreement;
6. Summarize future work planned during the next reporting period; and
7. List any recently completed or ongoing subrecipient monitoring activities.

The recipients can be City or township governments, County governments, For-profit organizations other than small businesses, Independent school districts, Native American tribal governments (Federally recognized), Native American tribal organizations (other than Federally recognized tribal governments), Nonprofits having a 501(c)(3) status with the IRS (other than institutions of

higher education), Nonprofits that do not have a 501(c)(3) status with the IRS (other than institutions of higher education), Private institutions of higher education, Public and State-controlled institutions of higher education, Public housing authorities or Indian housing authorities, Small businesses, Individuals, Special district governments, agricultural producer associations, farmer cooperatives, special service districts, or State governments.

For the following estimated total annual burden on respondents, the formula used to calculate the total burden hours is the estimated average time per response multiplied by the estimated total annual number of responses.

Estimate of Average Time to Respond: Public reporting burden for collecting information under this notice is estimated to average 45 minutes per response (0.75), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Type of Respondents: Individual or Household, Private Sectors: Businesses or other for-profits; Farms, Not-for-profits institution, and State, Local and Tribal Government.

Estimated Number of Respondents: 4,000.

Estimated Average Number of Responses per Respondent: 2.

Estimated Total Annual Responses: 8,000.

Estimated Average Time per Response: 0.75 hour.

Estimated Total Annual Burden on Respondents: 6,000 hours.

FPAC is requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of burden of the collection of information including the validity of the methodology and assumptions used;

(3) Evaluate the quality, utility, and clarity of the information collection; and

(4) Minimize the burden of the information collection on those who respond through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses where provided, will be anonymous. Comments will be summarized and included in the request for OMB approval.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any telephone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410 or email: *OAC@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Scott Linsky,

Acting Deputy Chief Operating Officer, USDA Farm Production and Conservation Business Center.

[FR Doc. 2024–08854 Filed 4–24–24; 8:45 am]

BILLING CODE 3411–E2–P

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers for Publication of Legal Notices in the Eastern Region

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice.

SUMMARY: This notice lists the newspapers that will be used by the Ranger Districts, Forests, and Regional Office of the Eastern Region to publish legal notices required under Forest Service regulations. The intended effect of this action is to inform interested members of the public which newspapers the Forest Service will use to publish notices of proposed actions and notices of decisions. This will provide the public with constructive notice of Forest Service proposals and decisions, provide information on the procedures to comment, object, or appeal, and establish the date that the Forest Service will use to determine if comments, appeals, or objections were timely.

DATES: Publication of legal notices in the listed newspapers begins on the date of this publication. This list of newspapers will remain in effect until a new list is published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Matthew St. Pierre, Administrative Review Specialist, Eastern Region, 626 E Wisconsin Avenue, Milwaukee, Wisconsin 53202 and by email at *matthew.stpierre@usda.gov* or phone at 414–297–3600.

SUPPLEMENTARY INFORMATION: The administrative procedures at 36 CFR 218 and 219 require the Forest Service to publish notices in a newspaper of general circulation. The content of the notices is specified in 36 CFR 218 and 219. In general, the notices will identify: the decision or project by title or subject matter; the name and title of the official making the decision; how to obtain additional information; and where and how to file comments or appeals/objection. The date the notice is published will be used to establish the official date for the beginning of the comment, appeal, or objection period.

Eastern Region

Regional Forester Notices for Comments and Decisions and Objections affecting National Forest System lands in the Eastern Region, in the states of Illinois, Indiana, Ohio, Michigan, Minnesota, Missouri, New Hampshire, Maine, Pennsylvania, Vermont, New York, West Virginia, and

Wisconsin: *The Milwaukee Journal Sentinel,* Milwaukee, Wisconsin.

Pennsylvania

Allegheny National Forest

Allegheny Forest Supervisor Decisions: *Warren Times Observer,* Warren, Pennsylvania.

District Ranger Decisions for Bradford District: *Bradford Era,* Bradford, Pennsylvania.

District Ranger Decisions for Marienville District: *The Kane Republican,* Kane, Pennsylvania.

Wisconsin

Chequamegon-Nicolet National Forest

Chequamegon-Nicolet Forest Supervisor Decisions: *The Northwoods River News,* Rhinelander, Wisconsin.

District Ranger Decisions for Eagle River-Florence District and Lakewood-Laona District: *The Northwoods River News,* Rhinelander, Wisconsin.

District Ranger Decisions for Great Divide District and Washburn District: *The Ashland Daily Press,* Ashland, Wisconsin.

District Ranger Decisions for the Medford-Park Falls District: *The Star News,* Medford, Wisconsin.

Minnesota

Chippewa National Forest

Chippewa Forest Supervisor Decisions: *Bemidji Pioneer,* Bemidji, Minnesota.

District Ranger Decisions for the Blackduck District: *The Blackduck American,* Blackduck, Minnesota.

District Ranger Decisions for the Deer River District: *Grand Rapids Herald-Review,* Grand Rapids, Minnesota.

District Ranger Decisions for the Walker District: *The Pilot/Independent,* Walker, Minnesota.

Superior National Forest

Superior Forest Supervisor Decisions: *Duluth News-Tribune,* Duluth, Minnesota.

District Ranger Decisions for the Gunflint District: *Cook County News-Herald,* Grand Marais, Minnesota.

District Ranger Decisions for the Kawishiwi District: *Ely Echo,* Ely, Minnesota.

District Ranger Decisions for the LaCroix District and Laurentian District: *Mesabi Tribune,* Virginia, Minnesota.

District Ranger Decisions for the Tofte District: *Duluth News-Tribune,* Duluth, Minnesota.

Vermont

Green Mountain National Forest

Green Mountain Forest Supervisor Decisions: *The Rutland Herald,* Rutland, Vermont.

District Ranger Decisions for the Manchester District, Middlebury District, and Rochester District: *The Rutland Herald,* Rutland, Vermont.

New York

Finger Lakes National Forest

Finger Lakes Forest Supervisor Decisions: *The Ithaca Journal,* Ithaca, New York.

District Ranger Decisions for the Hector District: *The Ithaca Journal,* Ithaca, New York.

Michigan

Hiawatha National Forest

Hiawatha Forest Supervisor Decisions: *The Daily Press,* Escanaba, Michigan.

District Ranger Decisions for the Rapid River District and Manistique District: *The Daily Press,* Escanaba, Michigan.

District Ranger Decisions for the Munising District: *The Mining Journal,* Marquette, Michigan.

District Ranger Decisions for the St. Ignace District and Sault Ste. Marie District: *The Sault News,* Sault Ste. Marie, Michigan.

Huron-Manistee National Forest

Huron-Manistee Forest Supervisor Decisions: *Cadillac News,* Cadillac, Michigan.

District Ranger Decisions for the Baldwin-White Cloud Districts: *Lake County Star,* Baldwin, Michigan.

District Ranger Decisions for the Cadillac-Manistee Districts: *Manistee News Advocate,* Manistee, Michigan.

District Ranger Decisions for the Mio District: *Oscoda County Herald,* Mio, Michigan.

District Ranger Decisions for the Huron Shores District: *Oscoda Press,* Oscoda, Michigan.

Ottawa National Forest

Ottawa Forest Supervisor Decisions: *The Daily Mining Gazette,* Houghton, Michigan.

District Ranger Decisions for the Bergland District, Bessemer District, Kenton District, Iron River District, Ontonagon District, and Watersmeet Districts: *The Daily Mining Gazette,* Houghton, Michigan.

Indiana

Hoosier National Forest

Hoosier Forest Supervisor Decisions: *Times-Mail,* Bedford, Indiana.

District Ranger Decisions for the Brownstone District: *Times-Mail,* Bedford, Indiana.

District Ranger Decisions for the Tell City District: *The Perry County News,* Tell City, Indiana.

Missouri

Mark Twain National Forest

Mark Twain Forest Supervisor Decisions: *The Phelps County Focus,* Rolla, Missouri.

District Ranger Decisions for the Ava/Cassville/Willow Springs District: *Springfield News-Leader,* Springfield, Missouri.

District Ranger Decisions for the Cedar Creek District: *Fulton Sun,* Fulton, Missouri.

District Ranger Decisions for the Eleven Point District: *Prospect News,* Doniphan, Missouri.

District Ranger Decisions for the Rolla District and Houston District: *Houston Herald,* Houston, Missouri.

District Ranger Decisions for the Poplar Bluff District: *Daily American Republic,* Poplar Bluff, Missouri.

District Ranger Decisions for the Potosi District: *The Independent-Journal,* Potosi, Missouri.

District Ranger Decisions for the Fredericktown District: *The Democrat-News,* Fredericktown, Missouri.

District Ranger Decisions for the Salem District: *The Salem News,* Salem, Missouri.

Illinois

Midewin National Tallgrass Prairie

Midewin Prairie Supervisor Decisions: *The Herald News,* Joliet, Illinois.

Shawnee National Forest

Shawnee Forest Supervisor Decisions: *Southern Illinoisan,* Carbondale, Illinois.

District Ranger Decisions for the Hidden Springs District and Mississippi Bluffs District: *Southern Illinoisan,* Carbondale, Illinois.

West Virginia

Monongahela National Forest

Monongahela Forest Supervisor Decisions: *The Inter-Mountain,* Elkins, West Virginia.

District Ranger Decisions for the Cheat-Potomac District: *The Grant County Press,* Petersburg, West Virginia.

District Ranger Decisions for the Gauley District: *The Nicholas Chronicle,* Summersville, West Virginia.

District Ranger Decisions for the Greenbrier District and the Marlinton-White Sulphur District: *The Pocahontas Times,* Marlinton, West Virginia.

Ohio

Wayne National Forest

Wayne Forest Supervisor Decisions: *Athens Messenger,* Athens, Ohio.

District Ranger Decisions for the Athens District: *Athens Messenger,* Athens, Ohio.

District Ranger Decisions for the Ironton District: *The Ironton Tribune,* Ironton, Ohio.

New Hampshire and Maine

White Mountain National Forest

White Mountain Forest Supervisor Decisions affecting National Forest System lands in New Hampshire: *The New Hampshire Union Leader,* Manchester, New Hampshire.

White Mountain Forest Supervisor Decisions affecting National Forest System lands in Maine: *Lewiston Sun-Journal,* Lewiston, Maine.

District Ranger Decisions for the Androscoggin District and Saco District: *The New Hampshire Union Leader,* Manchester, New Hampshire.

District Ranger Decisions for the Androscoggin District and Saco District affecting National Forest System lands in Maine: *Lewiston Sun-Journal,* Lewiston, Maine.

District Ranger Decisions for the Pemigewasset District: *The New Hampshire Union Leader,* Manchester, New Hampshire.

Troy Heithecker,

Associate Deputy Chief, National Forest System.

[FR Doc. 2024–08785 Filed 4–24–24; 8:45 am]

BILLING CODE 3411–15–P

AMERICAN BATTLE MONUMENTS COMMISSION

Request for a Revision of a Currently Approved Collection; ABMC Web Survey Amendments

AGENCY: American Battle Monuments Commission (ABMC).

ACTION: Notice of information collection, request for comment.

SUMMARY: This The American Battle Monuments Commission, in accordance with the Paperwork Reduction Act (PRA) of 1995, 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 on the proposed revision to the Visitor Web Survey prior to the submission of these information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before May 22, 2024.

ADDRESSES: Interested persons are invited to submit written comments by email to *byrnesa@abmc.gov.* Please reference Visitor Web Survey in the subject line of your comments. You may also submit comments, identified by Docket Number ABMC–2024–0001, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Ashleigh Byrnes, Deputy Chief of Public Affairs, 703–584–1564, *byrnesa@abmc.gov;* (Alternate) Lin-Lin Jennifer Li, Chief Information Officer, 703–584–1530, *lij@abmc.gov.*

SUPPLEMENTARY INFORMATION:

Title: Clearance for the Electronic Survey Collection of Demographic Data on Agency Website Usage and Service Delivery.

Type of Request: Regular submission, Request for a Revision of a Currently Approved Collection.

Abstract: In an effort to improve online visitor experience and usage habits, the American Battle Monuments Commission (ABMC) is conducting a web survey (survey) on *abmc.gov.* The existing survey collects information to track visitor feedback to enhance web design and content, increase data quality, and operate more efficiently. The survey solicits [or, ''provides ABMC''] information on visitation to ABMC's physical locations, functionality of the website, and overall experience.

The survey collected roughly 500 responses in 2023. The sample size increased to this point due to survey look and feel enhancements that launched on July 12, 2023. The visual appearance of the survey was realigned with the color palette and design of the abmc.gov site to make the survey more appealing to respondents. The official sampling percentage for the survey did not change, but collection did improve as a result of these enhancements. Prior to that, the survey sample size was fairly consistent over time.

The survey is designed to allow for incorporation of new content based on previous visitor feedback and agency objectives. New questions pertaining to demographic information must be submitted to the OMB for approval.

The survey currently collects the following information from site visitors:

- Visitation habits to ABMC physical locations (cemeteries, memorials, monuments, markers).
- Visitation habits to *abmc.gov.*
- Purpose of use for visiting *abmc.gov.*
- Applicable categories of interest associated with ABMC and *abmc.gov* (historical research, genealogy, media, education).
- Website functionality and usability.
- Overall user experience.

In accordance with federal guidance to advance diversity, equity, inclusion and accessibility, ABMC proposes to incorporate additional voluntary survey questions to collect data on select demographic characteristics for web visitors, including:

- Age range and sex.
- Ethnicity or race.
- Veteran status.
- Language.
- Disability and accessibility needs.

This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations, taking into account the diverse preferences and needs of the Agency's audience. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable. Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency.

Method of Collection: The survey collection is conducted electronically using a web-based questionnaire, and randomly samples 50% of desktop website visitors who have visited 2 or more pages. Sampled visitors are presented with an invitation to take the survey, which they can accept or decline. The survey also uses cookies to ensure that repeat visitors are not continuously asked to take the survey. Currently, these cookies are set to offer the ABMC survey every 90 days. Visitors who have been to the site and have accepted, declined, or abandoned a survey will not be invited again for 90 days in that browser, on that device, unless they clear their cookies.

Type of Respondents: Individuals and Households, Business and Organizations, State, Local or Tribal Government.

Estimate of Burden per Response: 10 minutes.

Estimated Number of Respondents: 500.

Estimated Total Annual Burden on Respondents: 83 hours per year.

Respondent's Obligation: Optional.

Request for Comments: Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission to the Office of Management and Budget for approval.

Kelly Dove,

Chief Human Capital Officer, ABMC.

[FR Doc. 2024–07708 Filed 4–24–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Office of the Secretary

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Generic Clearance Program Performance Progress Reports

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on December 07, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Office of the Secretary, Department of Commerce.

Title: Generic Clearance Program Performance Progress Reports.

OMB Control Number: Not yet issued. This is a new information collection.

Form Number(s): Varies or None.

Type of Request: Regular submission.

Number of Respondents: 5,000.

Average Hours per Response: Varies.

Burden Hours: 50,000.

Needs and Uses: Some program offices may use some form of electronic collection. This could include web pages, email or other online data management systems. Recipients may be required to enter and retrieve information pertinent to their awards through electronic forms closely resembling the paper forms (*i.e.,* fillable PDFs or tailored online data management systems). Such technology support is expected to improve standardization and timeliness of recipient reporting and to ease further analyses of reported data.

Affected Public: Individuals or households; Private Sector; Not-for-profit institutions; State, Local, or Tribal government.

Frequency: Varies.

Respondent's Obligation: Voluntary or Mandatory.

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 the title of the collection.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–08905 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–17–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (Committee) will meet on

Thursday, May 9, 2024, at 1:00 p.m.–2:30 p.m., Eastern Daylight Time. This meeting will be virtual via MS Teams. The Committee advises the Under Secretary for Industry and Security through the Assistant Secretary for Export Administration, BIS, U.S. Department of Commerce, in accordance with the Secretary's delegation of authority under Department Organization Order (DOO) 10–16 and assigned functions with BIS under DOO 50–1, on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology. The purpose of the meeting is to have Committee members and U.S. Government representatives mutually review updated technical data and policy-driving information that has been gathered.

Agenda

Open Session

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the open meeting and public participation requirements found in sections 1009(a)(1) and 1009(a)(3) of the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001–1014). The exemption is authorized by section 1009(d) of the FACA, which permits the closure of advisory committee meetings, or portions thereof, if the head of the agency to which the advisory committee reports determines such meetings may be closed to the public in accordance with subsection (c) of the Government in the Sunshine Act (5 U.S.C. 552b(c)). In this case, the applicable provisions of 5 U.S.C. 552b(c) are subsection 552b(c)(4), which permits closure to protect trade secrets and commercial or financial information that is privileged or confidential, and subsection 552b(c)(9)(B), which permits closure to protect information that would be likely to significantly frustrate implementation of a proposed agency action were it to be disclosed prematurely. The closed session of the meeting will involve

committee discussions and guidance regarding U.S. Government strategies and policies.

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than April 23, 2024.

To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of materials to Committee members, the Committee suggests that members of the public forward their materials prior to the meeting to Ms. Springer. Material submitted by the public will be made public and therefore should not contain confidential information.

The Deputy Assistant Secretary for Administration Performing the non-exclusive functions and duties of the Chief Financial Officer with the concurrence of the delegate of the General Counsel, formally determined on April 9, 2024, pursuant to 5 U.S.C. 1009(d)), that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. 1009(a)(1) and 1009(a)(3). The remaining portions of the meeting will be open to the public.

For more information, contact Ms. Springer via email.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2024–08857 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–331–806]

Frozen Warmwater Shrimp From Ecuador: Amended Preliminary Determination of Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) published a notice in the **Federal Register** on April 1, 2024, in which Commerce preliminarily determined that countervailable subsidies are being provided to producers and exporters of frozen warmwater shrimp (shrimp) from Ecuador. Based on comments filed by interested parties in this investigation, Commerce is amending the preliminary affirmative countervailing duty (CVD) determination on shrimp from Ecuador to correct significant ministerial errors.

DATES: Applicable April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Zachary Shaykin or Reginald Anadio, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2638 or (202) 482–3166, respectively.

SUPPLEMENTARY INFORMATION:

Background

In accordance with section 703(b) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.205(b), on April 1, 2024, Commerce published in the **Federal Register** the preliminary affirmative CVD determination for shrimp from Ecuador, and alignment of the final determination with the final antidumping duty determination.[1] From March 28 through April 2, 2024, we received timely-filed ministerial error allegations from Industrial Pesquera Santa Priscila S.A. (Santa Priscila), Sociedad Nacional de Galápagos C.A. (SONGA), the petitioner,[2] and the Government of Ecuador (GOE).[3] Santa Priscila, SONGA, and the GOE alleged in their ministerial error allegations that Commerce made significant ministerial errors in the *Preliminary Determination* with respect to Santa Priscila and SONGA's subsidy rates.[4]

Period of Investigation

The period of investigation (POI) is January 1, 2022, through December 31, 2022.

Scope of the Investigation

The products covered by this investigation are shrimp from Ecuador. For a complete description of the scope of this investigation, *see Preliminary Determination* at Appendix I.

Analysis of Significant Ministerial Error Allegations

Commerce will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination according to 19 CFR 351.224(e). A ministerial error is defined in 19 CFR 351.224(f) as ''an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.'' [5] A significant ministerial error is defined as a ministerial error, the correction of which, singly or in combination with other errors, would result in: (1) a change of at least five absolute percentage points in, but not less than 25 percent of, the CVD rate calculated in the original preliminary determination; or (2) a difference between a CVD rate of zero (or *de minimis*) and a CVD rate greater than *de minimis,* or vice versa.[6]

Amended Preliminary Determination

Pursuant to 19 CFR 351.224(e) and (g)(1), Commerce is amending the *Preliminary Determination* to reflect the correction of two ministerial errors made in the calculation of the countervailable subsidy rate for Santa Priscila.[7] Specifically, when calculating a countervailable subsidy rate attributable to Santa Priscila under the Tax Incentives for Priority Sectors under the 2010 Organic Production Code (Priority Sectors) program, we inadvertently used the wrong tax deduction amount with which to calculate the benefit attributable to Santa Priscila under the Priority Sectors Program.[8] Further, we inadvertently

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[1] *See Frozen Warmwater Shrimp From Ecuador: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With the Final Antidumping Duty Determination,* 89 FR 22379 (April 1, 2024) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] The petitioner in this investigation is the American Shrimp Processors Association.

[3] *See* Santa Priscila's Letter, ''Frozen Warmwater Shrimp from Ecuador—Request for Correction of Ministerial Errors with Respect to Industrial Pesquera Santa Priscila S.A. and Request for Meeting,'' dated March 28, 2024 (Santa Priscila's Ministerial Error Allegation); SONGA's Letter, ''Frozen Warmwater Shrimp from Ecuador—Request for Correction of Ministerial Error in Preliminary Determination,'' dated March 29, 2024 (SONGA's Ministerial Error Allegation); *see also* Petitioner's Letter, ''Frozen Warmwater Shrimp from Ecuador: Ministerial Error Comments,'' dated April 2, 2024; and GOE's Letter, ''Frozen Warmwater Shrimp from Ecuador—Request for Correction of Ministerial Errors with Respect to Industrial Pesquera Santa Priscila S.A. and Request for Meeting,'' dated April 2, 2024 (GOE's Ministerial Error Allegation).

[4] *See* Santa Priscila's Ministerial Error Allegation; *see also* SONGA's Ministerial Error Allegation; and GOE's Ministerial Error Allegation.

[5] *See* section 705(e) of the Act.

[6] *See* 19 CFR 351.224(g).

[7] *See* Memorandum, ''Countervailing Duty Investigation of Frozen Warmwater Shrimp from Ecuador: Allegations of Significant Ministerial Errors in the Preliminary Determination,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Ministerial Error Memorandum).

[8] *See Preliminary Determination* PDM at 15 through 17.

calculated a countervailable subsidy rate attributable to Santa Priscila under both the Priority Sectors program and the Investment Contract program that should have only been calculated pursuant to one program, *i.e.,* the Priority Sectors Program.[9] Commerce finds that these ministerial errors are significant ministerial errors within the meaning of 19 CFR 351.224(g) because correction of these errors decreases Santa Priscila's countervailing subsidy rate from 13.41 to 2.89 percent, which is a change that is at least five absolute percentage points in, and more than 25 percent of, the subsidy rate calculated for Santa Priscila in the original *Preliminary Determination.*

Furthermore, in the *Preliminary Determination,* we calculated a 1.69 percent subsidy rate for SONGA and indicated that we will instruct U.S. Customs and Border Protection (CBP) to require a cash deposit equal to that rate. Section 703(b)(4)(B) of the Act, provides that Commerce will apply a *de minimis* threshold of two percent to a country designated by the United States Trade Representative (USTR) as a developing country for purposes of the CVD law.[10] Ecuador is designated as a developing country by the USTR under CVD law and is subject to a *de minimis* standard of two percent.[11] As stated by SONGA and the GOE,[12] we inadvertently did not designate the preliminary *ad valorem* subsidy rate assigned to SONGA as *de minimis* as stipulated by section 703(b)(4)(B) of the Act. Therefore, for SONGA, we will not direct CBP to suspend liquidation of entries of the subject merchandise from Ecuador, in accordance with section 703(b)(4)(B) of the Act.

In addition, as a result of this inadvertent error and as stipulated by section 705(c)(5)(A) of the Act, we are correcting the all-others rate to equal the amended preliminary CVD rate established for Santa Priscila, *i.e.,* 2.89 percent *ad valorem,* as this is the only rate that is not zero, *de minimis,* or based entirely on the facts otherwise available.

Also, we listed an incorrect name for one of Santa Priscila's cross-owned companies, *i.e.,* Tropical Packing Ecuador S.A.[13] Moreover, we inadvertently stated ''aluminum extrusions from Indonesia'' in the ITC Notification section of the original notice.[14]

For a complete discussion of the alleged ministerial errors, *see* the Preliminary Ministerial Error Memorandum.

Amended Preliminary Determination

Company	Subsidy rate (percent *ad valorem*)
Industrial Pesquera Santa Priscila S.A.[15]	2.89.
Sociedad Nacional de Galápagos C.A.[16]	1.69 (*de minimis*).
All-Others	2.89.

Correction

In the **Federal Register** of April 1, 2024, in FR Doc 2024–06845, on page 22380, in the third column, correct the Subsidy Rate (percent *ad valorem*) for Sociedad Nacional de Galapagos C.A. and All Others, as found in the rate table, to 1.69 *de minimis* and 2.89, respectively, and correct the name ''Tropack S.A.'' as found under footnote 9 to ''Tropical Packing Ecuador S.A.'' Additionally, in FR Doc 2024–06845, on page 22380, in the third column, second paragraph, include ''As provided for in section 703(b)(4)(B) of the Act, for developing countries, any rate less than two percent *ad valorem* in an investigation is *de minimis.* Accordingly, for SONGA, we will not direct CBP to suspend liquidation of entries of subject merchandise'' before the sentence stating, ''Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.'' Additionally, in FR Doc 2024–06845, on page 22381, in the second column, correct ''aluminum extrusions from Indonesia'' to ''shrimp from Ecuador.''

Amended Cash Deposits and Suspension of Liquidation

The collection of cash deposits and suspension of liquidation will be established according to the rates calculated in this amended preliminary determination. Because the amended rates for Santa Priscila and all others result in decreased cash deposits, they will be effective retroactively to April 1, 2024, the date of publication of the *Preliminary Determination.* Parties will be notified of this determination, in accordance with section 703(d) and (f) of the Act.

Disclosure

We intend to disclose the calculations performed to parties in this proceeding within five days after public announcement of the amended preliminary determination, in accordance with 19 CFR 351.224.

International Trade Commission Notification

In accordance with section 703(f) of the Act, we will notify the International Trade Commission of our amended preliminary determination.

Notification to Interested Parties

This notice is issued and published in accordance with sections 703(f) and 777(i) of the Act.

Dated: April 19, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024–08817 Filed 4–24–24; 8:45 am]

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[9] *Id.* at 15 through 17 and 23 through 26.

[10] *See* section 703(b)(4)(B) of the Act; *see also* section 771(36) of the Act.

[11] *See Designations of Developing and Least Developed Countries Under the Countervailing Duty Law,* 85 FR 7613, 7615 (February 10, 2020); *see also Frozen Warmwater Shrimp from Ecuador, India, Indonesia, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation,* 88 FR 81053, 81056 (November 21, 2023).

[12] *See* SONGA's Ministerial Error Allegation; *see also* GOE's Ministerial Error Allegation.

[13] *See Preliminary Determination,* 89 FR at 22380.

[14] *Id.* at 22381

[15] As discussed in the *Preliminary Determination,* Commerce has found the following companies to be cross-owned with Santa Priscila: Manesil S.A., Produmar S.A., Egidiosa S.A., and Tropical Packing Ecuador S.A.

[16] As discussed in the *Preliminary Determination,* Commerce has found the following companies to be cross-owned with SONGA: Naturisa S.A., Holding Sola & Sola Solacciones S.A., and Empacadora Champmar S.A.

DEPARTMENT OF COMMERCE

International Trade Administration

The Regents of the University of Michigan; Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, asamended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we

invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before May 15, 2024. Address written comments to Statutory Import Programs Staff, Room 41006, U.S. Department of Commerce, Washington, DC 20230. Please also email a copy of those comments to *Dianne.Hanshaw@trade.gov.*

Docket Number: 24–009. Applicant: The Regents of the University of Michigan, 5082 Wolverine Tower, 3003 South State Street, Ann Arbor, MI 48109–1287. Instrument: Formula Student Motor and Motor Controllers. Manufacturer: AMK Motion GmbH + CoKG, Germany. Intended Use: The instrument is intended to be used to teach current engineering students at the University of Michigan about vehicle integration, design, and dynamics. This is taught to students through participation in the national wide intercollegiate Formula SAE competitions. This motor is a critical component in the electric powertrain of the vehicle as each motor will independently control each wheel of the car. These specific motors from AMK allow our team to learn the fundamentals of such a process without having to design and manufacture our motors and motor controllers, which is a far more expensive, time-consuming, and knowledge-heavy process. Justification for Duty-Free Entry: According to the applicant, there are no instruments of the same general category manufactured in the United States. Application accepted by Commissioner of Customs: January 3, 2024.

Dated: April 19, 2024.

Gregory W. Campbell,

Director, Subsidies and Economic Analysis, Enforcement and Compliance.

[FR Doc. 2024–08810 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–849]

Common Alloy Aluminum Sheet From Germany: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2022–2023

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that Speira GmbH (Speira), the sole respondent subject to this administrative review of the antidumping duty order on common alloy aluminum sheet from Germany, sold subject merchandise at less than normal value (NV) during the period of review (POR) April 1, 2022, through March 31, 2023. Interested parties are invited to comment on these preliminary results of the review.

DATES: Applicable April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2769.

SUPPLEMENTARY INFORMATION:

Background

On June 12, 2023, Commerce initiated an administrative review of the antidumping duty order on common alloy aluminum sheet from Germany covering the POR.[1] On December 27, 2023, Commerce extended the deadline for issuing the preliminary results of this review until April 19, 2024.[2]

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[3] A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice. The Preliminary 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 Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The products covered by the *Order* are common alloy aluminum sheet, which is a flat-rolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width. Common alloy sheet within the scope of the *Order* includes both not clad aluminum sheet, as well as multi-alloy, clad aluminum sheet. Common alloy sheet is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7606.11.3060, 7606.11.6000, 7606.12.3096, 7606.12.6000, 7606.91.3095, 7606.91.6095, 7606.92.3035, and 7606.92.6095. Further, merchandise that falls within the scope of the *Order* may also be entered into the United States under HTSUS subheadings 7606.11.3030, 7606.12.3015, 7606.12.3025, 7606.12.3035, 7606.12.3091, 7606.91.3055, 7606.91.6055, 7606.92.3025, 7606.92.6055, 7607.11.9090. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the *Order* is dispositive. For a full description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Partial Rescission of the Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole, or in part, with respect to specific companies, if all parties who requested the review withdraw their requests within 90 days of publication of the notice of initiation of the requested review in the **Federal Register**. All parties timely withdrew their review requests for the following companies: (1) Alanod GmbH & Co. KG (Alanod); (2) Constellium Rolled Products Singen GmbH & Co. KG (Constellium Rolled); (3) Constellium Singen GmbH (Constellium Singen); and (4) Novelis Deutschland GmbH (Novelis). Therefore, consistent with 19 CFR 351.213(d)(1), Commerce is

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 38021 (June 12, 2023); *see also Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, India, Indonesia, Italy, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan, and the Republic of Turkey: Antidumping Duty Orders,* 86 FR 22139 (April 27, 2021) (*Order*).

[2] *See* Memorandum, ''Extension of Deadline for the Preliminary Results of Antidumping Duty Administrative Review; 2022–2023,'' dated December 27, 2023.

[3] *See* Memorandum, ''Decision Memorandum for Preliminary Results of the 2022–2023 Administrative Review of the Antidumping Duty Order on Common Alloy Aluminum Sheet from Germany,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

rescinding this review, in part, with respect to these companies.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). We calculated export prices and NV for Speira in accordance with sections 772 and 773 of the Act, respectively. For a full description of the methodology underlying our preliminary results of review, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

We are assigning the following weighted-average dumping margin to the company listed below for the period April 1, 2022, through March 31, 2023:

Producer or exporter	Weighted-average dumping margin (percent)
Speira GmbH [4]	6.44

[4] Formerly known as Hydro Aluminium Rolled Products GmbH. *See Common Alloy Aluminum Sheet from Germany: Preliminary Results of Antidumping Duty Administrative Review; 2020–2022,* 88 FR 30087 (May 10, 2023, unchanged in *Common Alloy Aluminum Sheet from Germany: Final Results of Anti-dumping Duty Administrative Review; 2020–2022,* 88 FR 77556 (November 13, 2023).

Disclosure and Public Comment

Commerce intends to disclose, under administrative protective order, its calculations and analysis performed for these preliminary results of review to parties to the proceeding within five days of any public announcement of the preliminary results 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).

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice in the **Federal Register**. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[5] Interested parties who submit case briefs or rebuttal briefs in this review must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[6]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their briefs that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[7] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[8]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request for a hearing to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests for a hearing should contain: (1) the requesting party's name, address, and telephone number; (2) the number of individuals associated with the requesting party that will attend the hearing and whether any of those individuals is a foreign national; and (3) a list of the issues that the party intends to discuss at the hearing. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice in the **Federal Register**. If a request for a hearing is made, Commerce will announce the date and time of the hearing. Parties should confirm the date and time of the hearing two days before the scheduled hearing date.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results of review in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act.[9]

Assessment Rates

In accordance with section 751(a)(2)(C) of the Act, the assessment of antidumping duties on entries of merchandise covered by the review shall be based on the final results of this review.[10] Therefore, upon issuance of the final results of this review, Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise covered by this review in accordance with 19 CFR 351.212(b)(1).

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

We will calculate importer-specific assessment rates for Speira, in accordance with 19 CFR 351.212(b)(1).[11] Because Speira does not know, and thus did not report, entered values, we will calculate importer-specific per-unit assessment rates for the company by dividing the total amount of dumping calculated in the final results of this review for all reviewed U.S. sales to the importer by the total quantity of those sales. While we will calculate estimated *ad valorem* importer-specific assessment rates to determine whether the per-unit assessment rates are *de minimis,* we will report the per-unit assessment rates to CBP. [12] Where either the respondent's *ad valorem* weighted-average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,*[13] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Pursuant to a refinement to Commerce's assessment practice, where sales of subject merchandise that was produced or exported by an individually examined respondent were

[5] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

[6] *See* 19 351.309(c)(2) and (d)(2).

[7] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[8] *See APO and Service Final Rule,* 88 FR at 67077.

[9] *See* section 751(a)(3)(A) of the Act; *see also* 19 CFR 351.213(h)(1).

[10] *See* section 751(a)(2)(C) of the Act.

[11] We applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[12] *See* 19 CFR 351.212(b)(1).

[13] *See* 19 CFR 351.106(c)(2).

not reported in the U.S. sales data submitted by the respondent, but the merchandise was entered for consumption in the United States during the POR, we will instruct CBP to liquidate any entries of such merchandise at the all-others rate (*i.e.,* 49.40 percent) if there is no rate for the intermediate company(ies) involved in the transaction.[14]

Because Commerce is rescinding this review with respect to Alanod, Constellium Rolled, Constellium Singen, and Novelis, we will instruct CBP to assess antidumping duties on all appropriate entries of subject merchandise during the POR from these companies at rates equal to the cash deposit rate for estimated antidumping duties that was required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue its rescission instructions to CBP no earlier than 35 days after the date of publication of this notice in the **Federal Register**.

Cash Deposit Requirements

The following cash deposit requirements will be in effect for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of the final results of this administrative review in the **Federal Register**, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Speira will be equal to the weighted-average dumping margin established for the company in the final results of this review, except if the weighted-average dumping margin is less than 0.50 percent, and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), the cash deposit rate will be zero; (2) for previously investigated or reviewed exporters that are not covered by this review, the cash deposit rate will continue to be the company's cash deposit rate from the most recently completed segment of the proceeding in which it was examined; (3) if the exporter is not covered by this review, and does not have a cash deposit rate from a completed segment of this proceeding, but the producer of the subject merchandise does have a cash deposit rate, then the cash deposit rate will be the producer's cash deposit rate from the most recently completed segment of the proceeding in which it was examined; and (4) the cash deposit rate for all other producers or exporters will continue to be 49.40 percent, the all-others rate established in the less-than-fair-value investigation.[15] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(1) and 777(i)(l) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: April 19, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix—List of Sections in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Discussion of the Methodology
V. Currency Conversion
VI. Recommendation

[FR Doc. 2024–08895 Filed 4–24–24; 8:45 am]

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[14] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[15] *See Common Alloy Aluminum Sheet from Germany: Final Determination of Sales at Less Than Fair Value,* 86 FR 13318 (March 8, 2021).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–809, A–580–870, A–580–876, A–580–897]

Circular Welded Non-Alloy Steel Pipe From the Republic of Korea; Oil Country Tubular Goods From the Republic of Korea; Welded Line Pipe From the Republic of Korea; and Large Diameter Welded Pipe From the Republic of Korea: Notice of Initiation of Antidumping Duty Changed Circumstances Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is initiating a changed circumstances review (CCR) to determine whether Hyundai Steel Pipe Co., Ltd. (HSP) is the successor-in-interest to Hyundai Steel Company (Hyundai Steel) in the context of the antidumping duty (AD) orders on circular welded non-alloy steel pipe (CWP); oil country tubular goods (OCTG); welded line pipe (WLP); and large diameter welded pipe (LDWP) from the Republic of Korea (Korea).

DATES: Applicable April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Erin Kearney, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; (202) 482–0167.

SUPPLEMENTARY INFORMATION:

Background

On November 2, 1992, September 10, 2014, December 1, 2015, and May 2, 2019, respectively, Commerce published in the **Federal Register** AD orders on CWP, OCTG, WLP, and LDWP from Korea.[1] On March 11, 2024, HSP requested that, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), 19 CFR 351.216, and 19 CFR 351.221(c)(3), Commerce conduct an expedited CCR to determine that HSP is the successor-in-interest to Hyundai Steel and accordingly to assign it the cash deposit rates currently applicable to Hyundai Steel pursuant to *CWP Order, OCTG Order, WLP Order, and LDWP Order.*[2] In its submission, HSP stated that on April 1, 2021, Hyundai Steel restructured to organize its internal departmental units on the basis of product type through the end of 2023. HSP stated that on September 26, 2023, Hyundai Steel's board of directors

[1] *See Notice of Antidumping Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992) (*CWP Order*); *Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders; and Certain Oil Country Tubular Goods from the Socialist Republic of Vietnam: Amended Final Determination of Sales at Less Than Fair Value,* 79 FR 53691 (September 10, 2014) (*OCTG Order*); *Welded Line Pipe from the Republic of Korea and the Republic of Turkey: Antidumping Duty Orders,* 80 FR 75056 (December 1, 2015) (*WLP Order*); and *Large Diameter Welded Pipe from the Republic of Korea: Amended Final Affirmative Antidumping Determination and Antidumping Duty Order,* 84 FR 18767 (May 2, 2019) (*LDWP Order*) (collectively, *Orders*).

[2] *See* HSP's Letter, ''Hyundai Steel Pipe Request for Changed Circumstances Review,'' dated March 11, 2024 (HSP's CCR Request).

approved a plan to spin off its Steel Pipe Business Division into an independent operating company named Hyundai Steel Pipe Co., Ltd (HSP). HSP stated that, on October 25, 2023, Hyundai Steel's board of directors approved a resolution to transfer its assets and liabilities to HSP.[3]

Scope of the Orders

The merchandise covered by these orders is CWP, OCTG, WLP, and LDWP from Korea.[4]

Initiation of CCRs

Pursuant to section 751(b)(1)(A) of the Act and 19 CFR 351.216(d), Commerce conducts a CCR upon receipt of information concerning, or a request from, an interested party for a review of an AD and/or CVD order which shows changed circumstances sufficient to warrant a review of the order. The information submitted by HSP regarding its claim that it is the successor-in-interest to Hyundai Steel demonstrates changed circumstances sufficient to warrant the initiation of such reviews.[5] Therefore, in accordance with section 751(b)(1)(A) of the Act and 19 CFR 351.216(d) and (e), we are initiating the CCRs.

In making a successor-in-interest determination, Commerce examines several factors, including, but not limited to, changes in the following: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base.[6] While no single factor or combination of factors will necessarily provide a dispositive indication of a successor-in-interest relationship, generally, Commerce will consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor.[7] Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, Commerce may assign the new company the cash deposit rate of its predecessor.[8]

Pursuant to 19 CFR 351.221(c)(3)(ii), Commerce may combine the notices of initiation and preliminary results of a CCR into a single notice if it concludes that expedited action is warranted. We have determined that it is appropriate to further consider, and potentially seek additional information regarding, certain factors noted above that Commerce examines in successor-in-interest CCRs. Therefore, we have determined that expedited action is not warranted, and we have not combined the notice of preliminary results of the CCRs with this notice. Commerce intends to publish in the **Federal Register** a notice of the preliminary results of this CCR, in accordance with 19 CFR 351.221(b)(4) and (c)(3)(i), which will set forth Commerce's preliminary factual and legal conclusions. Pursuant to 19 CFR 351.221(b)(4)(ii), interested parties will have an opportunity to comment on the preliminary results.

Unless extended, Commerce intends to issue the final results of this CCR within 270 days after the date of initiation, in accordance with 19 CFR 351.216(e).

Notification to Interested Parties

We are issuing this notice in accordance with sections 751(b)(1) and 777(i) of the Act and 19 CFR 351.216(b) and 351.221(b)(1).

Dated: April 19, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy & Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024–08894 Filed 4–24–24; 8:45 am]

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[3] *Id.*

[4] For a complete description of the scope of each of these orders, *see CWP Order, OCTG Order, WLP Order,* and *LDWP Order.*

[5] *See* HSP's CCR Request.

[6] *See, e.g., Certain Frozen Warmwater Shrimp from India: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review,* 81 FR 75376 (October 31, 2016) (*Shrimp from India Preliminary Results*), unchanged in *Certain Frozen Warmwater Shrimp from India: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 81 FR 90774 (December 15, 2016) (*Shrimp from India Final Results*).

[7] *See, e.g., Shrimp from India Preliminary Results,* 81 FR at 75377, unchanged in *Shrimp from India Final Results,* 81 FR at 90774.

[8] *Id.; see also Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan,* 67 FR 58, 59 (January 2, 2002); *Ball Bearings and Parts Thereof from France: Final Results of Changed-Circumstances Review,* 75 FR 34688, 34689 (June 18, 2010); and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Preliminary Results of Antidumping Duty Changed Circumstances Review,* 63 FR 14679 (March 26, 1998), unchanged in *Circular Welded Non-Alloy Steel Pipe from Korea; Final Results of Antidumping Duty Changed Circumstances Review,* 63 FR 20572 (April 27, 1998), in which Commerce found that a company which only changed its name and did not change its operations is a successor-in-interest to the company before it changed its name.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–041]

Truck and Bus Tires From People's Republic of China: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) finds that revocation of the countervailing duty (CVD) order on truck and bus tires from the People's Republic of China (China) would likely lead to the continuation or recurrence of countervailable subsidies at the levels indicated in the ''Final Results of Expedited Sunset Review'' section of this notice.

DATES: Applicable April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Suresh Maniam, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1603.

SUPPLEMENTARY INFORMATION:

Background

On February 15, 2019, Commerce published in the **Federal Register** the CVD *Order* on truck and bus tires from China.[1] On January 2, 2024, Commerce published in the **Federal Register** the notice of initiation of the first five-year sunset review of the *Order* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On January 12, 2024, we received a timely notice of intent to participate in this sunset review from the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Workers Union, AFL–CIO, CLC (the domestic interested party) within 15-day deadline specified in 19 CFR 351.218(d)(1)(i).[3] The domestic interested claimed interested party status under section 771(9)(D) of the Act as a certified union representative of a U.S. industry engaged in the manufacture of truck and bus tires in the United States. On February 4, 2024, the domestic interested party provided a complete substantive response for this review

[1] *See Truck and Bus Tires from the People's Republic of China: Amended Final Determination and Countervailing Duty Order,* 84 FR 4434 (February 15, 2019) (*Order*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 89 FR 66 (January 2, 2024) (*Initiation Notice).*

[3] *See* Domestic Interested Party's Letter, ''Notice of Intent to Participate,'' dated January 12, 2024.

within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[4] Commerce received no substantive responses from any other interested parties, including the Government of China, nor was a hearing requested. On February 22, 2024, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from other interested parties.[5] As a result, in accordance with section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited, *i.e.,* 120-day, sunset review of the *Order.*

Scope of the Order

The products covered by the scope of the *Order* are truck and bus tires from China. A complete description of the scope of the *Order* is contained in the Issues and Decision Memorandum.[6]

Analysis of Comments Received

A complete discussion of all issues raised in this sunset review, including the likelihood of the continuation or recurrence of subsidization in the event of revocation of the *Order* and the countervailable subsidy rates likely to prevail if the *Order* were to be revoked, are addressed in the Issues and Decision Memorandum. A list of topics discussed in the Issues and Decision Memorandum is included in the Appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), which 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.*

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(b) of the Act, Commerce determines that revocation of the *Order* would likely lead to the continuation or recurrence of a countervailable subsidy at the following net countervailable subsidy rates:

Exporter/producer	Subsidy rate (percent *ad valorem*)
Guizhou Tyre Import and Export Co., Ltd.[7]	66.28
Double Coin Holdings Ltd.[8]	23.92
All Others	45.10

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). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results and notice in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act, and 19 CFR 351.218.

Dated: April 19, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. History of the *Order*
V. Legal Framework
VI. Discussion of the Issues
1. Likelihood of Continuation or Recurrence of a Countervailable Subsidy
2. Net Countervailable Subsidy Likely to Prevail
3. Nature of the Subsidy
VII. Final Results of Expedited Sunset Review
VIII. Recommendation

[FR Doc. 2024–08841 Filed 4–24–24; 8:45 am]
BILLING CODE 3510–DS–P

[4] *See* Domestic Interested Party's Letter, ''Substantive Response,'' dated February 1, 2024.

[5] *See* Commerce's Letter, ''Sunset Reviews for January 2024,'' dated February 22, 2024.

[6] *See* Memorandum, ''Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Truck and Bus Tires from People Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[7] Commerce found Guizhou Tyre Import and Export Co., Ltd. to be cross-owned with Guizhou Tyre Co., Ltd. *See Truck and Bus Tires from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination with Final Antidumping Determination,* 81 FR 43577 (July 5, 2016) (*Preliminary Determination*) at 17–18, and accompanying Preliminary Decision Memorandum (PDM), unchanged in *Order.*

[8] Commerce found the following companies to be cross-owned with Double Coin Holdings Ltd.: Double Coin Group (Jiangsu) Tyre Co., Ltd.; Double Coin Group (Chongqing) Tyre Co., Ltd.; Double Coin Group Shanghai Donghai Tyre Co. Ltd.; and Double Coin Group (Xinjiang) Kunlun Tyre Co., Ltd. *See Preliminary Determination* PDM at 16–17.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–040]

Truck and Bus Tires From the People's Republic of China: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) order on truck and bus tires from the People's Republic of China (China) would likely lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Expedited Sunset Review'' section of this notice.

DATES: Applicable April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1785.

SUPPLEMENTARY INFORMATION:

Background

On February 15, 2019, Commerce published in the **Federal Register** the AD order on truck and bus tires from China.[1] On January 2, 2024, Commerce published in the **Federal Register** the notice of initiation of the first five-year sunset review of the *Order* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2]

On January 12, 2024, we received a timely notice of intent to participate in the sunset review from the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied

[1] *See Truck and Bus Tires from the People's Republic of China: Amended Final Determination and Countervailing Duty Order,* 84 FR 4434 (February 15, 2019) (*Order*); *see also Truck and Bus Tires from the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Determination of Antidumping Duty Investigation; Notice of Amended Order,* 88 FR 37023 (June 6, 2023) (amending the *Order* with respect Guizhou Tyre Import and Export Co., Ltd); *Truck and Bus Tires From the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Determination of Antidumping Duty Investigation; Notice of Amended Order; Correction,* 88 FR 38819 (June 14, 2023).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 89 FR 66 (January 2, 2024); *see also Order.*

Industrial Workers Union, AFL–CIO, CLC (the domestic interested party) within the 15-day deadline specified in 19 CFR 351.218(d)(1)(i).[3] The domestic interested party claimed interested party status under section 771(9)(D) of the Act and 19 CFR 351.102(b)(17) as a certified union representative of a U.S. industry engaged in the manufacture of truck and bus tires in the United States. On February 1, 2024, the domestic interested party provided a complete substantive response for this review within the 30-day period specified in 19 CFR 351.218(d)(3)(i).[4] Commerce received no substantive responses from any other interested parties, including the Government of China, nor was a hearing requested.

On February 22, 2024, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from other interested parties.[5] As a result, in accordance with section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited, *i.e.,* 120-day, sunset review of the *Order.*

Scope of the Order

The products covered by the scope of the *Order* are truck and bus tires from China. A complete description of the scope of the *Order* is contained in the Issues and Decision Memorandum.[6]

Analysis of Comments Received

All issues raised in this sunset review are addressed in the Issues and Decision Memorandum. A list of topics discussed in the Issues and Decision Memorandum is included as the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

[3] *See* Domestic Interested Party's Letter, ''Notice of Intent to Participate,'' dated January 12, 2024.

[4] *See* Domestic Interested Party's Letter, ''Substantive Response of the USW,'' dated February 1, 2024 (Substantive Response).

[5] *See* Commerce's Letter, ''Sunset Reviews for January 2024,'' dated February 22, 2024.

[6] *See* Memorandum, ''Issues and Decision Memorandum for the Expedited First Sunset Review of the Antidumping Duty Order on Truck and Bus Tires from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Order* would likely lead to the continuation or recurrence of dumping and that the magnitude of the margins of dumping likely to prevail would be margins up to 22.57 percent.

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). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.221(c)(5)(ii).

Dated: April 19, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. History of the *Order*
V. Legal Framework
VI. Discussion of the Issues
1. Likelihood of Continuation or Recurrence of Dumping
2. Magnitude of the Margin of Dumping Likely To Prevail
VII. Final Results of Expedited Sunset Review
VIII. Recommendation

[FR Doc. 2024–08851 Filed 4–24–24; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD860]

International Affairs; U.S. Fishing Opportunities in the Northwest Atlantic Fisheries Organization Regulatory Area

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

ACTION: Notification of U.S. fishing opportunities.

SUMMARY: We are announcing 2024 fishing opportunities in the Northwest Atlantic Fisheries Organization Regulatory Area. This action is necessary to make fishing privileges in the Regulatory Area available on an equitable basis to the extent possible. The intended effect of this notice is to alert U.S. fishing vessels of fishing opportunities for yellowtail flounder, redfish, and *Illex* squid along with Atlantic halibut, to relay the available quotas available to U.S. participants, and to outline the process and requirements for vessels to apply to participate in the 2024 fishery in the Northwest Atlantic Fisheries Organization Regulatory Area.

DATES: Effective through December 31, 2024. Expressions of interest regarding fishing opportunities in Northwest Atlantic Fisheries Organization (NAFO) will be accepted through May 10, 2024.

ADDRESSES: Expressions of interest regarding U.S. fishing opportunities should be made in writing to Michael Pentony, U.S. Commissioner to NAFO, NMFS Greater Atlantic Regional Fisheries Office at 55 Great Republic Drive, Gloucester, MA 01930 (phone: 978–281–9315, email: *Michael.Pentony@noaa.gov*).

Information relating to chartering vessels of NAFO Contracting Party, transferring NAFO fishing opportunities to or from another NAFO Contracting Party, or U.S. participation in NAFO is available from Patrick E. Moran in the NMFS Office of International Affairs, Trade, and Commerce at 1315 East-West Highway, Silver Spring, MD 20910 (phone: 301–427–8370, fax: 301–713–2313, email: *Pat.Moran@noaa.gov*).

Additional information about NAFO fishing opportunities, NAFO Conservation and Enforcement Measures (CEM), and the High Seas Fishing Compliance Act (HSFCA) Permit required for NAFO participation is available from Shannah Jaburek, in

the NMFS Greater Atlantic Regional Fisheries Office at 55 Great Republic Drive, Gloucester, MA 01930 (phone: 978–282–8456, fax: 978–281–9135, email: *Shannah.Jaburek@noaa.gov*) and online from NAFO at *https://www.nafo.int.*

FOR FURTHER INFORMATION CONTACT: Shannah Jaburek, Fishery Policy Analyst, (978) 282–8456.

SUPPLEMENTARY INFORMATION:

General NAFO Background

The United States is a Contracting Party to NAFO. NAFO is an intergovernmental fisheries science and management body whose convention applies to most fishery resources in international waters of the Northwest Atlantic, except salmon, tunas/marlins, whales, and sedentary species such as shellfish. Currently, NAFO has 12 contracting parties from North America, Europe, Asia, and the Caribbean. NAFO's Commission is responsible for the management and conservation of the fishery resources in the NAFO Regulatory Area (in waters outside the exclusive economic zones (EEZ)). Figure 1 shows the NAFO Regulatory Area.

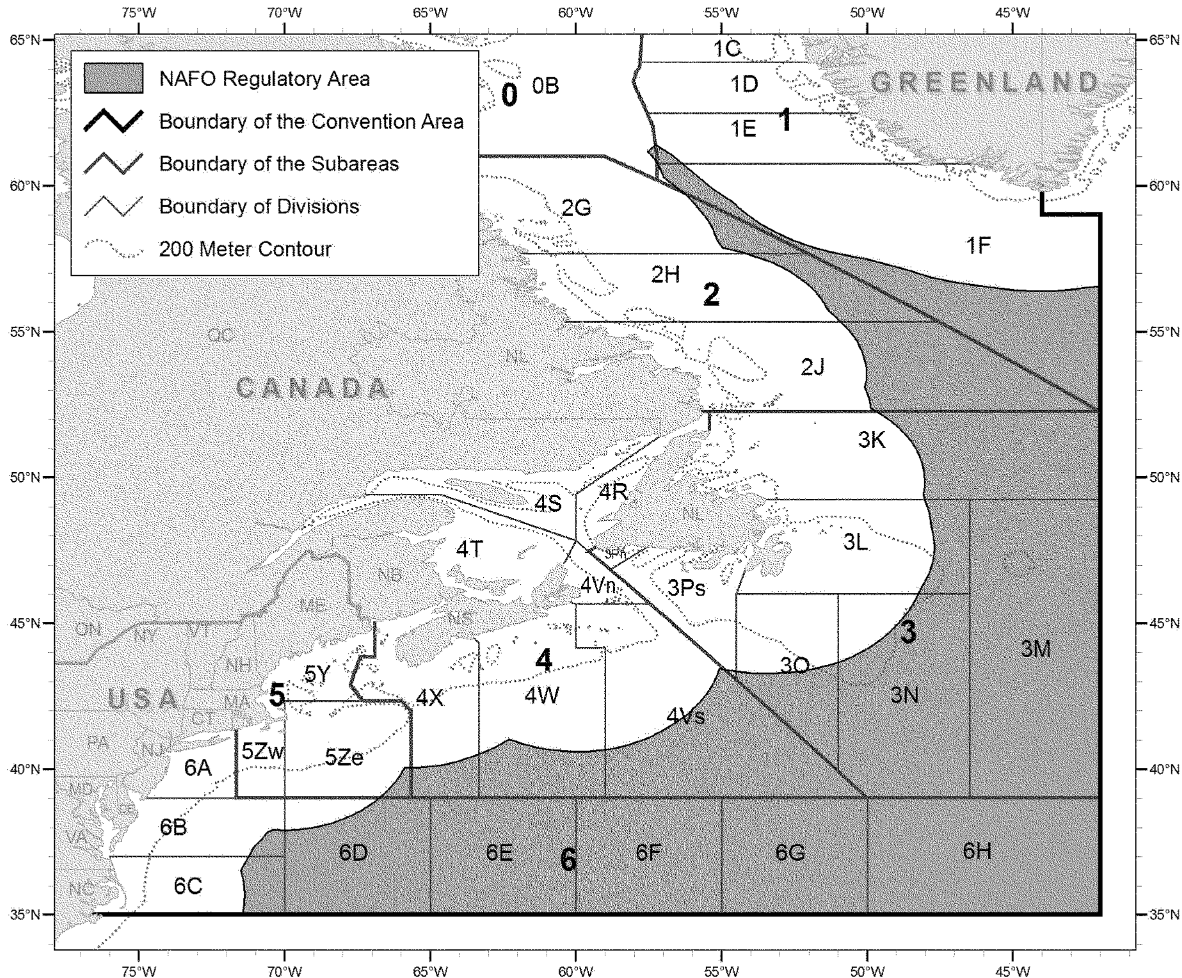

Figure 1 -- NAFO Convention Area Including Statistical Subareas, Divisions, and Subdivisions

As a Contracting Party within NAFO, the United States may be allocated catch quotas or effort allocations for certain species in specific areas within the NAFO Regulatory Area and may participate in fisheries for other species for which we have not received a specific quota. For most stocks for which the United States does not receive a specific allocation, an open allocation, known as the ''Others'' allocation under the Convention, is shared access among all NAFO Contracting Parties.

Additional information on NAFO can be found online at *https://www.nafo.int/About-us.* The 2024 NAFO CEM that specify the fishery regulations, Total Allowable Catches (TAC or ''quotas'') and other information about the fishery program will be available online at: *https://www.nafo.int/Fisheries/Conservation* when completed. Information from the 2023 Annual Meeting of NAFO, at which changes to the TACs and other management measures occur, is available on the NAFO website.

This notice announces the fishing opportunities available to U.S. vessels in NAFO regulatory waters, including specific 2024 stocks for which the United States has an allocation under

NAFO, and fishing opportunities under the ''Other'' NAFO allocations. This notice also outlines the application process and other requirements for U.S. vessels that wish to participate in the 2024 NAFO fisheries.

NAFO Fishing Opportunities Available to U.S. Fishing Vessels

The principal species managed by NAFO are Atlantic cod, yellowtail and witch flounders, Acadian redfish, American plaice, Greenland halibut, white hake, capelin, shrimp, skates, and *Illex* squid. NAFO specifies conservation measures for fisheries on these species occurring in its Regulatory Area, including TACs for these managed species that are allocated among NAFO Contracting Parties. The United States received quota allocations at the 2023 NAFO Annual Meeting for two stocks to be fished during 2024. The species, location by NAFO subarea, and allocation (in metric tons (mt)) of these 2024 U.S. fishing opportunities are as follows: Redfish in Division 3M, 69 mt; and *Illex* Squid in Subareas 3 & 4, 453 mt. In addition, the United States received a transfer of 1,000 mt of NAFO Division 3LNO yellowtail flounder from Canada's 2024 quota allocation consistent with the continuation of a 2020 bilateral arrangement between the two countries.

The TACs that may be available to U.S. vessels for stocks where the United States has not been allocated quota (*i.e.,* the ''Others'' allocation in Annex I.A of the CEM) are as follows:

TABLE 1—2024 NAFO ''OTHERS'' ALLOCATIONS

Species	NAFO Division	Others quota (mt)
Cod	3M	46.8
Redfish	3LN	109
	3M	124
	3O	100
Yellowtail Flounder	3LNO	78
Witch Flounder	3NO	14
White Hake	3NO	59
Skates	3LNO	258
Illex squid	Squid 3_4 (Sub-Areas 3+4)	794

Note that the United States shares the ''Other'' allocations with other NAFO Contracting Parties, and access is on a first come, first served basis. Directed fishing is prohibited by NAFO when the ''Others'' quota for a particular stock has been fully harvested.

Additional directed quota for these and other stocks managed within the NAFO Regulatory Area could be made available to U.S. vessels through industry-initiated chartering arrangements or government-to-government transfers of quota from other NAFO Contracting Parties.

U.S. vessels participating in NAFO may also retain bycatch of NAFO managed species to the following maximum amounts as outlined in Article 6 of the CEM. The percentage, by weight, is calculated as a percent of each stock of the total catch of species listed in CEM Annex I.A (*i.e.,* the NAFO managed stocks listed in table 1) retained onboard from the applicable division at the time of inspection, based on logbook information:

1. Cod, Division 3M: 1,250 kilograms (kg) or 5 percent, whichever is more;
2. Witch Flounder, Division 3NO: 1,250 kg or 5 percent, whichever is more;
3. Redfish, Division 3LN: 1,250 kg or 5 percent, whichever is more;
4. Cod, Division 3NO: 1,000 kg or 4 percent, whichever is more;
5. American plaice: While conducting a directed fishery for yellowtail flounder in Divisions 3LNO—2,900 kg or 15 percent of American plaice in accordance with provisions in Article 6.3(g); otherwise, 1,250 kg or 5 percent, whichever is greater; and
6. For all other Annex I.A stocks where the U.S. has no specific quota, the bycatch limit is 2,500 kg or 10 percent unless a ban on fishing applies or the quota for the stock has been fully utilized. If the fishery for the stock is closed or a retention ban applies, the permitted bycatch limit is 1,250 kg or 5 percent.

Opportunities to fish for species not listed above (*i.e.,* species listed in Annex I.A of the NAFO CEM and non-allocated on non-regulated species), but occurring within the NAFO Regulatory Area such as Atlantic halibut, may also be available. U.S. fishermen interested in fishing for these other species should contact the NMFS Greater Atlantic Regional Fisheries Office (see **ADDRESSES**) for additional information. Authorization to fish for such species will include permit-related conditions or restrictions, including but not limited to, minimum size requirements, bycatch-related measures, and catch limits. Any such conditions or restrictions will be designed to ensure the optimum utilization, long-term sustainability, and rational management and conservation of fishery resources in the NAFO Regulatory Area, consistent with the Convention on Cooperation in the Northwest Atlantic Fisheries, which has been adopted by all NAFO Contracting Parties.

Applying for These Fishing Opportunities

Expressions of interest to fish for any or all of the 2024 U.S. fishing opportunities in NAFO described above will be considered from all U.S. fishing interests (*e.g.,* vessel owners, processors, agents, others). Applicants are urged to carefully review and thoroughly address the application requirements and selection criteria as detailed below. Expressions of interest should be directed in writing to Regional Administrator Michael Pentony (see **ADDRESSES**).

Information Required in an Application Letter

Expressions of interest should include a detailed description of anticipated fishing operations in 2024. Descriptions should include, at a minimum:

- Intended target species;
- Proposed dates of fishing operations;
- Vessel(s) to be used to harvest fish, including the name, registration, and home port of the intended harvesting vessel(s);
- The number of fishing personnel and their nationality involved in vessel operations;
- Intended landing port or ports; including for ports outside of the United States, whether or not the product will be shipped to the United States for processing;
- Processing facilities to be used;

• Target market for harvested fish; and

• Evidence demonstrating the ability of the applicant to successfully conduct fishing operations in the NAFO Regulatory Area, in accordance with NAFO management measures. This may include descriptions of previously successful NAFO or domestic fisheries participation.

Note that applicant U.S. vessels must possess or be eligible to receive a valid HSFCA permit. HSFCA permits are available from the NMFS Greater Atlantic Regional Fisheries Office. Information regarding other requirements for fishing in the NAFO Regulatory Area is detailed below and is also available from the NMFS Greater Atlantic Regional Fisheries Office (see **ADDRESSES**).

U.S. applicants wishing to harvest U.S. allocations using a vessel from another NAFO Contracting Party, or hoping to enter a chartering arrangement with a vessel from another NAFO Contracting Party, should see below for details on U.S. and NAFO requirements for such activities. If you have further questions regarding what information is required in an expression of interest, please contact Patrick Moran (see **ADDRESSES**).

Criteria Used in Identifying Successful Applicants

Applicants demonstrating the greatest benefits to the United States through their intended operations will be most successful. Such benefits may include:

• The use of U.S. vessels and crew to harvest fish in the NAFO Regulatory Area;

• Positive impacts on U.S. employment as a result of the fishing, transport, or processing operations;

• Use of U.S. processing facilities;

• Transport, marketing, and sales of product within the U.S.; and

• Other ancillary demonstrable benefits to U.S. businesses as a result of the fishing operation.

Other factors we may consider include, but are not limited to: A documented history of successful fishing operations in NAFO or other similar fisheries; the history of compliance by the vessel with the NAFO CEM or other domestic and international regulatory requirements, including potential disqualification of an applicant with repeated compliance issues; and for those applicants without NAFO or other international fishery history, a description of demonstrated harvest, processing, marketing, and regulatory compliance within domestic fisheries.

To ensure equitable access by U.S. fishing interests, we may provide additional guidance or procedures, or we may issue regulations designed to allocate fishing interests to one or more U.S. applicants from among qualified applicants. After reviewing all requests for allocations submitted, we may also decide not to grant any allocations if it is determined that no requests adequately meet the criteria described in this notice.

Notification of Selected Vessels in the 2024 NAFO Fisheries

We will provide written responses to all applicants notifying them of their application status and, as needed for successful applicants, allocation awards will be made as quickly as possible so that we may notify NAFO and take other necessary actions to facilitate operations in the Regulatory Area by U.S. fishing interests. Successful applicants will receive additional information from us on permit conditions and applicable regulations before starting 2024 fishing operations.

Mid-Season Allocation Adjustments

In the event that an approved U.S. entity does not, is not able to, or is not expected to fish an allocation, or part thereof, awarded to them, NMFS may reallocate to other approved U.S. entities. If requested, approved U.S. entities must provide updated fishing plans and/or schedules. A U.S. entity may not consolidate or transfer allocations without prior approval from NMFS.

Chartering a Vessel to Fish Available U.S. Allocations

Under the bilateral arrangement with Canada, the United States may enter into a chartering (or other) arrangement with a Canadian vessel to harvest the transferred yellowtail flounder. For other NAFO-regulated species listed in Annexes I.A and I.B, the United States may enter into a chartering arrangement with a vessel from any other NAFO Contracting Party. Additionally, any U.S. vessel or fishing operation may enter into a chartering arrangement with any other vessel or business from a NAFO Contracting Party. The United States and the other Contracting Party involved in a chartering arrangement must agree to the charter, and the NAFO Executive Secretary must be advised of the chartering arrangement before the commencement of any charter fishing operations. Any U.S. vessel or fishing operation interested in making use of the chartering provisions of NAFO must provide at least the following information: The name and registration number of the U.S. vessel; a copy of the charter agreement; a detailed fishing plan; a written letter of consent from the applicable NAFO Contracting Party; and the date from which the vessel is authorized to commence fishing; and the duration of the charter (not to exceed 6 months).

Expressions of interest using another NAFO Contracting Party vessel under charter should be accompanied by a detailed description of anticipated benefits to the United States, as described above. Additional detail on chartering arrangements can be found in Article 26 of the CEM (*https://www.nafo.int/Fisheries/Conservation*).

Any vessel from another Contracting Party wishing to enter into a chartering arrangement with the United States must be in full current compliance with the requirements outlined in the NAFO Convention and CEM. These requirements include, but are not limited to, submission of the following reports to the NAFO Executive Secretary:

• Notification that the vessel is authorized by its flag state to fish within the NAFO Regulatory Area during 2024;

• Provisional monthly catch reports for all vessels of that NAFO Contracting Party operating in the NAFO Regulatory Area;

• Daily catch reports for each day fished by the subject vessel within the Regulatory Area;

• Observer reports within 30 days following the completion of a fishing trip; and

• An annual statement of actions taken by its flag state to comply with the NAFO Convention.

The United States may also consider the vessel's previous compliance with NAFO bycatch, reporting, and other provisions, as outlined in the NAFO CEM, before authorizing the chartering arrangement.

Transfer of U.S. Quota Allocations to Another NAFO Party

Under NAFO rules in effect for 2024, the United States may transfer fishing opportunities by mutual agreement with another NAFO Contracting Party and with prior notification to the NAFO Executive Secretary. An applicant may request to arrange for any of the previously described U.S. opportunities to be transferred to another NAFO party, although such applications will likely be given lesser priority than those that involve more direct harvesting or processing by U.S. entities. Applications to arrange for a transfer of U.S. fishing opportunities should contain a letter of consent from the receiving NAFO Contracting Party, and should also be

accompanied by a detailed description of anticipated benefits to the United States. As in the case of chartering operations, the United States may also consider a NAFO Contracting Party's previous compliance with NAFO bycatch, reporting, and other provisions, as outlined in the NAFO CEM, before entering agreeing to a transfer.

Receiving a Transfer of NAFO Quota Allocations From Another NAFO Party

Under NAFO rules in effect for 2024, the United States may receive transfers of additional fishing opportunities from other NAFO Contracting Parties. We are required to provide a letter consenting to such a transfer and must provide notice to the NAFO Executive Secretary. In the event that an applicant is able to arrange for the transfer of additional fishing opportunities from another NAFO Contracting Party to the United States, the U.S. may agree to facilitate such a transfer. However, there is no guarantee that if an applicant has facilitated the transfer of quota from another Contracting Party to the United States, such applicant will receive authorization to fish for such quota. If quota is transferred to the United States, we may need to solicit new applications for the use of such quota. All applicable NAFO requirements for transfers must be met. As in the case of chartering operations, the United States may also consider a NAFO Contracting Party's previous compliance with NAFO bycatch, reporting, and other provisions, as outlined in the NAFO CEM, before agreeing to accept a transfer. Any fishing quota or other harvesting opportunities received via this type of transfer are subject to all U.S and NAFO rules as detailed below.

For more details on NAFO requirements for chartering and transferring NAFO allocations, contact Patrick Moran (see **ADDRESSES**).

Fishing in the NAFO Regulatory Area

U.S. applicant vessels must be in possession of, or obtain, a valid HSFCA permit, which is available from the NMFS Greater Atlantic Regional Fisheries Office. All permitted vessels must comply with any conditions of this permit and all applicable provisions of the Convention on Cooperation in the Northwest Atlantic Fisheries and the CEM. We reserve the right to impose additional permit conditions that ensure compliance with the NAFO Convention and the CEM, the Magnuson-Stevens Fishery Conservation and Management Act, and any other applicable law.

The CEM provisions include, but are not limited to:

- Maintaining a fishing logbook with NAFO-designated entries (Annex II.A and Article 28);
- Adhering to NAFO hail system requirements (Annexes II.D and II.F; Article 28);
- Carrying an approved onboard observer for each trip consistent with requirements of Article 30;
- Maintaining and using a functioning, autonomous vessel monitoring system authorized by issuance of the HSFCA permit as required by Articles 29 and 30; and
- Complying with all relevant NAFO CEM requirements, including minimum fish sizes, gear, bycatch retention, and per-tow move on provisions for exceeding bycatch limits in any one haul/set.

Further details regarding U.S. and NAFO requirements are available from the NMFS Greater Atlantic Regional Fisheries Office, and can also be found in the NAFO CEM on the internet (*https://www.nafo.int/Fisheries/Conservation*).

Vessels issued valid HSFCA permits under 50 CFR part 300 are exempt from certain domestic fisheries regulations governing fisheries in the Northeast United States found in 50 CFR part 648. These exemptions are conditional on the following requirements: The vessel operator has a letter of authorization issued by the Regional Administrator on board the vessel; for the duration of the trip, the vessel fishes, except for transiting purposes, exclusively in the NAFO Regulatory Area and does not harvest fish in, or possess fish harvested in, or from, the U.S. EEZ; when transiting the U.S. EEZ, all gear is properly stowed and not available for immediate use as defined under § 648.2; and the vessel operator complies with the provisions, conditions, and restrictions specified on the HSFCA permit and all NAFO CEM while fishing in the NAFO Regulatory Area.

Dated: April 19, 2024.

Alexa Cole,

Office of International Affairs, Trade, and Commerce, National Marine Fisheries Science.

[FR Doc. 2024–08816 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Final Evaluation Findings of State Coastal Management Programs and National Estuarine Research Reserves

AGENCY: Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of availability.

SUMMARY: Notice is hereby given of the availability of final evaluation findings for seven State and territory coastal management programs (*i.e.,* Alabama, Connecticut, Guam, Michigan, Ohio, Texas, and Virginia), and four national estuarine research reserves (*i.e.,* Heʻeia, Grand Bay, Narragansett Bay, and Waquoit Bay), which were prepared pursuant to sections 312 and 315 of the Coastal Zone Management Act (CZMA).

ADDRESSES: Copies of these final evaluation findings may be found at *https://coast.noaa.gov/czm/evaluations/evaluation_findings/index.html* or by submitting a written request to Michael Migliori at *Michael.Migliori@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Migliori, Lead Evaluator, NOAA Office for Coastal Management, by phone at (443) 332–8936 or email at *Michael.Migliori@noaa.gov.*

SUPPLEMENTARY INFORMATION: The NOAA Office for Coastal Management has completed the coastal zone management program final evaluation findings for the States of Alabama, Connecticut, Michigan, Ohio, Texas, and Virginia and the Territory of Guam. The States and territory were found to be implementing and enforcing their federally approved coastal zone management programs, addressing the national coastal management objectives identified in CZMA section 303(2), and adhering to the programmatic terms of their financial assistance awards. In addition, the NOAA Office for Coastal Management has completed the final evaluation findings for Heʻeia, Grand Bay, Narragansett Bay, and Waquoit Bay National Estuarine Research Reserves. The reserves were found to be adhering to the terms of the reserves' financial assistance awards and to the programmatic requirements of the Coastal Zone Management Act, including the requirements of CZMA section 315(b)(2), and its implementing regulations.

NOAA published in the **Federal Register** notices for public meetings and

opportunities to submit public comments on the evaluation of these State coastal zone management programs and national estuarine research reserves. See 88 FR 42917 (July 5, 2023, Alabama), 87 FR 47983 (August 5, 2022, Connecticut), 88 FR 15376 (March 13, 2023, Guam), 87 FR 41665 (July 13, 2022, Michigan), 87 FR 59062 (September 29, 2022, Ohio), 87 FR 48156 (August 8, 2022, Texas), 87 FR 41673 (July 13, 2022, Virginia), 88 FR 30950 (May 15, 2023, He'eia), 88 FR 50847 (August 2, 2023, Grand Bay), 88 FR 59871 (August 30, 2023, Narragansett Bay), and 87 FR 27989 (May 10, 2022, Waquoit Bay). NOAA addressed the public comments it received in the final evaluation findings.

Authority: 16 U.S.C. 1458 and 1461(f); 15 CFR 921.40 and 923.133.

Keelin Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2024–08797 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Ocean Research Advisory Panel (ORAP)

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public meetings.

SUMMARY: This notice sets forth a new schedule and proposed agenda of a meeting of the Ocean Research Advisory Panel (ORAP) that could not proceed on February 26, 2024 due to technical difficulties. At this new scheduled meeting, the members will discuss issues outlined in the section on Matters to be considered.

DATES: The meeting is scheduled for May 21, 2024 from 9 a.m. to 4:30 p.m. eastern daylight time (EDT) and May 22, 2024 from 8:30 a.m. to 12:30 p.m. EDT. These times and the agenda topics described below are subject to change.

ADDRESSES: The May 21–22, 2024 meeting will be at the NOAA Fisheries Southeast Regional Office, 263 13th Ave. S St., Petersburg, FL 33701. At this meeting location, all public attendees need to bring a valid driver's license or valid Government ID to sign in at the Security desk when they arrive. The link for the webinar registration will be posted, when available, on the ORAP website: *https://www.noaa.gov/ocean-research-advisory-panel/orap-public-meetings*.

For the latest agenda please refer to the ORAP website: *https://www.noaa.gov/ocean-research-advisory-panel/orap-public-meetings*.

FOR FURTHER INFORMATION CONTACT: Viviane Silva, ORAP Designated Federal Officer (DFO), SSMC3, Room 11320, 1315 East-West Hwy., Silver Spring, MD 20910; Phone Number: 240–624–0656; Email: *DFO.orap@noaa.gov;* or visit the ORAP website at *https://www.noaa.gov/ocean-research-advisory-panel/orap-public-meetings*.

SUPPLEMENTARY INFORMATION: The Ocean Research Advisory Panel (ORAP) advises the Ocean Policy Committee (OPC) and provides independent recommendations to the Federal Government on matters of ocean policy.

Congress directed the establishment of the ORAP in Section 1055(c) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283), 10 U.S.C. 8933.

ORAP's responsibilities are (1) to advise the OPC on policies and procedures to implement the National Oceanographic Partnership Program; (2) to advise the OPC on matters relating to national oceanographic science, engineering, facilities, or resource requirements; (3) to advise the OPC on improving diversity, equity, and inclusion in the ocean sciences and related fields; (4) to advise the OPC on national ocean research priorities; and (5) any additional responsibilities that the OPC considers appropriate.

Status: The May 21–22, 2024 meeting will be open to public participation with a 30-minute public comment period at 3:15 p.m. EDT. The ORAP expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of three-five minutes. Written comments for the May 21–22, 2024 meeting should be received by May 10, 2024 by the ORAP DFO (*DFO.orap@noaa.gov*) to provide sufficient time for ORAP review. Written comments received by the ORAP DFO after this date will be distributed to the ORAP, but may not be reviewed prior to the meeting date.

Special Accommodations: These meetings are physically accessible to people with disabilities. Requests for special accommodations may be directed to the ORAP DFO no later than 12:00 p.m. EDT on May 10, 2024.

Matters to Be Considered: During the ORAP meeting on Dec 13–14, 2023, the Ocean Policy Committee (OPC) requested that the ORAP advise on areas of opportunity for partnership (such as through the National Oceanic Partnership Program) on the topic of emerging technology (which could include Artificial Intelligence/Machine Learning, eDNA, and similar technology) with ocean industry and other sectors over the next 5–10 years. The OPC also requested that ORAP self-select another topic to address. The ORAP members agreed that the topic of accessible, inter-operable, interdisciplinary, and trusted ocean data to meet research and user needs is critical and deserves ORAP immediate attention. At this meeting on May 21–22, 2024, ORAP members will be discussing the two OPC tasks based on an initial review of each topic conducted by ORAP members.

Meeting materials, including work products, will be made available on the ORAP website: *https://www.noaa.gov/ocean-research-advisory-panel/orap-public-meetings*.

Dated: March 29, 2024.

David Holst,

Director Chief Financial Officer/CAO, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2024–08891 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Alaska Region Logbook and Activity Family of Forms

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 5, 2023 (*88 FR 84305*), during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic & Atmospheric Administration (NOAA), Commerce.

Title: Alaska Region Logbook and Activity Family of Forms.

OMB Control Number: 0648–0213.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 255.

Average Hours per Response: Catcher Vessel Trawl DFL: 18 minutes; Catcher Vessel Longline/Pot DFL: 35 minutes; Catcher/Processor Longline/Pot DCPL: 50 minutes; Shoreside Processor Check-in/Check-out Report: 5 minutes; Mothership Check-in/Check-out Report: 7 minutes; Product Transfer Report: 20 minutes; Vessel Activity Report: 14 minutes.

Total Annual Burden Hours: 12,386 hours.

Needs and Uses: The National Marine Fisheries Service, Alaska Region (NMFS AKR), is requesting renewal of this currently approved information collection that consists of paper logbooks and reports used for management of the groundfish fisheries in the Bering Sea and Aleutian Islands Management Area (BSAI) and the Gulf of Alaska, management of the Individual Fishing Quota halibut and sablefish fisheries, and management of the BSAI Crab Rationalization Program crab fisheries.

One change has been made to this information collection. The text for one data field on the Product Transfer Report form has been clarified to include that it collects the shipper's Federal Processor Permit number. This change is necessary to make the form consistent with the form's instructions and with 50 CFR 679.5(g)(4)(ii), which requires the shipper's Federal Fisheries Permit number or Federal Processor Permit number to be included on the report. This does not change the respondents, responses, or burden for this report.

NMFS AKR manages the groundfish and crab fisheries in the exclusive economic zone (EEZ) of the BSAI and the groundfish fisheries of the Gulf of Alaska under fishery management plans (FMPs) for the respective areas. The North Pacific Fishery Management Council prepared, and NMFS approved, the FMPs under the authority of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* Regulations implementing the FMPs appear at 50 CFR parts 679 and 680. Regulations for the logbooks and reports in this information collection are at 50 CFR 679.5.

The information collected through the paper logbooks and reports promotes the goals and objectives of the FMPs, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws. The collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources.

Collecting information from fishery participants is necessary to promote successful management of groundfish, crab, Pacific halibut, and salmon resources. A comprehensive information system that identifies the participants and monitors their fishing activity is necessary to enforce the management measures and prevent overfishing. An information system is also needed to measure the consequences of management controls. This collection supports an effective monitoring and enforcement system with information that includes identification of the participating vessels, operators, dealers, and processors; location of the fishing activity; timeframes when fishing and processing is occurring; and shipment and transfer of fishing products.

Shoreside processors, stationary floating processors, and motherships receiving EEZ-caught fish and all vessels of the United States harvesting EEZ fish are required to hold a Federal permit and thus comply with reporting requirements per CFR 679.5. The data collected are used for making in-season and inter-season management decisions that affect the groundfish resources and the fishing industry that uses them.

This information collection contains four components: Paper logbooks, vessel activity reports, check-in/check-out reports, and product transfer reports. Daily logbooks provide data about the location and timing of fishing effort, as well as discard information of prohibited species. NOAA Office for Law Enforcement (OLE) and the United States Coast Guard (USCG) use logbook information during vessel boarding and site visits to ensure conservation of groundfish, compliance with regulations, and reporting accuracy by the fishing industry. The logbooks are also an important source of information for NMFS to determine where and when fishing activity occurs and the number of sets and hauls.

Vessel activity reports provide information about fish or fish product on board a vessel when it crosses the boundary of the EEZ off Alaska or crosses the U.S.—Canada international boundary between Alaska and British Columbia. NOAA OLE and USCG boarding officers use this information to audit and separate product inventory when boarding a vessel. Check-in/check-out reports provide information on participation by processors and motherships in the groundfish fisheries. The check-in/check-out information is used by NMFS in-season managers to monitor the fishing capacity and effort in fishery allocations and quotas. Additionally, NOAA OLE agents use this information to track commercial business activity and ensure accurate accountability and proper reporting is being performed.

Product transfer reports provide information on the volume of groundfish disposed of by persons buying it from the harvesters. The product transfer report is an important enforcement document and provides an important check on buyer purchase reports. Information collected on product transfer reports is used by NOAA OLE to verify the accuracy of reported shipments through physical inspections. NOAA OLE uses the product transfer report to monitor movement of product in and out of the processor on a timely basis.

Affected Public: Individuals or households; Business or other for-profit organizations.

Frequency: Quarterly; On Occasion; Daily.

Respondent's Obligation: Mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0213.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–08912 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; West Coast Region Groundfish Trawl Fishery Monitoring and Catch Accounting Program

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 February 9, 2024, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic & Atmospheric Administration (NOAA), Commerce.

Title: West Coast Region Groundfish Trawl Fishery Monitoring and Catch Accounting Program.

OMB Control Number: 0648–0619.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 153.

Average Hours per Response: For 5 existing observer providers: 2 hours for preparation and submission of the annual observer provider permit renewal application. For 1 new observer provider: 10 hours for observer provider permit application preparation and submission. For 1 observer provider: 4 hours for a written response and submission of an appeal if an observer provider permit is denied. For 45 catch monitors: 1 hour for submission of qualifications to work as a catch monitor. For 5 catch monitors: 4 hours for a written response and submission of an appeal if a catch monitor permit is denied. For 16 vessels in the Mothership or Catcher/Processor fleet, 30 minutes or less for satisfying requirements for use of at-sea scales, including daily testing reports (30 minutes), daily catch and cumulative weight reports (10 minutes), audit trail (1 minute), calibration log (2 minutes), and fault log (3 minutes).

Total Annual Burden Hours: 447 hours.

Needs and Uses: This request is for extension of the current collection for the West Coast Region Groundfish Trawl Fishery Monitoring and Catch Accounting Program. In January 2011, the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) implemented a trawl rationalization program, a catch share program, for the Pacific coast groundfish fishery's trawl fleet. The program was developed through Amendment 20 to the Groundfish Fishery Management Plan (FMP), under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) and consists of an individual fishing quota (IFQ) program for the shorebased trawl fleet (including whiting and non-whiting fisheries); and cooperative (coop) programs for the at-sea mothership (MS) and catcher/processor (C/P) trawl fleets (whiting only). Fixed allocations to the limited entry trawl fleet were developed through a parallel process with Amendment 21 to the FMP. The regulations implementing the program were effective January 1, 2011; all of the necessary tracking systems to make the program operational became active on January 11, 2011, the date fishing began under the new program. Since that time, the Council and NMFS have been addressing implementation issues as they arise. To achieve individual accountability for catch and bycatch and track total catch, the shorebased IFQ Program is subject to 100 percent monitoring both at-sea and dockside. In addition to 100 percent monitoring at-sea, motherships and catcher/processors are subject to flow scale requirements that include daily testing, reporting, and an annual inspection.

Affected Public: Business or other for-profit organizations.

Frequency: Reporting on occasion, daily, weekly, or annually.

Respondent's Obligation: Mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act. US Code 16 U.S.C. 1801 *et seq.* And CFR Citation 50 CFR 660.15

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0619.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–08914 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Science Advisory Board

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public meetings.

SUMMARY: This notice sets forth the schedule and proposed agenda for a meeting of the Science Advisory Board (SAB). The members will discuss issues outlined in the section on Matters to be Considered.

DATES: The meeting is scheduled for June 18, 2024, from 1 p.m. to 5 p.m. eastern standard time (EST). The time and the agenda topics described below are subject to change.

ADDRESSES: The meeting will be held virtually. The link for the webinar registration will be posted, when available, on the SAB website: *https://sab.noaa.gov/current-meetings/.*

For the latest agenda please refer to the SAB website: *http://sab.noaa.gov/SABMeetings/.*

FOR FURTHER INFORMATION CONTACT: Casey Stewart, Executive Director, SSMC3, Room 11360, 1315 East-West Hwy., Silver Spring, MD 20910; Phone Number: 240–381–0833; Email: *noaa.scienceadvisoryboard@noaa.gov;* or visit the SAB website at *https://sab.noaa.gov/current-meetings/.*

SUPPLEMENTARY INFORMATION: The NOAA Science Advisory Board (SAB) was established by a Decision Memorandum dated September 25, 1997, and is the only Federal Advisory Committee with responsibility to advise the Under Secretary of Commerce for Oceans and Atmosphere on strategies for research, education, and application of science to operations and information services. SAB activities and advice provide necessary input to ensure that National Oceanic and Atmospheric Administration (NOAA) science programs are of the highest quality and

provide optimal support to resource management.

Status: The June 18, 2024, meeting will be open to public participation with a 10-minute public comment period at 4:20 p.m. EST on June 18, 2024. The SAB expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of three minutes. Written comments for the June 18, 2024 meeting should be received by the SAB Executive Director's Office (*noaa.scienceadvisoryboard@noaa.gov*) by June 13, 2024 to provide sufficient time for SAB review. Written comments received by the SAB Executive Director after these dates will be distributed to the SAB, but may not be reviewed prior to the meeting date.

Special Accommodations: The meeting is virtual. Requests for special accommodations may be directed to the Executive Director no later than 12 p.m. on June 04, 2024.

Matters to Be Considered: The meeting on June 18, 2024, will include the following topics: (1) the SAB Consent Calendar, (2) Working Group Updates, (3) ngGong Response, (4) NOAA Response to SAB and TSTAP Statement on National Risk Assessment, (5) NOAA Response to White Paper on Air Quality in a Changing Climate: NOAA's Role, (6) NOAA Response to SAB Climate Working Group (CWG) White Paper on Climate Information Needs for 5–10 Year Hazard Mitigation Planning Cycles, and (7) Business Develop Working Group Update.

Meeting materials, including work products, will also be available on the SAB website: *https://sab.noaa.gov/current-meetings/current-meeting-documents/*.

David Holst,

Chief Financial Officer/Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2024–08892 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–KD–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination Under the Textile and Apparel Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA–DR")

AGENCY: The Committee for the Implementation of Textile Agreements.

ACTION: Determination to add a product in unrestricted quantities to Annex 3.25 of the CAFTA–DR.

SUMMARY: The Committee for the Implementation of Textile Agreements ("CITA") has determined that certain double-knit jacquard fabric, as specified below, is not available in commercial quantities in a timely manner in the CAFTA–DR countries. The product is added to the list in Annex 3.25 of the CAFTA–DR in unrestricted quantities.

DATES: *Applicable Date:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Laurie Mease, Office of Textiles and Apparel, U.S. Department of Commerce, 202–482–2043 or *Laurie.Mease@trade.gov.*

For Further Information Online: https://otexaprod.trade.gov/otexacapublicsite/requests/cafta under "Approved Requests," File Number: CA2024001.

SUPPLEMENTARY INFORMATION:

Authority: The CAFTA–DR; Section 203(o)(4) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act ("CAFTA–DR Implementation Act"), Public Law 109–53; the Statement of Administrative Action accompanying the CAFTA–DR Implementation Act; and Presidential Proclamation 7987 (February 28, 2006).

Background: The CAFTA–DR provides a list in Annex 3.25 for fabrics, yarns, and fibers that the Parties to the CAFTA–DR have determined are not available in commercial quantities in a timely manner in the territory of any Party. The CAFTA–DR provides that this list may be modified pursuant to Article 3.25.4, when the United States determines that a fabric, yarn, or fiber is not available in commercial quantities in a timely manner in the territory of any Party. *See* Annex 3.25 of the CAFTA–DR; *see also* section 203(o)(4)(C) of the CAFTA–DR Implementation Act.

The CAFTA–DR Implementation Act requires the President to establish procedures governing the submission of a request and providing opportunity for interested entities to submit comments and supporting evidence before a commercial availability determination is made. In Presidential Proclamation 7987, the President delegated to CITA the authority under section 203(o)(4) of the CAFTA–DR Implementation Act for modifying the Annex 3.25 list. Pursuant to this authority, on September 15, 2008, CITA published modified procedures it would follow in considering requests to modify the Annex 3.25 list of products determined to be not commercially available in the territory of any Party to the CAFTA–DR (*Modifications to Procedures for Considering Requests Under the Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement,* 73 FR 53200) ("CITA's Procedures").

On March 14, 2024, CITA received a Commercial Availability Request ("Request") from Lacoste for certain double-knit jacquard fabric, as specified below. On March 18, in accordance with CITA's Procedures, CITA notified interested parties of the Request, which was posted on the dedicated website for CAFTA–DR Commercial Availability proceedings. In its notification, CITA advised that any Response with an Offer to Supply ("Response") must be submitted by March 28, and any Rebuttal to a Response ("Rebuttal") must be submitted by April 3, in accordance with sections 6 and 7 of CITA's Procedures.

No interested entity submitted a Response to the Request advising CITA of its objection to the Request with an offer to supply the subject product.

In accordance with section 203(o)(4)(C) of the CAFTA–DR Implementation Act, and section 8(c)(2) of CITA's Procedures, as no interested entity submitted a Response objecting to the Request and providing an offer to supply the subject product, CITA has determined to add the specified fabric to the list in Annex 3.25 of the CAFTA–DR.

The subject product has been added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities. A revised list has been posted on the dedicated website for CAFTA–DR Commercial Availability proceedings, at *https://otexaprod.trade.gov/otexacapublicsite/shortsupply/cafta.*

Specifications: Certain Double-Knit Jacquard Fabric

HTS: 6006.33
Fabric Type: Polyester/Cotton/Nylon Double Face Jacquard Knitted Fabric
Fiber Content: 55% to 65% Polyester/30% to 40% Cotton/3% to 6% Nylon
Yarn Size:
  Face: 100% Polyester Filament yarn 100 to 200 Denier
  Tie: 100% Nylon 10 to 40 Denier
  Back: 100% Cotton 20/1 to 34/1
Fabric Weight:
  Metric: 200–340 GM2
  English: 5.8–10.03 ounces per square yard
Weave Type: Double Knit Jacquard

Fabric Width:
Metric: 152–195 cm
English: 59.8–76.8 inches
Finish: Yarn Dye of Various Color

Remarks: The yarn size designations describe a range of yarn specifications for yarn before knitting, dyeing and finishing of the fabric. They are intended as specifications to be followed by the mills in sourcing yarn used to produce the fabric. Dyeing, finishing, and knitting can alter the characteristic of the yarn as it appears in the finished fabric. This specification therefore includes yarns appearing in the finished fabric as finer or coarser than the designated yarn sizes provided that the variation occurs after processing of the greige yarn and production of the fabric. The specifications for the fabric apply to the fabric itself prior to cutting and sewing of the finished garment. Such processing may alter the measurements.

Jennifer Knight,
Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 2024–08790 Filed 4–24–24; 8:45 am]

BILLING CODE 3510–DR–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 9:30 a.m. EDT, Monday, April 29, 2024.

PLACE: CFTC Headquarters Conference Center, Three Lafayette Centre, 1155 21st Street NW, Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') will hold this meeting to consider the following matters:

- *Final Rule:* Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants; and
- *Final Rule:* Adopting Amendments to the Large Trader Reporting Rules for Futures and Options.

The agenda for this meeting will be available to the public and posted on the Commission's website at *https://www.cftc.gov.* Members of the public are free to attend the meeting in person, or have the option to listen by phone or view a live stream. Instructions for listening to the meeting by phone and connecting to the live video stream will be posted on the Commission's website.

In the event that the time, date, or place of this meeting changes, an announcement of the change, along with the new time, date, or place of the meeting, will be posted on the Commission's website.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, Secretary of the Commission, 202–418–5964.

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

Dated: April 22, 2024.

Christopher Kirkpatrick,
Secretary of the Commission.

[FR Doc. 2024–08958 Filed 4–23–24; 11:15 am]

BILLING CODE 6351–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

Consumer Advisory Board Meeting

AGENCY: Consumer Financial Protection Bureau.

ACTION: Notice of public meeting.

SUMMARY: Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Consumer Advisory Board (CAB or Board) of the Consumer Financial Protection Bureau (CFPB or Bureau). The notice also describes the functions of the Board.

DATES: The meeting date is Wednesday, May 15, 2024, from approximately 10:30 a.m. to 1:00 p.m., eastern time. This meeting will be held virtually and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

FOR FURTHER INFORMATION CONTACT: Kim George, Outreach and Engagement Associate, Advisory Board and Councils, External Affairs Division, at 202–450–8617, or email: *CFPB_CABandCouncilsEvents@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 3 of the charter of the Board states that: The purpose of the CAB is outlined in section 1014(a) of the Dodd-Frank Act, which states that the CAB shall ''advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws'' and ''provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information.''

To carry out the CAB's purpose, the scope of its activities shall include providing information, analysis, and recommendations to the CFPB. The CAB will generally serve as a vehicle for trends and themes in the consumer finance marketplace for the CFPB. Its objectives will include identifying and assessing the impact on consumers and other market participants of new, emerging, and changing products, practices, or services.

II. Agenda

The CAB will discuss broad policy matters related to the Bureau's Unified Regulatory Agenda and general scope of authority.

If you require any additional reasonable accommodation(s) in order to attend this event, please contact the Reasonable Accommodations team at *CFPB_ReasonableAccommodations@cfpb.gov* 48 hours prior to the start of this event.

Written comments will be accepted from interested members of the public and should be sent to *CFPB_CABandCouncilsEvents@cfpb.gov,* a minimum of seven (7) days in advance of the meeting. The comments will be provided to the CAB members for consideration. Individuals who wish to join this meeting must RSVP via this link *https://surveys.consumerfinance.gov/jfe/form/SV_ahJBv2l19gR1vwi.*

III. Availability

The Board's agenda will be made available to the public on Tuesday, May 14, 2024, via *consumerfinance.gov.*

A recording and summary of this meeting will be available after the meeting on the Bureau's website *consumerfinance.gov.*

Jocelyn Sutton,
Deputy Chief of Staff, Consumer Financial Protection Bureau.

[FR Doc. 2024–08865 Filed 4–24–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2024–HQ–0006]

Proposed Collection; Comment Request

AGENCY: U.S. Army Corps of Engineers (USACE), Department of the Army, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the USACE announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is

necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by June 24, 2024.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the U.S. Army Corps of Engineers Alaska District 2204 3rd St, Elmendorf AFB, AK 99506, ATTN: Ms. Megan Green, or call 907–753–2524.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Homer Small Boat Harbor Vessel Survey; OMB Control Number 0710–HSBH.

Needs and Uses: The Alaska District of the Corps of Engineers is currently conducting a general investigation into the feasibility of building a second harbor in Homer, Alaska. The small boat harbor which exists there currently is overcrowded, and enlarging it is not feasible given the geography of the area. This project would be intended to reduce delays and safety risks resultant from overcrowding by building a second harbor adjacent to the existing one. The purpose of this survey is to collect data crucial to estimate delay times and associated costs in the existing conditions upon which formulated alternative plans will be compared. The data collected will also inform benefits associated with project alternatives. This data collection is essential for development of an accurate model because there is no readily available data on vessel movement patterns or delays in Alaskan small boat harbors, which are generally multi-use, serving commercial and subsistence fishing, freight, recreational boaters, and others. Many of these boats do not have Automatic Identification System transponders and harbors do not keep data on vessel movements or delays.

Affected Public: Business or other for-profit; individuals or households.

Annual Burden Hours: 1,313.

Number of Respondents: 1,750.

Responses per Respondent: 1.

Annual Responses: 1,750.

Average Burden per Response: 45 minutes.

Frequency: Once.

Dated: April 19, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–08859 Filed 4–24–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2024–OS–0044]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Service (DFAS) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by June 24, 2024.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Enterprise Standards and Solutions, Disbursing, DFAS, 8899 E 56th Street Indianapolis, IN 46249–0201, ATTN: Kellen Stout (DFAS IMCO), Phone Number: (317) 212–1801.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Statement of Claimant Requesting Replacement Check; DD Form 2660; OMB Control Number 0730–0002.

Needs and Uses: Information collection is necessary to obtain a signed statement from payee regarding non-receipt or loss of a Treasury check and request for a replacement (recertified) check. The statement acknowledges non-entitlement to both checks and consents to recoupment from future pay and allowances due if both checks are negotiated.

Affected Public: Individuals or households.

Annual Burden Hours: 2,000.

Number of Respondents: 2,000.

Responses per Respondent: 1.

Annual Responses: 2,000.

Average Burden per Response: 1 hour.

Frequency: As required.

Dated: April 19, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–08860 Filed 4–24–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2024–HA–0043]

Proposed Collection; Comment Request

AGENCY: The Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Health Agency (DHA) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by June 24, 2024.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to DHA, 7700 Arlington Blvd., Falls Church, VA 22042, ATTN: Amanda Grifka, 703–681–1771.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Professional Fulfillment Index (PFI) Survey; OMB Control Number 0720–PFIS.

Needs and Uses: The PFI was developed by Stanford and collects data about healthcare professional's burnout and professional fulfillment. The DHA seeks to empower the Military Health System to address areas of opportunity around provider burnout and aims to inform leaders about the state of healthcare providers and teams with respect to the Culture of Wellness, Efficiency of Practice, and Personal Resilience. This brief survey will be completed by providers quarterly to track changes in responses over time.

Affected Public: Individuals or households.

Annual Burden Hours: 48,333.

Number of Respondents: 145,000.

Responses per Respondent: 4.

Annual Responses: 580,000.

Average Burden per Response: 5 minutes.

Frequency: Quarterly.

Dated: April 19, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–08856 Filed 4–24–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2024–OS–0042]

Proposed Collection; Comment Request

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

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the OUSD(P&R) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by June 24, 2024.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Child and Youth Programs, 4800 Mark Center Drive, Suite 3G15, Alexandria, VA 22350, ATTN: Stacey Young, (571) 372–0867.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Military Child Development Program Workforce Case Studies; OMB Control Number 0704–MCDS.

Needs and Uses: This project is needed to analyze, identify, and offer solutions for factors contributing to the staffing issues to support DoD in making informed decisions on ways to improve the strategies to recruit, train, and retain qualified staff within the Child Development Program.

Affected Public: Individuals or households; Federal Government.

Annual Burden Hours: 204.

Number of Respondents: 204.

Responses per Respondent: 1.

Annual Responses: 204.

Average Burden per Response: 60 minutes.

Frequency: Once.

Dated: April 19, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–08858 Filed 4–24–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2024–OUS–0014]

Request for Information (RFI) Regarding Developing a Postsecondary Student Success Award Program for Institutions of Higher Education

AGENCY: Office of the Under Secretary, U.S. Department of Education.

ACTION: Request for information.

SUMMARY: The U.S. Department of Education (Department) is requesting information in the form of written comments that include information, suggestions, and proposals regarding an award system to recognize institutions of higher education (IHEs) that serve as engines of opportunity and economic mobility by supporting all students to complete affordable credentials of value that prepare them well to participate in the workforce, their communities, and our democracy.

DATES: We must receive your comments by May 28, 2024.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at *www.regulations.gov.* However, if you require an accommodation or cannot otherwise submit your comments via *regulations.gov*, please contact the program contact person listed below under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

The Department strongly encourages you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), the Department strongly encourages you to convert the PDF to ''print-to-PDF'' format, or to use some other commonly used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the Department to electronically search and copy certain portions of your submissions to assist in the rulemaking process.

Federal eRulemaking Portal: Please go to *www.regulations.gov* to submit your comments electronically. Information on using *regulations.gov*, including instructions for finding a rule on the site and submitting comments, is available on the site under ''FAQ.''

Privacy Note: The Department's policy is to generally make comments received from members of the public available for public viewing on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should include in their comments only information about themselves that they wish to make publicly available. Commenters should not include in their comments any information that identifies other individuals or that permits readers to identify other individuals. The Department will not make comments that contain personally identifiable information (PII) about someone other than the commenter publicly available on *www.regulations.gov* for privacy reasons. This may include comments where the commenter refers to a third-party individual without using their name if the Department determines that the comment provides enough detail that could allow one or more readers to link the information to the third party. If your comment refers to a third-party individual, to help ensure that your comment is posted, please consider submitting your comment anonymously to reduce the chance that information in your comment about a third party could be linked to the third party. The Department will also not make comments that contain threats of harm to another person or to oneself available on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Engle, U.S. Department of Education, 400 Maryland Avenue SW, room 5C136, Washington, DC 20202. Telephone: (202) 987–0420. Email: *jennifer.engle@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: For purposes of this award, the Department considers postsecondary student success to include providing access to an affordable education including to underserved populations,[1] supporting students through to completion of credentials of value, and helping students navigate to career pathways that improve their lives through economic opportunity and mobility.

I. Background

A college education can serve as a ladder to socioeconomic mobility and lifelong success. Postsecondary education is associated with lower rates of unemployment, higher levels of earnings, better health, and greater community engagement.[2] Higher education—particularly at certain broad access colleges and universities that enroll a significant share of students from low-income backgrounds and serve them well—can dramatically increase students' socioeconomic mobility, launching students from the lowest-income households into lives with economic security,[3] helping to build a strong middle class that contributes to local communities and the broader economy.

However, at too many IHEs, a credential remains out of reach for many of their students. Just one in three first-time students at two-year colleges, and only two in three first-time students at four-year colleges, graduate from the first institution they attend within three and six years respectively.[4] Further,

[1] The definition of ''underserved student,'' for the purposes of this award, aligns with the definition of this term in the Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities). This may include: (a) a student who is living in poverty or is served by schools with high concentrations of students living in poverty; (b) a student of color; (c) a student who is a member of a federally recognized Indian Tribe; (d) an English learner; (e) a student with a disability; (f) a student experiencing homelessness or housing insecurity; (g) a lesbian, gay, bisexual, transgender, queer or questioning, or intersex (LGBTQI+) student; (h) a student without documentation of immigration status; (i) a pregnant, parenting, or caregiving student; (j) a student impacted by the justice system, including a formerly incarcerated student; (k) a student who is the first in their family to attend postsecondary education; (l) a student enrolling in or seeking to enroll in postsecondary education for the first time at the age of 20 or older; (m) a student who is working full-time while enrolled in postsecondary education; (n) a student who is enrolled in or is seeking to enroll in postsecondary education who is eligible for a Pell Grant; (o) an adult student in need of improving their basic skills or an adult student with limited English proficiency; and/or (p) a military- or veteran- connected student.

[2] See, for example, Ma, J., & Matea, P. (2023). *Education Pays 2023.* New York: College Board. Retrieved from: *research.collegeboard.org/media/pdf/education-pays-2023.pdf.*

[3] Chetty, R., Friedman, J. N., Saez, E., Turner, N., & Yagan, D. (2017). *Mobility report cards: The role of colleges in intergenerational mobility (No. w23618.* National Bureau of Economic Research. Retrieved from: *www.equality-of-opportunity.org/papers/coll_mrc_paper.pdf.*

[4] U.S. Department of Education, National Center for Education Statistics, Integrated Postsecondary Education Data System (IPEDS), Spring 2004 through Spring 2013 and Winter 2013–14 through Winter 2021–22, Graduation Rates component. (This table was prepared January 2023.) Retrieved from: *nces.ed.gov/programs/digest/d22/tables/dt22_326.20.asp* and U.S. Department of Education, National Center for Education Statistics, Integrated

Continued

despite 80 percent of community college students (aspiring to transfer to a four-year institution to earn bachelor's degrees, only about a third of community college students transfer to four-year institutions. Fewer than half of those students complete bachelor's degrees within six years.[5] Students from low-income backgrounds, first-generation students, students of color, English language learners, adult students, students with disabilities, and other students who have been historically underserved in postsecondary education often fare worse, resulting in double-digit gaps in graduation rates for some students of color (*e.g.,* 43 and 46 percent of Native American and Black students respectively graduate within six years compared to 68 percent of white students in four-year institutions) and some students from low-income backgrounds (*e.g.,* 49 percent of first-time, full-time Pell Grant recipients in public institutions graduate within eight years compared to 66 percent of non-Pell students)in comparison to their peers.[6]

Many students who leave college unable to earn a credential also hold debt from financing their postsecondary education. The consequences of stopping or dropping out can be significant, particularly for these borrowers. Students who leave college with educational debt, but no credential, are far more likely to default on their student loans, even when their balances are relatively low.[7] Recent Department data show that 68 percent of students in default on their Federal student loans did not complete their program.[8] Without affordable credentials and degrees that lead to good jobs, former students may not recoup the time and money they have invested in their schooling, not to mention the public investment in financing their education. Student debt can also negatively impact the economy by reducing consumption in homeownership and everyday goods and services.[9]

II. Postsecondary Education Success Efforts

Many IHEs, non-profit organizations, systems of higher education, and States have invested in postsecondary education success efforts and have improved transfer and graduation rates for all students, while enrolling students reflective of the communities they serve—whether locally, statewide, or nationally—including underserved populations. These efforts pay dividends for the students earning credentials of value—affordable certificates and degrees that lead to economic opportunity—as well as for their regional economies and communities.

For instance, studies show the importance of early support from institutions like help completing the Free Application for Federal Student Aid (FAFSA®) and well-designed financial aid programs, including high-quality free community college programs, in promoting student success.[10] Other studies show that the adoption of co-requisite (as opposed to pre-requisite) remediation programs and reforming placement policies can help ensure students successfully complete college-level coursework needed for graduation while simultaneously addressing opportunity gaps in access to courses, programs, and other supports that strengthen students' English or math skills,[11] which may result from disparities in their secondary school experiences or delays in college-going to pursue employment. Similarly, research indicates that comprehensive, integrated academic advising—including wraparound support services such as transportation and child care as well as accessibility services—can be critically important to ensuring students complete academic coursework and graduate at higher rates.[12] Research also shows that students with disabilities who access universally-available or disability-related supports are more likely to persist in their college program.[13] Colleges and universities that have improved student outcomes often go beyond implementing specific interventions by instituting more comprehensive, data-driven transformation efforts.[14] Research consistently shows that implementing these kinds of evidence-based practices can improve postsecondary success rates, which is why the Department

Postsecondary Education Data System (IPEDS), Graduation Rates component, Spring 2002 through Spring 2014 and Winter 2014–15 through Winter 2021–22 (final data) and Winter 2022–23 (provisional data); and Admissions component, IPEDS Winter 2015 (final data). (This table was prepared January 2024.) Retrieved from: *nces.ed.gov/programs/digest/d23/tables/dt23_326.10.asp.*

[5] Shapiro, D., Dundar, A., Huie, F., Wakhungu, P. K., Yuan, X., Nathan, A., & Hwang, Y. (2017/2022 update). *Tracking transfer: Measures of effectiveness in helping community college students to complete bachelor's degrees.* National Student Clearinghouse Research Center. Retrieved from: *nscresearchcenter.org/tracking-transfer/.*

[6] See, for example, U.S. Department of Education, National Center for Education Statistics, Integrated Postsecondary Education Data System (IPEDS), Winter 2016–17 and Winter 2021–22, Graduation Rates component; IPEDS Fall 2010 and Fall 2015, Institutional Characteristics component; and IPEDS Winter 2015–16, Admissions component. (This table was prepared February 2023.) Retrieved from: *nces.ed.gov/programs/digest/d22/tables/dt22_326.15.asp* and U.S. Department of Education, National Center for Education Statistics, IPEDS, Winter 2022–23, Outcome Measures component (provisional data). Retrieved from: *nces.ed.gov/ipeds/Search?query=&query2=&resultType=all&page=1&sortBy=date_desc&surveyComponents=Outcome%20Measures%20(OM)&collectionYears=2021–22&sources=Tables%20Library&overlayTableId=36029.*

[7] Miller, B. (2017). *Who are student loan defaulters?* Washington, DC: Center for American Progress. Retrieved from: *www.americanprogress.org/article/student-loan-defaulters/.*

[8] Note: Among borrowers in default whose completion status is known. U.S. Department of Education. (2023). Data about Federal student loan borrowers in default. Negotiated Rulemaking for Higher Education 2023–2024. Retrieved from: *www2.ed.gov/policy/highered/reg/hearulemaking/2023/data-on-borrowers-in-default.pdf.*

[9] Mezza, A., Ringo, D., Sommer, K. (January 2019). Can Student Loan Debt Explain Low Homeownership Rates for Young Adults? *Consumer and Community Context (volume 1, number 1). Washington, DC: The Board of Governors of the Federal Reserve.* Retrieved from: *https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf.*

[10] See, for example, Bettinger, E., Long, B., Oreopoulos, P., & Sanbonmatsu, L. (2012). *The role of application assistance and information in college decisions: Results from the H&R Block FAFSA experiment.* Quarterly Journal of Economics, 127(3), 1205–1242. Retrieved from: *ies.ed.gov/ncee/wwc/Study/78087;* David, D., & Dynarski, S. (2009). *Into college, out of poverty? Policies to increase the postsecondary attainment of the poor.* NBER Working Paper, 15387. Retrieved from: *www.nber.org/system/files/working_papers/w15387/w15387.pdf;* Harris, D. N., & Mills, J. (2021). *Optimal college financial aid: Theory and evidence on free college, early commitment, and merit aid from an eight-year randomized trial (EdWorkingPaper: 21–393).* Retrieved from Annenberg Institute at Brown University: *doi.org/10.26300/wz1m-v526.*

[11] See, for example, Institute of Education Sciences (2021). *What Works Clearinghouse Summary of Evidence: Dana Center Mathematics Pathways.* Washington, DC: U.S. Department of Education. Retrieved from: *ies.ed.gov/ncee/wwc/Intervention/1602;* Miller, T., Daugherty, L., Martorell, P., & Gerber, R. (2022). *Assessing the effect of corequisite English instruction using a randomized controlled trial.* Journal of Research on Educational Effectiveness, v15 n1 p78–102. Retrieved from *eric.ed.gov/?id=EJ1327668.*

[12] See, for example, Karp, M., Ackerson, S., Cheng, I., Cocatre-Zilgien, E., Costelloe, S., Freeman, B., Lemire, S., Linderman, D., McFarlane, B., Moulton, S., O'Shea, J., Porowski, A., & Richburg-Hayes, L. (2021). *Effective advising for postsecondary students: A practice guide for educators (WWC 2022003).* Washington, DC: National Center for Education Evaluation and Regional Assistance (NCEE), Institute of Education Sciences, U.S. Department of Education. Retrieved from: *ies.ed.gov/ncee/wwc/PracticeGuide/28.*

[13] Newman, L. A., Madaus, J. W., Lalor, A. R., & Javitz, H. S. (2020). Effect of accessing supports on higher education persistence of students with disabilities. *Journal of Diversity in Higher Education.* Retrieved from *https://files.eric.ed.gov/fulltext/ED605478.pdf.*

[14] See, for example, Gumbel, A. (2020). *Won't lose this dream: How an upstart urban university rewrote the rules of a broken system.* New York City: The New Press.

wants to shine a spotlight on the institutions and their partners that are already doing exceptional work to ensure successful outcomes for all of their students.

III. Solicitation of Comments: Developing a Postsecondary Student Success Award Program for Institutions of Higher Education

The Department is interested in developing an award system to recognize IHEs [15] that are supporting success across all of their students by conferring affordable credentials of value that lead to economic success while enrolling student bodies reflective of their communities—including students from underserved populations. The Department requests comments on how to understand institutions' efforts to ensure success in postsecondary education in order to evaluate and select institutions to receive the award. We seek feedback on what information the Department should request or require of institutions that are invited to apply and what information we should use to determine which institutions should be selected to receive the award:

1. What metrics should the Department use and how should the Department measure performance on those metrics to determine both which institutions should be eligible to apply for and which should be selected to receive the award? The Department is particularly interested in—

- Which data and data sources to use related to access, transfer and completion, and post-college outcomes (*e.g.,* preparing students for high-demand occupations that pay a livable wage or further training and education, providing economic value or affordability in relation to earnings);
- What benchmarks to use to measure performance and progress on these metrics and what methods to use to weigh performance across these metrics to assess eligibility and confer awards; and
- What contextual factors and operational structures (*e.g.,* selectivity) should be considered alongside these metrics including whether and how to categorize institutions for purposes of award eligibility and receipt;
- Which categories to use to disaggregate student data especially for underserved students (*e.g.,* economic status, first-generation status, race/ethnicity, English learner status, disability status).

2. How should applicant institutions demonstrate they are using data to drive success for all students while enrolling a student body reflective of the communities they serve, including underserved populations? The Department is particularly interested in understanding how the application for the award can show:

- Which data and research have been used to identify the institutional policies and practices needed to ensure success for all students and how data and research have been used to set goals and to implement and evaluate evidence-based solutions;
- Which data are used by institutional leaders, faculty, and staff to monitor progress toward success goals and what processes and structures are used to ensure data are well understood and used broadly and frequently across the campus community to ensure student success, especially for underserved populations;
- How institutions have assessed and addressed gaps in their data systems, tools, and capacity to support student success efforts and use these data to support systems of continuous improvement, including whether institutions are using more robust and real-time data than available from public data systems (*e.g.,* IPEDS) such as leading indicators of student success based on course-level data (*e.g.,* credit accumulation, gateway course completion); predictive analytics based on student engagement; unmet financial need; retention, transfer, and completion rates inclusive of all students; time and credits to credential or upward transfer; upward transfer rates and post-transfer success rates; pursuit of graduate education; and earnings, debt, and loan repayment by program and completion status; and
- How data are shared with other education institutions in the State or region, including those in the preK–12 system (including alternative preparation programs) and IHEs from which and to which students transfer, and with relevant State agencies, to inform coordinated student success efforts.

3. How should applicant institutions demonstrate a commitment by senior leadership, including the governing board of the institution (where applicable), to support economic mobility through campus-wide student success efforts? The Department is particularly interested in understanding how the application can show:

- That the vision, mission, and strategic goals of the institutions reflect an actualized commitment to shared success for all students, including populations that may be underserved by postsecondary education;
- That the efforts and strategies undertaken by the institution create a shared value system and cross-campus culture supportive of an institutional commitment to student success;
- That the organization and staffing of the institution ensure a continued focus on maintaining or increasing success rates for all students, including through faculty and staff selection, onboarding, training, and development, and that faculty are well integrated into, and committed to, student success efforts;
- That the institution has established effective external partnerships by the institution to help support success efforts; and
- That the success efforts undertaken by the institution are sustainable, both through funding and through organizational design strategies.

4. How should applicant institutions demonstrate the effectiveness of their strategies to ensure economic mobility through student success efforts? The Department is particularly interested in understanding how the application can show:

- The impact of effective implementation of interventions and strategies across all student groups leading to completion and post-college education and economic opportunity;
- The integration of such strategies with other institutional planning efforts, such as strategic plan development and renewal of accreditation processes, as well as continuous improvement efforts; and
- The rigorous evaluation of the strategies implemented by the institution and the dissemination of such evaluations to support knowledge-building in the field as well as transparency regarding student outcomes, such as through public dashboards.

This is a request for information only. This RFI is not a request for proposals (RFP) or a promise to issue an RFP or a notice inviting applications. This RFI does not commit the Department to contract for any supply or service whatsoever. Further, we are not seeking proposals and will not accept unsolicited proposals. The Department will not pay for any information or administrative costs that you may incur in responding to this RFI. The documents and information submitted in response to this RFI become the property of the U.S. Government and will not be returned.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the

[15] The term ''institution of higher education'' here has the same meaning ascribed the term in 20 U.S.C. 1001.

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: 20 U.S.C. 3402.

James Kvaal,

Under Secretary, U.S. Department of Education.

[FR Doc. 2024–08541 Filed 4–24–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Docket No. 24–28–LNG]

Sabine Pass Liquefaction, LLC; Application for Blanket Authorization To Export Previously Imported Liquefied Natural Gas to Non-Free Trade Agreement Countries on a Short-Term Basis

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 on March 21, 2024, by Sabine Pass Liquefaction, LLC (SPL or Sabine Pass). SPL requests blanket authorization to export liquefied natural gas (LNG) previously imported into the United States by vessel from foreign sources in a volume equivalent to 500 billion cubic feet (Bcf) of natural gas on a cumulative basis over a two-year period. SPL 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, May 28, 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: SPL requests a short-term blanket authorization to export LNG that has been previously imported into the United States from foreign sources for a two-year period commencing on June 7, 2024. SPL states that it will export the LNG from the Sabine Pass LNG Terminal located in Cameron Parish, Louisiana, to any country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or policy. This includes both countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA countries) and all other countries (non-FTA countries). This Notice applies only to the portion of the Application requesting authority to export the LNG to non-FTA countries pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a). SPL states that its existing blanket re-export authorization, set forth in DOE/FECM Order No. 4838 (Docket No. 22–19–LNG), is scheduled to expire on June 6, 2024. SPL further states that it does not seek authorization to export domestically produced natural gas or LNG.

SPL requests this authorization on its own behalf and as agent for other parties that hold title to the LNG at the time of export. Additional details can be found in SPL's Application, posted on the DOE website at: *https://www.energy.gov/fecm/articles/sabine-pass-liquefaction-llc-docket-no-24-28-lng.*

DOE Evaluation

In reviewing SPL's Application, DOE will consider any issues required by law or policy. DOE will consider domestic need for the natural gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this application should comment in their responses on these issues.

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 until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Interested parties will be provided 30 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 the proceeding 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, or notices of intervention 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. 24–28–LNG'' or ''Sabine Pass Liquefaction 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 Application 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 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 22, 2024.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability.

[FR Doc. 2024–08878 Filed 4–24–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Monday, May 20, 2024; 1 p.m.–4:15 p.m. EDT; Tuesday, May 21, 2024; 9 a.m.–3:30 p.m. EDT.

ADDRESSES: The DeSoto Savannah, 15 E Liberty, Savannah, Georgia 31401. The meeting will also be streamed on YouTube, no registration is necessary; links for the livestream can be found on the following website: *https://cab.srs.gov/srs-cab.html.*

FOR FURTHER INFORMATION CONTACT: Amy Boyette, Office of External Affairs, U.S. Department of Energy (DOE), Savannah River Operations Office, P.O. Box A, Aiken, SC 29802; Phone: (803) 952–6120; or Email: *amy.boyette@srs.gov.*

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda

Monday, May 20, 2024

Chair Update
Agency Updates
Subcommittee Updates
Program Presentations
Board Business
Public Comments

Tuesday, May 21, 2024

Program Presentations
Public Comments
Board Business and Voting

Public Participation: The meeting is open to the public. To register for in-person attendance, please send an email to *srscitizensadvisoryboard@srs.gov* no later than 4 p.m. EDT on Thursday, May 16, 2024. The EM SSAB, Savannah River Site, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Amy Boyette at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board via email either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should submit their request to *srscitizensadvisoryboard@srs.gov.* Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. Comments will be accepted after the meeting, by no later than 4 p.m. EDT on Tuesday, May 28, 2024. Please submit comments to *srscitizensadvisoryboard@srs.gov.* The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make oral public comments will be provided a maximum of five minutes to present their comments. Individuals wishing to submit written public comments should email them as directed above.

Minutes: Minutes will be available by emailing or calling Amy Boyette at the email address or telephone number listed above. Minutes will also be available at the following website: *https://cab.srs.gov/srs-cab.html.*

Signing Authority: This document of the Department of Energy was signed on April 22, 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 22, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–08877 Filed 4–24–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. DI24–1–000]

Paradigm Shift Hydro, LLC; Notice of Declaration of Intention and Soliciting Comments, Protests, and Motions To Intervene

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Declaration of Intention.

b. *Docket No:* DI24–1–000.

c. *Date Filed:* November 21, 2023.

d. *Applicant:* Paradigm Shift Hydro, LLC.

e. *Name of Project:* Johnson Canyon Energy Project.

f. *Location:* The proposed Johnson Canyon Energy Project would be located near the town of Plymouth, in Box Elder County, Utah.

g. *Filed Pursuant to:* Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Paradigm Shift Hydro, LLC; 270 Bellevue Avenue, PMB #1053; Newport, RI 02840; Agent Contact: Jonathan Pertillo, Managing Member, Paradigm Shift Hydro, LLC; 270 Bellevue Avenue, PMB #1053; Newport, RI 02840.

i. *FERC Contact:* Jennifer Polardino, (202) 502–6437, or *Jennifer.Polardino@ferc.gov.*

j. *Deadline for filing comments, protests, and motions to intervene is:* May 20, 2024.

The Commission strongly encourages electronic filing. Please file comments, protests, and motions to intervene using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number DI24–1–000. Comments emailed to Commission staff are not considered part of the Commission record.

k. *Description of Project:* The proposed closed-loop Johnson Canyon Energy Project would consist of: (1) a 50-foot-high, 400-foot-long dam forming a 20-acre upper reservoir with a storage capacity of 1,000 acre-feet; (2) a 50-foot-high, 450-foot-long dam forming a 25-acre lower reservoir with a storage capacity of 1,250 acre-feet; (3) underground tunnels connecting the upper and lower reservoirs consisting of: (a) two, 10-foot diameter parallel pipes with a length of 7,500-feet each; (b) two 10-foot diameter, 100-foot-high vertical shafts; (c) a 25-foot diameter, 200-foot-long pump intake tunnel located in the lower reservoir ; (4) a reinforced concrete and steel powerhouse containing two 50 megawatt (MW) reversible pump-turbines for a total installed capacity of 100 MW; and (5) appurtenant facilities. The proposed project would connect to the Rocky Mountain Power system at the Josephson substation via a new 1.6-mile overhead transmission line.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the project would affect the interests of interstate or foreign commerce. The Commission also determines whether or not the project: (1) would be located on a navigable waterway; (2) would occupy public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) would be located on a non-navigable stream over which Congress has Commerce Clause jurisdiction and would be constructed or enlarged after 1935.

l. *Locations of the Application:* This filing may be viewed on the Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* All filings must bear in all capital letters the title ''COMMENTS'', ''PROTESTS'', and ''MOTIONS TO INTERVENE'', as applicable, and the Docket Number of the particular application to which the filing refers. A copy of any Motion to Intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: April 18, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–08779 Filed 4–24–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0367; FRL–11867–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Underground Storage Tanks: Technical and Financial Requirements, and State Program Approval Procedures (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Underground Storage Tanks: Technical and Financial Requirements, and State Program Approval Procedures (EPA ICR Number 1360.18, OMB Control Number 2050–0068) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through April 30, 2024. Public comments were previously requested via the **Federal Register** on July 11, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before May 28, 2024.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OLEM–2018–0368 to EPA online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection 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: Elizabeth McDermott, Office of Underground Storage Tanks, Mail Code 5401R, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–0646; email address: *mcdermott.elizabeth@epa.gov.*

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through April 30, 2024. 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.

Public comments were previously requested via the **Federal Register** on July 11, 2023 during a 60-day comment period (88 FR 44125). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: Subtitle I of the Resource Conservation and Recovery Act (RCRA), as amended, requires that EPA develop standards for Underground Storage Tank (UST) systems, as may be necessary, to protect human health and the environment, and procedures for approving state programs in lieu of the federal program. EPA promulgated technical and financial requirements for owners and operators of USTs at 40 CFR part 280, and state program approval procedures at 40 CFR part 281. This ICR is a comprehensive presentation of all information collection requirements contained at 40 CFR parts 280 and 281.

The data collected for new and existing UST system operations and financial requirements are used by owners and operators and/or EPA or the implementing agency to monitor results of testing, inspections, and operation of UST systems, as well as to demonstrate compliance with regulations. EPA believes strongly that if the minimum requirements specified under the regulations are not met, neither the facilities nor EPA can ensure that UST systems are being managed in a manner protective of human health and the environment.

EPA uses state program applications to determine whether to approve a state program. Before granting approval, EPA must determine that programs will be no less stringent than the federal program and contain adequate enforcement mechanisms.

Form Numbers: 600–25; 7530–1.

Respondents/affected entities: Facilities that own and operate underground storage tanks (USTs), states that implement the UST programs, and tribes.

Respondent's obligation to respond: Mandatory (40 CFR part 280).

Estimated number of respondents: 193,876.

Frequency of response: Once, on occasion, annual.

Total estimated burden: 8,332,975 hours (per year). Burden is defined at 5 CFR 1320.03(b)

Total estimated cost: $689,689,686 (per year), includes $406,006,490 annualized capital and operation & maintenance costs.

Changes in Estimates: There is a decrease of 389,217 hours in the total estimated respondent burden hours compared with the ICR currently approved by OMB. There is a total decrease in burden hours because the overall number of underground storage tanks decreased while the requirements for each tank owner remained the same.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024–08830 Filed 4–24–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2024–0139; FRL–11668–01–OCSPP]

Agency Information Collection Activities; Proposed Renewal of an Existing ICR Collection and Request for Comment; Notice of Arrival of Pesticides and Devices Under Section 17(c) of FIFRA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), this document announces the availability of and solicits public comment on the following Information Collection Request (ICR) that EPA is planning to submit to the Office of Management and Budget (OMB): ''Notice of Arrival of Pesticides and Devices under section 17(c) of FIFRA,'' identified by EPA ICR No. 0152.15 and OMB Control No. 2070–0020. This ICR represents a renewal of an existing ICR that is currently approved through January 31, 2025. Before submitting the ICR to OMB for review and approval under the PRA, EPA is soliciting comments on specific aspects of the information collection that is summarized in this document. The ICR and accompanying material are available in the docket for public review and comment.

DATES: Comments must be received on or before June 24, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2024–0139, through *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 or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Carolyn Siu, Mission Support Division (7602M), Office of Program Support, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 719–1649; email address: *siu.carolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)), EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

2. Evaluate the accuracy of the Agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What information collection activity or ICR does this action apply to?

Title: Notice of Arrival of Pesticides and Devices under section 17(c) of FIFRA.

EPA ICR No.: 0152.15.

OMB Control No.: 2070–0020.

ICR status: This ICR is currently approved through January 31, 2025. Under the PRA, 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 OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The U.S. Customs and Border Protection (Customs) regulations at 19 CFR 12.112 require that an importer desiring to import a pesticide or device into the United States shall, prior to the shipment's arrival in the United States, submit a Notice of Arrival (NOA) of Pesticides and Devices (EPA Form 3540–1 or its Customs-authorized electronic equivalent) to EPA. Once EPA receives the NOA, EPA will determine the disposition of the shipment upon its arrival in the United States. Upon completing its review, the EPA response is sent to the importer of record or licensed customs broker, who must present the NOA to Customs upon arrival of the shipment at the port of entry. This is necessary to ensure that EPA is notified of the arrival of pesticides and pesticidal devices as required under section 17(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and that EPA has the ability to examine such shipments to determine compliance with FIFRA. Customs compares entry documents for the shipment with the NOA and notifies the EPA regional office of any discrepancies. Alternatively, importers may submit NOA information electronically through Customs' Automated Commercial Environment. Most of the electronic filings are automatically processed, and an early indication is provided to the filer if the initial reporting requirements have been met and if the shipment can be released upon arrival at the port of entry. For those filings that do not meet the reporting requirements, automatic checks will be performed to notify the filer of errors.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 26 minutes per response. Burden is defined in 5 CFR 1320.3(b).

The ICR, which is available in the docket along with other related materials, provides a detailed explanation of the collection activities and the burden estimate that is only briefly summarized here:

Respondents/affected entities: Entities potentially affected are those that are pesticide importers, which include the following North American Industrial Classification System (NAICS) codes ranging from Commercial and Institutional Building Construction (NAICS 236220) to Pesticide and Other Agricultural Chemical Manufacturing (NAICS 325300) and even Public Administration: Executive Offices (NAICS 921110). Other business and institutions that import pesticides include Agriculture, Forestry, Fishing and Hunting (Sector 11), Wholesale Trade, (Sector 42).

Respondent's obligation to respond: Mandatory, per 40 CFR 152.25(f) and FIFRA sections 3 and 25.

Forms: EPA Form 3540–1 or its Customs-authorized electronic equivalent.

Frequency of response: On occasion.

Total estimated number of potential respondents: 92,133.

Total estimated average number of responses for each respondent: 1.

Total estimated annual burden hours: 67,723 hours.

Total estimated annual respondent costs: $5,478,039, which includes an estimated cost of $0 for capital investment or maintenance and operational costs.

III. Are there changes in the estimates from the last approval?

There is an increase of 26,843 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This change reflects an increase in the annual number of NOAs submitted electronically through the ACE system by 75,892. There is an increase in respondent costs by $2,724,517. Cost increases are a result of changes to reflect the current wage rates. This is an adjustment.

In addition, OMB has asked the Agency to replace the format EPA has historically used for ICR Supporting Statements with the 18-question format that is used by other federal agencies and departments. The 18-question format is based on the submission instructions to agencies that appear on the OMB submission form. Although this supporting statement has been modified to reflect the 18-question format, the change in format has not changed the information collection activities or related estimated burden and costs. EPA welcomes your feedback on whether this improves the presentation of the information collection activities and related burden and costs estimates.

IV. What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** document pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: April 22, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–08906 Filed 4–24–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0228; FR ID 215504]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before June 24, 2024. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0228.

Title: Section 80.59, Compulsory Ship Inspections and Ship Inspection Certificates, FCC Forms 806, 824, 827, and 829.

Form No.: FCC Forms 806, 824, 827, and 829.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit, not-for-profit institutions, and State, local, or tribal government.

Number of Respondents and Responses: 10,150 respondents and 15,175 responses.

Estimated Time per Response: The actual inspection will take approximately 4 hours to complete. An FCC ship safety certificate will take approximately 0.083 hours (5 minutes) to complete. Providing an entry in the ship's log will take an inspector and ship operator/owner approximately 0.25 hours (15 minutes) each to complete. These estimates are based on FCC staff's knowledge and familiarity with the availability of the data required. Approximately 100 requests for a waiver of the required annual inspection are received each year from the licensees of large oceangoing vessels returning from a foreign port; it is estimated than an engineer or communications specialists would spend two hours preparing such a waiver request. Therefore, the range for completing the information collection requirements is 0.083 hours–4 hours.

Frequency of Response: On occasion, annual, and every five-year reporting requirements, recordkeeping requirement, and third party disclosure requirement.

Obligation to Respond: Required for regulatory or compliance. The statutory authority for this collection 47 U.S.C. 154, 303, 307(e), 309 and 332, unless noted.

Total Annual Burden: 23,229 hours.

Annual Cost Burden: No cost.

Needs and Uses: The requirements contained in § 80.59 are necessary to implement the provisions of section 362(b) of the Communications Act of 1934, as amended, which require the Commission to inspect the radio installation of large cargo ships and certain passenger ships at least once a year to ensure that the radio installation is in compliance with the Communications Act.

Additionally, section 385 of the Communications Act requires the inspection of small passenger ships at least once every five years, and Subpart T of Part 80 of the Commission's rules requires the inspection of certain vessels operating in the Great Lakes at least once every 48 months.

The Safety Convention—an international treaty (to which the United States (U.S.) is a signatory)—also requires an annual inspection. The Safety Convention permits an Administrator to entrust the inspections to either surveyors nominated for the purpose or to organizations recognized by it. Therefore, the U.S. can have other parties conduct the radio inspection of vessels for compliance with the Safety Convention.

The Commission allows FCC-licensed technicians to conduct these inspections. FCC-licensed technicians not only certify that the ship passed an inspection, but also issue a safety certificate. These safety certificates (FCC Forms 806, 824, 827, and 829) indicate that the vessel complies with the Communications Act, the Commission's rules, and the Safety Convention. These technicians are required to provide a summary of the results of the inspection in the ship's log. In addition, the vessel's owner, operator, or ship's master must certify in the ship's log that the inspection was satisfactory. Inspection certificates issued in accordance with the Safety Convention must be posted in a prominent and accessible place on the ship.

Further, § 80.59(d) states that the Commission may, upon a finding that the public interest would be served, grant a waiver of the annual inspection required by section 362(b) of the Communications Act, for a period of not more than 90 days for the sole purpose of enabling a U.S. vessel to complete its voyage and proceed to a port in the U.S. when an inspection can be held. An information application must be submitted by a ship's owner, operator, or authorized agent. The application must be electronically submitted to the FCC Headquarters (via email to *Ghassan.Khalek@fcc.gov, Katie.Knox@fcc.gov, Kathleen.Curameng@fcc.gov,* and *Thomas.Derenge@fcc.gov*) at least three days before the ship's arrival. The application must provide specific information that is contained in § 80.59. The forms to be completed are FCC Forms 806, 824, 827, and 829.

The Commission seeks revision of this OMB control number due to recent amendments to the Safety Convention by way of Resolution Marine Safety Committee (MSC) 496(105) that was adopted on April 28, 2022; as a result of SOLAS revisions of its Passenger Ship Safety Certificate and Cargo Ship

Radio certificates, FCC Forms 806 and 829 are being revised accordingly. Regarding the remaining forms associated with this OMB control number, FCC Forms 824 and 827 will undergo technical amendments for non-substantive edits.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2024–08775 Filed 4–24–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

TIME AND DATE: 5:30 p.m. on Monday, April 22, 2024.

PLACE: The meeting was held via video conference on the internet.

STATUS: Closed.

MATTERS TO BE CONSIDERED: The Special Review Committee of the Federal Deposit Insurance Corporation met to consider matters related to the Corporation's corporate activities within its authority to act on behalf of the Federal Deposit Insurance Corporation. In calling the meeting, the Special Review Committee determined, by the unanimous vote of Director Jonathan P. McKernan and Director Michael J. Hsu (Acting Comptroller of the Currency), that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (4), and (6) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b (c)(2),(c)(4), and (c)(6)).

CONTACT PERSON FOR MORE INFORMATION: Requests for further information concerning the meeting may be directed to Debra A. Decker, Executive Secretary of the Corporation, at 202–898–8748.

Dated: April 22, 2024.

Federal Deposit Insurance Corporation.

Debra A. Decker,

Executive Secretary.

[FR Doc. 2024–08973 Filed 4–23–24; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

Notice of Meeting Held With Less Than Seven Days Advance Notice

TIME AND DATE: 10:00 a.m. on April 25, 2024.

PLACE: This Board meeting will be open to public observation only by webcast. Visit *https://www.fdic.gov/news/board-matters/video.html* for a link to the webcast. FDIC Board Members and staff will participate from FDIC Headquarters, 550 17th Street NW, Washington, DC.

Observers requiring auxiliary aids (*e.g.,* sign language interpretation) for this meeting should email *DisabilityProgram@fdic.gov* to make necessary arrangements.

STATUS: Open to public observation via webcast.

MATTERS TO BE CONSIDERED: The Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10:00 a.m. on Thursday, April 25, 2024 to consider the following matters:

Discussion Agenda

Memorandum re: Deposit Insurance Fund Restoration Plan Semiannual Update.

Memorandum and resolution re: Proposals Related to Change in Bank Control Act.

Summary Agenda

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Report of actions taken pursuant to authority delegated by the Board of Directors.

CONTACT PERSON FOR MORE INFORMATION: Direct requests for further information concerning the meeting to Debra A. Decker, Executive Secretary of the Corporation, at 202–898–8748.

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

Dated at Washington, DC, on April 23, 2024.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2024–09045 Filed 4–23–24; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

TIME AND DATE: Tuesday, April 30, 2024 at 10:00 a.m. and its continuation at the conclusion of the open meeting on May 1, 2024.

PLACE: 1050 First Street NE, Washington, DC and virtual (This meeting will be a hybrid meeting.)

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Compliance matters pursuant to 52 U.S.C. 30109.

Matters relating to internal personnel decisions, or internal rules and practices.

Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action.

Matters concerning participation in civil actions or proceedings or arbitration.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer Telephone: (202) 694–1220.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Vicktoria J. Allen,

Deputy Secretary of the Commission.

[FR Doc. 2024–09002 Filed 4–23–24; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business

information including confidential, contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than May 10, 2024.

A. Federal Reserve Bank of San Francisco (Joseph Cuenco, Assistant Vice President, Formations & Transactions) 101 Market Street, San Francisco, California 94105–1579. Comments can also be sent electronically to *sf.fisc.comments.applications@sf.frb.org:*

1. *Alfred Lee Finley and Susan N. Finley, Fort Worth, Texas;* to acquire additional voting shares of GBank Financial Holdings Inc, and thereby indirectly acquire voting shares of GBank, both of Las Vegas, Nevada.

In addition, ALF Operating Partners, Fort Worth, Texas, Alfred Lee Finley, Partner; to join the Finley Family Group, a group acting in concert, to retain voting shares of GBank Financial Holdings Inc, and thereby indirectly retain voting shares of GBank.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–08902 Filed 4–24–24; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business information including confidential, contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than May 28, 2024.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri, 64198–0001. Comments can also be sent electronically to *KCApplicationComments@kc.frb.org:*

1. *Stockton Bancshares, Inc., Stockton, Kansas;* to merge with Coffeyville Bancorp, Inc., and thereby indirectly acquire Community State Bank, both of Coffeyville, Kansas.

B. Federal Reserve Bank of Dallas (Karen Smith, Director, Mergers & Acquisitions) 2200 North Pearl Street, Dallas, Texas 75201–2272. Comments can also be sent electronically to *Comments.applications@dal.frb.org:*

1. *Integrity Bancorp, Inc.;* to become a bank holding company by acquiring Integrity Bank SSB, both of Houston, Texas.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–08903 Filed 4–24–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Announcement of Requirements and Registration for The REACH Lark Galloway-Gilliam Award for Advancing Health Equity Challenge (REACH Lark Award Challenge)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces the 2024 Racial and Ethnic Approaches to Community Health (REACH) Lark Galloway-Gilliam for Advancing Health Equity Award Challenge (REACH Lark Award Challenge). This biennial challenge was established in 2019 to recognize extraordinary individuals, organizations, or community coalitions associated with the REACH program whose work has contributed to the implementation of culturally tailored interventions that advance health equity, reduce health disparities, and increase community engagement to address preventable risk behaviors (*e.g.,* tobacco use, poor nutrition, and physical inactivity).

DATES: The Challenge will accept applications from April 29, 2024, through June 21, 2024.

FOR FURTHER INFORMATION CONTACT: Stormie Israel, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention, 4770 Buford Hwy., NE, Mailstop S107–5, Atlanta, GA 30341, Telephone: 770–488–2964, Email: *dnpaopolicy@cdc.gov.*

SUPPLEMENTARY INFORMATION: Racial and ethnic disparities in health remain pervasive across the United States. CDC administers REACH, a national program that provides funding to State and local health departments, tribes, universities, and community-based organizations. Since REACH was established in 1999, the program has demonstrated success in addressing these disparities and advancing health equity by engaging with diverse communities and implementing culturally tailored interventions. For more information about the REACH program, visit *https://www.cdc.gov/nccdphp/dnpao/state-local-programs/reach/index.htm.*

The intent of this challenge is to recognize individuals, organizations, or community coalitions associated with

the REACH program that meaningfully assisted with and carried out culturally tailored interventions that advance health equity, reduce health disparities, and increase community engagement to address preventable risk behaviors (*e.g.,* tobacco use, poor nutrition, physical inactivity, and inadequate access to clinical services) in populations/groups disproportionately affected by chronic disease; including, African American/Black, American Indian or Alaska Native, Asian, Hispanic or Latino, and Native Hawaiian or other Pacific Islander persons. To support the science and practice of improving health equity, this challenge can help further the goals of the REACH program by documenting and further disseminating the innovative or unique interventions employed by individuals, organizations, or community coalitions applying or nominated for this award.

Subject of Challenge Competition: The CDC's National Center for Chronic Disease Prevention and Health Promotion is conducting this Challenge under the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Reauthorization Act of 2010, as amended (15 U.S.C. 3719).

The ''applicant'' refers to each individual, organization, or community coalition that submits an application or nomination. The ''nominee'' refers to each individual or organization/community coalition who is nominated, whether self-nominated or nominated by a separate individual or organization.

Applicants will be asked to respond to a series of questions related to how the nominee assisted with and carried out culturally tailored interventions to advance health equity, reduce health disparities, and increase community engagement to address preventable risk behaviors (*e.g.,* tobacco use, poor nutrition, physical inactivity, and inadequate access to clinical services) in populations or groups disproportionately affected by chronic disease, including African American/Black, American Indian or Alaska Native, Asian, Hispanic or Latino, and Native Hawaiian or other Pacific Islander persons.

Award Approving Official: Mandy K. Cohen, MD, MPH, Director, Centers for Disease Control and Prevention, and Administrator, Agency for Toxic Substances and Disease Registry.

Eligibility Rules for Participating in the Challenge

The REACH Lark Award Challenge is open to the public. To be eligible for this award, nominees must meet the following eligibility requirements:

(1) Shall have completed the application (for self-nominees) or have had an application submitted on their behalf (for those nominated by others) for the competition under the rules promulgated by HHS/CDC;

(2) Shall have complied with all the requirements under this section and satisfy one of the following requirements:

a. Be a currently or previously funded CDC REACH recipient that has not previously received the REACH Lark Award in any year; or

b. Be a technical assistance provider to a former or current REACH recipient (current and past REACH recipients can be found at: *https://www.cdc.gov/nccdphp/dnpao/state-local-programs/reach/index.htm*); or

c. Be a partner organization, part of a partner network, or coalition members that collaborated on REACH-related work with a current or previously funded REACH recipient;

(3) Shall not have been a REACH Lark Award Challenge recipient in any previous year;

(4) Shall be either:

a. A U.S. citizen or legal permanent resident, eighteen years of age or older, if the nominee is an individual or group of individuals; or

b. Incorporated in and maintain a primary place of business in the United States, if the nominee is an entity; where the United States means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States;

(5) Shall not be a federal entity or federal employee acting within the scope of their employment;

(6) Shall not be an employee of or contractor of CDC;

(7) Shall not use federal funds from a grant or cooperative agreement to develop COMPETES Act challenge applications for this challenge, if the applicant is a federal grantee;

(8) Shall not use federal funds from a contract to develop COMPETES Act challenge applications or to fund efforts in support of a COMPETES Act challenge submission, if the applicant is a federal contractor;

(9) Shall not be deemed ineligible because an individual or team applicant or nominee used federal facilities or consulted with federal employees during a competition if the facilities and employees are made available to all individuals and entities participating in the competition on an equitable basis.

(10) By participating, the applicant represents, warrants, and agrees that the entry contains accurate information. If an applicant is nominating another individual, organization, community coalition (*e.g.,* not self-nominating), the applicant must provide acknowledgement in writing that the nominee consents to being nominated.

(11) Applicants and nominees must agree to be recognized if selected as a winner and agree to participate in an interview with CDC staff to provide information that may be used by CDC staff to write a success story that describes the intervention(s) that advanced health equity. Winners and their intervention(s) may be recognized, and the success story may be made public, including but not limited to press releases, the challenge website, and Division of Nutrition, Physical Activity, and Obesity and CDC Resources, and other publicly available platforms (*e.g.,* social media, CDC website, etc.).

(12) By participating in this challenge, applicants agree to assume any and all risks related to participating in the challenge. Applicants also agree to waive claims against the federal government and its related entities, except in the case of willful misconduct, when participating in the challenge, including claims for injury; death; damage; or loss of property, money, or profits; and including those risks caused by negligence or other causes.

Applicants and nominees who are not selected for the award may be asked for permission for CDC to share information about successful interventions that promoted health equity on CDC's Division of Nutrition, Physical Activity, and Obesity website, the CDC website, social media, or other platform generally with appropriate attribution to the applicant or nominee.

Registration Process for Participants

To participate and submit an application, interested parties should go to *https://www.challenge.gov.* The application requires responses to questions related to eligibility, followed by three questions related to the nominee's work; the answer to each of the three questions should be no longer than 300 words. Applicants can also submit supplemental materials that demonstrate the nominee's work and/or impact. Supplemental materials are not to exceed 10 total pages. Examples of supplementary materials include PDF of online content and other forms of written materials (*e.g.,* news articles, evaluation reports, or success stories).

Amount of the Prize

No cash prize will be awarded. A maximum of two applicants (one

individual and one organization/community coalition) associated with the REACH program will be a recipient of the 2024 REACH Lark Award. Recipients of the REACH Lark Award will receive a plaque (''Winner''). While the winners may be invited to meetings by CDC, attendance at such events is not required as a condition of accepting the award.

Basis Upon Which Winners Will Be Selected

CDC's Division of Nutrition, Physical Activity, and Obesity's (DNPAO's) Office of Policy Partnerships and Communication (OPPC) will select three to five judges based on their knowledge of the REACH program, the science and practice of achieving health equity, and the elimination of health disparities at the national, state, or local levels. Judges may include REACH program senior advisors, other CDC employees, or nonfederal individuals from outside the agency. Participating as a previous REACH Lark Award judge does not disqualify an individual or organization from being an award recipient for the 2024 challenge. Conflict of interest issues related to Judges will be handled, per the COMPETES Act (15 U.S.C. 3719(k)(2)).

Judges will review the applications and select up to two award recipients (one individual and one organization or community coalition) from all eligible entries based on:

(1) Community Context and Challenge(s)—The following questions address the challenges of the community in which the nominee works/worked. (10 points)

(a) Describe the priority population with whom the nominee worked. (5 points)

Scoring will be based on the extent to which the nominee worked to address chronic disease risk factors among priority populations experiencing health disparities for chronic diseases including the following: Black or African American people, American Indian/Alaska Native people, Hispanic or Latino people, Asian people, and/or Native Hawaiian/Other Pacific Islander people.

(b) Describe the preventable risk factors associated with chronic diseases (hypertension, heart disease, type 2 diabetes, and/or obesity) that the nominee addressed. (5 points)

Scoring will be based on the extent to which the risk factor(s) addressed align with the REACH program's goals of advancing health equity. Information about past REACH programs can be found here: *https://www.cdc.gov/nccdphp/dnpao/state-local-programs/reach/past_programs/index.htm.* Examples of risk factors that align with the goals of the REACH program include poor nutrition, physical inactivity, inadequate access to clinical services, and tobacco use.

(c) Describe any relevant additional community characteristics/challenges that will help the judges understand the context of the community in which the nominee worked. (Not scored).

(2) Strategies—The following questions pertain to strategies used by the nominee to address the challenge(s) discussed above. (30 points)

(a) Describe the strategies that the nominee used to address challenges and how the nominee's work aligns with the CDC REACH program's goals of advancing health equity. (15 points)

Scoring will be based on the extent to which the nominee's work contributed to developing, implementing, and/or evaluating strategies that were:

(1) Evidence-based or practice-based (5 points)
(2) Culturally tailored and designed to reduce health inequities (5 points)
(3) Supportive of policy, systems, and/or environmental change (5 points)

(b) Describe how the nominee's work actively and effectively engaged members of the community and partners across different sectors, such as, but not limited to transportation, healthcare, agriculture, emergency food systems, and faith-based and community-based organizations. (15 points)

Scoring will be based on the extent to which the nominee engaged members of the community and partners across different sectors in identifying and implementing strategies.

(3) Impact—The following questions pertain to the impact of the nominee's work on addressing preventable risk factors in a population(s)/group(s) disproportionately affected by chronic diseases. (20 points)

(a) Describe the impact of the nominee's work on addressing preventable risk factors in populations/groups disproportionately affected by chronic diseases. (20 points)

(i) To the extent possible, provide quantitative data that support impact statements (*e.g.,* number of people served by a strategy, number of people reporting a behavior change, health outcome data if available, etc.).

(ii) Provide qualitative data from community members, partners, co-workers, etc., (*e.g.,* success stories, testimonials, etc.) that provide insight into the impact of nominee's work.

Scoring will be based on the extent to which the nominee's work resulted in progress toward addressing preventable risk factors in the population(s)/group(s) identified in Section 1. While quantitative data is not required, nominations that include quantitative and qualitative data are more likely to paint a more complete picture of the nominee's contributions and their impact on the community.

Judges will use the point system outlined in the judging criteria above to select the winner(s).

Additional Information

Information about the winners, such as the name and location of the individual, organization, or community coalition, priority population served, and health outcomes addressed may be shared through press releases, the challenge website, and Division of Nutrition, Physical Activity, and Obesity and CDC Resources, and other publicly available platforms (*e.g.,* social media, CDC website, etc.) Details regarding the winners and their applications may be shared with the public as part of recognition efforts.

The award is named in honor of Lark Galloway-Gilliam, the founding Executive Director of Community Health Councils, Inc. (CHC). CHC began in 1992 to support planning, resource development, and policy education in response to the growing health crisis in the South Los Angeles area and other under-resourced and marginalized communities throughout Los Angeles County. Lark led the CHC team to engage communities and strengthen the connections among organizations to improve health, eliminate disparities, and advance health equity. Lark also served in several leadership roles, including the first president of the National REACH Coalition, the MLK Medical Center Advisory Board, and the Institute for People, Place, and Possibility (IP3) Board of Directors for Community Commons.

Compliance with Rules and Contacting Challenge Winners

Applicants, nominees, and the REACH Lark Award Challenge winners must comply with all terms and conditions of these Official Rules and winning is contingent upon fulfilling all requirements herein. The winners will be notified by email, telephone, or mail after the date of the judging.

Privacy

If applicants choose to provide HHS/CDC with personal information by registering or filling out the application form through the *Challenge.gov* website, that information will only be used to respond to contestants in matters regarding their submission,

announcements of entrants, finalists, and winners of the contest. Information is not collected for commercial marketing. Winners are permitted to cite that they won this contest.

General Conditions

CDC reserves the right to cancel, suspend, and/or modify the Challenge, or any part of it, for any reason, at CDC's sole discretion.

Participation in this Challenge constitutes an applicants' full and unconditional agreement to abide by the Challenge's Official Rules found at *https://www.Challenge.gov.*

Authority: 15 U.S.C. 3719.

Noah Aleshire,

Chief Regulatory Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–08899 Filed 4–24–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10291, CMS–10529, CMS–10722, CMS–R–148, and CMS–10725]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by *May 28, 2024.*

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing*

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* State Collection and Reporting of Dental Provider and Benefit Package Information on the Insure Kids Now! Website and Hotline; *Use:* On the Insure Kids Now (IKN) website, the Secretary is required to post a current and accurate list of dentists and providers that provide dental services to children enrolled in the state plan (or waiver) under Medicaid or the state child health plan (or waiver) under CHIP. States collect the information pertaining to their Medicaid and CHIP dental benefits. *Form Number:* CMS–10291 (OMB control number: 0938–1065); *Frequency:* Yearly and quarterly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; Total Annual Responses: 255; *Total Annual Hours:* 11,781. (For policy questions regarding this collection contact Andrew Snyder at 410–786–1274.)

2. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Quarterly Medicaid and CHIP Budget and Expenditure Reporting for the Medical Assistance Program, Administration and CHIP; *Use:* The Medicaid and CHIP Financial System is a financial reporting system that produces budget estimate statements for Forms CMS–37 and CMS–21B. The Medicaid and CHIP Budget and Expenditure System is a financial reporting system that produces expenditure statements for Forms CMS–64 and CMS–21. All forms are to be filed on a quarterly basis and need to be certified by the states. *Form Number:* CMS–10529 (OMB control number: 0938–1265); *Frequency:* Quarterly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 672; *Total Annual Hours:* 18,144. (For policy questions regarding this collection contact Robert Lane at 410–786–2015.)

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Annual State Report on CMS Value Based Purchasing Arrangements (VBP) Supplemental Rebate Agreements; *Use:* The reported data is being collected to safeguard against unnecessary utilization of such care and services and to assure that state payments to providers of Medicaid services are consistent with efficiency, economy, and quality of care. CMS will collect this data to ensure that VBP programs adopted by states continue to meet these standards. *Form Number:* CMS–10722 (OMB control number: 0938–1385); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 51; *Total Annual Hours:* 306. (For policy questions regarding this collection contact Abraham Weinschneider at 410–786–5688.)

4. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Limitations on Provider Related Donations and Health Care Related Taxes, Medicaid and

Supporting Regulations in 42 CFR 433.68 through 433.74; *Use:* States may elect to submit a waiver to CMS for the broad based and/or uniformity requirements for any health care related tax program which does not conform to the broad based and uniformity requirements. It is also the responsibility of each State to demonstrate that their tax program(s) do not violate the hold harmless provision. For a waiver to be approved and a determination that the hold harmless provision is not violated, States must submit written documentation which satisfies the regulatory requirements. Without this information, the amount of FFP (Federal financial participation) payable to a State cannot be correctly determined. *Form Number:* CMS–R–148 (OMB control number: 0938–0618); *Frequency:* Quarterly and occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 50; *Total Annual Responses:* 40; *Total Annual Hours:* 3,200. (For policy questions regarding this collection contact Stuart Goldstein at 410–786–0694.)

5. *Title of Information Collection:* Pharmacy Benefit Manager Transparency for Qualified Health Plans; *Type of Information Collection Request:* Revision of a currently approved collection; *Use:* Implementation of section 1150A of the Social Security Act, as added by section 6005 of the Patient Protection and Affordable Care Act (ACA), requires, among other entities, Qualified Health Plans (QHPs) and pharmacy benefit managers (PBMs) that serve QHP issuers to report information on prescription drug benefits to the U.S. Department of Health and Human Services (HHS). PBMs are third-party administrators of prescription programs for a variety of types of health plans, including QHPs. CMS finalized regulations for this reporting at 45 CFR 156.295 and 184.50.

Under these requirements a QHP issuer is required to report issuer and plan level prescription drug data to CMS only when the QHP issuer does not contract with a PBM to administer the prescription drug benefit for their QHPs. Section 1150A(a)(1) of the Social Security Act authorizes CMS to collect the same prescription drug and rebate information from Prescription Drug Plan sponsors of a prescription drug plan and Medicare Advantage organizations offering a Medicare Advantage Prescription Drug Plan under part D of title XVIII. Since 2012, CMS has collected these data from Part D sponsors as part of the Medicare Part D Direct and Indirect Remuneration (DIR) reporting requirement, and detailed drug information for each National Drug Code (NDC) from the Prescription Drug Event (PDE) data that plans are required to submit.

CMS is formally requesting an extension of this ICR in connection with submission from QHP issuers that do not contract with a PBM and PBMs (hereinafter referred to as ''submitters''). The information required from submitters and the process of submission has changed since the previous OMB approval. The submitters are now required to complete a web form that reports the allocation methodology that is selected by the submitters to allocate data, where necessary. Submitters are required to maintain internal documentation of the allocation methodologies chosen, as CMS may need to follow up with the submitters to better understand the methodology. The associated burden estimates for this collection reflect the time and effort for submitters to provide prescription drug benefit information to CMS using the Health Information Oversight System (HIOS) module. *Form Number:* CMS–10725 (OMB control number: 0938–1394); *Frequency:* Annually; *Affected Public:* Private Sector, Business or other For-Profits; *Number of Respondents:* 278; *Number of Responses:* 278; *Total Annual Hours:* 1,285. (For questions regarding this collection, contact LeAnn Brodhead at (301) 492–4493.)

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–08828 Filed 4–24–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3449–N]

Announcement of the Re-Approval of AABB (Association for the Advancement of Blood and Biotherapies) as an Accreditation Organization Under the Clinical Laboratory Improvement Amendments of 1988

AGENCY: Centers for Medicare & Medicaid Services (CMS), Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice announces the application of the Association for the Advancement of Blood and Biotherapies (AABB) for re-approval as an accreditation organization for clinical laboratories under the Clinical Laboratory Improvement Amendments of 1988 (CLIA) program. This deeming authority is granted to AABB for the Blood Bank and Transfusion Service (BB/TS) program, the Immunohematology Reference Laboratory (IRL) program, the Molecular Testing (MT) program, and the Cellular Therapy (CT) program. We have determined that AABB meets or exceeds the applicable CLIA requirements. We are announcing the re-approval and grant AABB deeming authority for a period of 6 years.

DATES: The approval is effective from April 25, 2024 to April 25, 2030.

FOR FURTHER INFORMATION CONTACT: Daralyn Hassan, 410–786–9360.

SUPPLEMENTARY INFORMATION:

I. Background and Legislative Authority

On October 31, 1988, the Congress enacted the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (Pub. L. 100–578). CLIA amended section 353 of the Public Health Service Act. We issued a final rule implementing the accreditation provisions of CLIA on July 31, 1992 (57 FR 33992). Under those provisions, we may grant deeming authority to an accreditation organization if its requirements for laboratories accredited under its program are equal to or more stringent than the applicable CLIA program requirements in 42 CFR part 493 (Laboratory Requirements). Subpart E of part 493 (Accreditation by a Private, Nonprofit Accreditation Organization or Exemption Under an Approved State Laboratory Program) specifies the requirements an accreditation organization must meet to be approved by CMS as an accreditation organization under CLIA.

II. Notice of Re-Approval of AABB as an Accreditation Organization

In this notice, we approve the Association for the Advancement of Blood and Biotherapies (AABB) as an organization that may accredit laboratories for purposes of establishing their compliance with CLIA requirements for the following specialty and subspecialty areas under CLIA:

- Microbiology, including Bacteriology, Mycology, Parasitology, and Virology.
- Diagnostic Immunology, including Syphilis Serology and General Immunology.
- Chemistry, including Routine Chemistry.
- Hematology.

- Immunohematology, including ABO Group & Rh Group, Antibody Detection, Antibody Identification, and Compatibility Testing.

We have examined the initial AABB application and all subsequent submissions to determine its accreditation program's equivalency with the requirements for re-approval of an accreditation organization under subpart E of part 493. We have determined that AABB meets or exceeds the applicable CLIA requirements. We have also determined that AABB will ensure that its accredited laboratories will meet or exceed the applicable requirements in subparts H, I, J, K, M, Q, and the applicable sections of R. Therefore, we grant AABB re-approval as an accreditation organization under subpart E of part 493, for the period stated in the **DATES** section of this notice for the submitted specialty and subspecialty areas under CLIA. As a result of this determination, any laboratory that is accredited by AABB during the time period stated in the **DATES** section of this notice will be deemed to meet the CLIA requirements for the listed specialties and subspecialties, and therefore, will generally not be subject to routine inspections by a State survey agency to determine its compliance with CLIA requirements. The accredited laboratory, however, is subject to validation and complaint investigation surveys performed by CMS or its agent(s).

III. Evaluation of AABB Request for Re-Approval as an Accreditation Organization Under CLIA

The following describes the process we used to determine that the AABB accreditation program meets the necessary requirements to be approved by CMS and that, as such, we may approve AABB as an accreditation program with deeming authority under the CLIA program. AABB formally applied to CMS for re-approval as an accreditation organization under CLIA for the following specialties and subspecialties:

- Microbiology, including Bacteriology, Mycology, Parasitology, and Virology.
- Diagnostic Immunology, including Syphilis Serology and General Immunology.
- Chemistry, including Routine Chemistry.
- Hematology.
- Immunohematology, including ABO Group & Rh Group, Antibody Detection, Antibody Identification, and Compatibility Testing.

In reviewing these materials, we reached the following determinations for each applicable part of the CLIA regulations:

A. Subpart E—Accreditation by a Private, Nonprofit Accreditation Organization or Exemption Under an Approved State Laboratory Program

AABB submitted a description of its mechanism for monitoring compliance with all requirements equivalent to condition-level requirements, a list of all its current laboratories and the expiration date of their accreditation, and a detailed comparison of the individual accreditation requirements with the comparable condition-level requirements. We have determined that AABB's policies and procedures for oversight of laboratories performing laboratory testing for the submitted CLIA specialties and subspecialties are equivalent to those required by our CLIA regulations with respect to inspection, monitoring proficiency testing (PT) performance, investigating complaints, and making PT information available. AABB also submitted documentation regarding its requirements for monitoring and inspecting laboratories and describing its own standards regarding accreditation organization data management, inspection processes, procedures for removal or withdrawal of accreditation, notification requirements, and accreditation organization resources. The requirements of the accreditation programs submitted for re-approval are equal to or more stringent than the requirements of the CLIA regulations.

B. Subpart H—Participation in Proficiency Testing for Laboratories Performing Nonwaived Testing

AABB's requirements are equal to or more stringent than the CLIA requirements at §§ 493.801 through 493.865. Like CLIA, all AABB's accredited laboratories are required to participate in an HHS-approved PT program for tests listed in part 493 subpart I. Additionally, AABB administers a non-regulated PT program to challenge the ability of the laboratories in the IRL program to resolve complex serological problems. Laboratories in the MT program are required to participate in a graded PT program or a sample exchange program.

C. Subpart J—Facility Administration for Nonwaived Testing

We have determined that AABB requirements are equal to the CLIA requirements at §§ 493.1100 through 493.1105.

D. Subpart K—Quality System for Nonwaived Testing

We have determined that AABB requirements are equal to the CLIA requirements at §§ 493.1200 through 493.1299.

E. Subpart M—Personnel for Nonwaived Testing

We have determined that AABB requirements are equal to the CLIA requirements at §§ 493.1403 through 493.1495 for laboratories that perform moderate and high complexity testing.

F. Subpart Q—Inspection

We have determined that AABB requirements are equal to the CLIA requirements at §§ 493.1771 through 493.1780. AABB will continue to conduct biennial onsite inspections.

G. Subpart R—Enforcement Procedures

AABB meets the requirements of subpart R to the extent that it applies to accreditation organizations. AABB policy sets forth the actions the organization takes when laboratories it accredits do not comply with its requirements and standards for accreditation. When appropriate, AABB will deny, suspend, or revoke accreditation in a laboratory accredited by AABB and report that action to us within 30 days. AABB also provides an appeals process for laboratories that have had accreditation denied, suspended, or revoked.

We have determined that AABB laboratory enforcement and appeal policies are equal to or more stringent than the requirements of part 493 subpart R as they apply to accreditation organizations.

IV. Federal Validation Inspections and Continuing Oversight

In accordance with § 493.563, the Federal validation inspections of laboratories accredited by AABB may be conducted on a representative sample basis or in response to substantial allegations of noncompliance (that is, complaint inspections). The outcome of those validation inspections, performed by CMS or our agents, or the State survey agencies, will be our principal means for verifying that the laboratories accredited by AABB remain in compliance with CLIA requirements. This Federal monitoring is an ongoing process.

V. Removal of Re-Approval as an Accrediting Organization

CLIA regulation at § 493.575 provide that we may rescind the approval of an accreditation organization, such as that of AABB, for cause, before the end of

the effective date of re-approval. If we determine that AABB has failed to adopt, maintain, and enforce requirements that are equal to, or more stringent than, the CLIA requirements or that systemic problems exist in its monitoring, inspection, or enforcement processes, we may impose a probationary period, not to exceed 1 year, in which AABB would be allowed to address any identified issues. Should AABB be unable to address the identified issues within that timeframe, we may, in accordance with the applicable regulations, revoke AABB's deeming authority under CLIA.

Should circumstances result in our withdrawal of AABB's re-approval, we will publish a notice in the **Federal Register** explaining the basis for removing its re-approval.

VI. Collection of Information Requirements

The information collection requirements associated with the accreditation process for clinical laboratories under the CLIA program are currently OMB-approved under OMB control number 0938–0686 and expire May 31, 2025. Additionally, this notice does not impose any new or revised information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, it does not need to be reviewed by the Office of Management and Budget (OMB) under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq).

VII. Executive Order 12866 Statement

In accordance with the provisions of Executive Order 12866, this notice was not reviewed by the Office of Management and Budget.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Trenesha Fultz-Mimms, who is the **Federal Register** Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Trenesha Fultz-Mimms,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2024–08809 Filed 4–24–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–D–5473]

Promotional Labeling and Advertising Considerations for Prescription Biological Reference Products, Biosimilar Products, and Interchangeable Biosimilar Products: Questions and Answers; Revised Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a revised draft guidance for industry entitled ''Promotional Labeling and Advertising Considerations for Prescription Biological Reference Products, Biosimilar Products, and Interchangeable Biosimilar Products: Questions and Answers.'' FDA is issuing this revised draft guidance to address questions that manufacturers, packers, distributors, and their representatives (firms) may have when developing FDA-regulated promotional labeling and advertisements (promotional communications) for prescription reference products, biosimilar products, and interchangeable biosimilar products licensed under the Public Health Service Act (PHS Act). In conjunction with the enactment of the Biosimilar User Fee Amendments of 2022 (BsUFA III), FDA agreed to publish a draft guidance on promotional labeling and advertising considerations for interchangeable biosimilar products, as described in the document titled ''Biosimilar Biological Product Reauthorization Performance Goals and Procedures Fiscal Years 2023 through 2027.'' The revised draft guidance is consistent with this commitment and replaces the draft guidance for industry entitled ''Promotional Labeling and Advertising Considerations for Prescription Biological Reference and Biosimilar Products: Questions and Answers'' issued on February 4, 2020.

DATES: Submit either electronic or written comments on the draft guidance by June 24, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–D–5473 for ''Promotional Labeling and Advertising Considerations for Prescription Biological Reference Products, Biosimilar Products, and Interchangeable Biosimilar Products: Questions and Answers.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two

copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128 Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:
Alpita Popat, Office of Prescription Drug Promotion, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3203, Silver Spring, MD 20993–0002, 301–796–1200, *CDER-OPDP-RPM@fda.hhs.gov;* or James Myers, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a revised draft guidance for industry entitled ''Promotional Labeling and Advertising Considerations for Prescription Biological Reference Products, Biosimilar Products, and Interchangeable Biosimilar Products: Questions and Answers.'' The revised draft guidance addresses questions firms may have when developing FDA-regulated promotional communications for prescription reference products licensed under section 351(a) of the PHS Act (42 U.S.C. 262(a)) and prescription biosimilar products, including interchangeable biosimilar products, licensed under section 351(k) of the PHS Act. *Reference product,* as defined in section 351(i)(4) of the PHS Act, means the single biological product licensed under section 351(a) of the PHS Act against which a biological product is evaluated in an application submitted under section 351(k) of the PHS Act. This guidance does not make any recommendations for nonprescription products. Unless otherwise specified, the term *biosimilar product* as used in this revised draft guidance refers to a product that is licensed under section 351(k) of the PHS Act as biosimilar to or biosimilar to and interchangeable with a reference product.

Section 351(k) of the PHS Act provides an abbreviated licensure pathway for biological products shown to be biosimilar to or biosimilar to and interchangeable with an FDA-licensed reference product. Section 351(i) of the PHS Act defines *biosimilarity* to mean ''that the biological product is highly similar to the reference product notwithstanding minor differences in clinically inactive components'' and that ''there are no clinically meaningful differences between the biological product and the reference product in terms of the safety, purity, and potency of the product.'' To meet the standard for *interchangeability,* an applicant must provide sufficient information to demonstrate biosimilarity and also to demonstrate that the biological product can be expected to produce the same clinical result as the reference product in any given patient and, if the biological product is administered more than once to an individual, the risk in terms of safety or diminished efficacy of alternating or switching between the use of the biological product and the reference product is not greater than the risk of using the reference product without such alternation or switch (351(k)(4) of the PHS Act). Interchangeable biosimilar products may be substituted for the reference product without the intervention of the prescribing healthcare provider (351(i)(3) of the PHS Act).

FDA is providing this revised draft guidance to address questions firms may have when developing FDA-regulated promotional communications for prescription reference products or prescription biosimilar products, including interchangeable biosimilar products. The revised draft guidance discusses considerations for presenting data and information about reference products or biosimilar products in these promotional communications to help ensure that they are accurate, truthful and non-misleading. The revised draft guidance includes information about general requirements for the content of FDA-regulated promotional communications that apply to reference products and biosimilar products and includes more specific considerations for developing promotional communications for reference products and biosimilar products, such as:

- Identifying reference products and biosimilar products
- Presenting information from the studies conducted to support licensure of the reference product when the information is included in the FDA-approved labeling of both the reference and the biosimilar products
- Presenting data or information for a biosimilar product related to the safety or effectiveness of the biosimilar product that is not included in the FDA-approved labeling but is consistent with the FDA-approved labeling for that product (see the guidance for industry entitled ''Medical Product Communications That Are Consistent With the FDA-Required Labeling: Questions and Answers'' (June 2018))
- Presenting comparisons between a reference product and its biosimilar product(s)
- Submitting promotional communications to FDA

The revised draft guidance also provides examples to illustrate some of the considerations outlined in the guidance.

This revised draft guidance replaces the draft guidance for industry ''Promotional Labeling and Advertising Considerations for Prescription Biological Reference and Biosimilar Products: Questions and Answers''

issued on February 4, 2020 (85 FR 6201) (2020 draft guidance). In revising this guidance, FDA considered comments received on the 2020 draft guidance and expanded the scope of the 2020 draft guidance to fulfill the BsUFA III commitment to publish draft guidance on promotional labeling and advertising considerations for interchangeable biosimilar products. Changes from the 2020 draft guidance include additional recommendations and an example for interchangeable biosimilar products. In addition, editorial changes were made to improve clarity.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Promotional Labeling and Advertising Considerations for Prescription Biological Reference Products, Biosimilar Products, and Interchangeable Biosimilar Products: Questions and Answers.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information in FDA's guidance entitled ''Providing Regulatory Submissions in Electronic and Non-Electronic Format: Promotional Labeling and Advertising Materials for Human Prescription Drugs,'' the collections of information in 21 CFR part 314, and the collections of information resulting from submissions using Form FDA 2253 (Transmittal of Advertisements and Promotional Labeling for Drugs and Biologics for Human Use) have been approved under OMB control number 0910–0001. The collections of information in 21 CFR 601.12 have been approved under OMB control number 0910–0338; the collections of information in 21 CFR 202.1 have been approved under OMB control number 0910–0686; the collections of information in FDA's guidance entitled ''Medical Product Communications That Are Consistent With the Food and Drug Administration Required Labeling: Questions and Answers'' have been approved under OMB control number 0910–0856; the collections of information in 21 CFR part 11 pertaining to electronic records and signatures have been approved under OMB control number 0910–0303; and the collections of information relating to section 351(k) of the Public Health Service Act relating to biosimilar and interchangeable product applications have been approved under OMB control number 0910–0718.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: April 17, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–08886 Filed 4–24–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0477]

Agency Information Collection Revision 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before June 24, 2024.

ADDRESSES: Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 264–0041 and *PRA@HHS.GOV.*

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990–0477–60D and project title for reference, to Sherrette A. Funn, email: *Sherrette.Funn@hhs.gov, PRA@HHS.GOV* or call (202) 264–0041 the Reports Clearance Officer.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Incident Report Form.

Type of Collection: Reinstatement with Change.

OMB No.: 0990–0477.

Abstract: The Office of the Assistant Secretary for Health, Office for Human Research Protections (OHRP), is requesting reinstatement of the OMB No. 0990–0477, Incident Report Form, with two new information elements on the Incident Report form: *IORG # for Reviewing IRB;* and, *Revising research policies and procedures* as a corrective action plan category, if it applies. The purpose of the Incident Report form is to facilitate organizations or institutions prompt reporting of specific human subject protection incidents to OHRP, in a simplified standardized format, as required by HHS protection of human subjects regulations at 45 CFR part 46.

ANNUALIZED BURDEN HOUR TABLE

Forms name	Number of respondents	Number of responses per respondents	Average burden per response	Total burden hours
Incident Report	25	1	30/60	12.5
Incident Report	25	3	30/60	37.5
Incident Report	200	5	30/60	500
Total				550

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2024–08799 Filed 4–24–24; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Advisory Committee on Minority Health; Notice of Meeting Cancellation

The Office of Minority Health (OMH) published a notice in the **Federal Register** concerning a meeting of the Advisory Committee on Minority Health. The meeting scheduled for Tuesday, April 30, 2024 at 11 a.m. to 12:30 p.m. (EDT) is cancelled. The notice for the April 30, 2024 meeting was published in the **Federal Register** on Monday, April 1, 2024 in FR Doc. 2024–06850, on pages 22412–22413.

FOR FURTHER INFORMATION CONTACT: Violet Woo, Designated Federal Officer, OMH's Advisory Committee on Minority Health, OMH, HHS, Tower Building, 1101 Wootton Parkway, Suite 100, Rockville, Maryland 20852. Telephone: (240) 453–6816; Email: *OMH-ACMH@hhs.gov.*

Violet Woo,

Designated Federal Officer, Advisory Committee on Minority Health.

[FR Doc. 2024–08896 Filed 4–24–24; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel: Superfund Hazardous Substances Research and Training Program (SRP) Conflict Panel Review.

Date: May 30–31, 2024.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Environmental Health Science, 530 Davis Drive, Keystone Building, Durham, NC 27713 (Virtual Meeting).

Contact Person: Leroy Worth, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30/Room 3171, Research Triangle Park, NC 27709, (984) 287–3340, *worth@niehs.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: April 19, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08832 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council for Nursing Research.

This will be a hybrid meeting held in-person and virtually and will be open to the public as indicated below. Individuals who plan to attend in-person or view the virtual meeting and need special assistance or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH Videocast at the following link: *https://videocast.nih.gov/watch=54495*

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Nursing Research.

Date: May 23, 2024.

Open: May 23, 2024, 9:00 a.m. to 4:15 p.m.

Agenda: Call to Order and Opening Remarks, NINR Director's Report, Discussion of NINR Programs, Council Open Discussion.

Place: National Institutes of Health, Building 31, 31 Center Drive, Room 6C6, Bethesda, MD 20892 (Hybrid Meeting).

Closed: May 23, 2024, 4:15 p.m. to 4:45 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Building 31, 31 Center Drive, Room 6C6, Bethesda, MD 20892.

Contact Person: Elizabeth Tarlov, Ph.D., RN Director, Division of Extramural Science Programs (DESP), National Institute of Nursing Research, 31 Center Drive, Bethesda, MD 20892, (301) 594–1580, *elizabeth.tarlov@nih.gov.*

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of an organization may submit a letter of intent, a brief description of the organization represented and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *https://www.ninr.nih.gov/aboutninr/nacnr,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: April 22, 2024.

Patricia B. Hansberger,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08889 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; MEX–AD: Characterization of AD in the Mexican Population.

Date: May 22, 2024.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kaitlyn Noel Lewis Hardell, Ph.D., MPH Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Room 2E405, Bethesda, MD 20814, (301) 555–1234, *kaitlyn.hardell@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 19, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08834 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Leveraging Social Networks to Promote Widespread Individual Behavior Change.

Date: June 17, 2024.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lisa-Marie Tisdale Rowell, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Room 1007G, Bethesda, MD 20892, (301) 594–5622, *wigfalllt@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 19, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08833 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Enhancing Use of Data from the Harmonized Cognitive Assessment Protocol (HCAP) Network.

Date: June 3, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lisa-Marie Tisdale Rowell, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Room 1007G, Bethesda, MD 20814, (301) 594–5622, *wigfalllt@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 19, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08824 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Clinicians training grants.

Date: June 18, 2024.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maurizio Grimaldi, M.D., Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Room 2C218, Bethesda, MD 20892, 301–496–9374, *grimaldim2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 19, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08823 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*https://videocast.nih.gov/watch=54528*).

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 Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

Date: May 29, 2024.

Open: May 29, 2024, 9:30 a.m. to 2:45 p.m.

Agenda: Discussion of Program Policies and Issues.

Place: National Institutes of Health, Building 31, 31 Center Street, 6C Room A&B, Bethesda, MD 20892 (Hybrid Meeting).

Closed: May 29, 2024, 3:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Building 31, 31 Center Street, Bethesda, MD 20892.

Contact Person: Darren D. Sledjeski, Ph.D., Director, Division of Extramural Activities (DEA), National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Blvd., Bethesda, MD 20892, (301) 451–7766, *darren.sledjeski@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *https://www.niams.nih.gov/about/working-groups/advisory-council,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: April 19, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08825 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Training and Workforce Development Study Section—A.

Date: June 6–7, 2024.

Time: 9:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Latarsha J. Carithers, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12C, Bethesda, Maryland 20892, 301–594–4859, *latarsha.carithers@nih.gov.*

Marcienne Michele Wright, Scientific Review Officer, Office of Scientific Review, National Institutes of General Medical Sciences, National Institutes of Health, 45 Center Drive, Bethesda, Maryland 20892, 301–827–7635, *marci.wright@nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; NIGMS Predoctoral T32 SEP.

Date: June 6–7, 2024.

Time: 9:30 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Marcienne Michele Wright, Scientific Review Officer, Office of Scientific Review, National Institutes of General Medical Sciences, National Institutes of Health, 45 Center Drive, Bethesda, Maryland 20892, 301–827–7635, *marci.wright@nih.gov.*

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Training and Workforce Development Study Section—B.

Date: June 27–28, 2024.

Time: 9:30 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Latarsha J. Carithers, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12C, Bethesda, Maryland 20892, 301–594–4859, *latarsha.carithers@nih.gov.*

Name of Committee: National Institute of General Medical Sciences, Special Emphasis Panel, Centers of Biomedical Research Excellence (COBRE), Phase I.

Date: July 9–10, 2024.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Lisa A. Dunbar, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, MSC 6200, Room 3AN18D, Bethesda, Maryland 20892, 301–594–2849, *dunbarl@mail.nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of Centers of Biomedical Research, Excellence—COBRE (P20) Applications.

Date: July 16–17, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical

Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Manas Chattopadhyay, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12N, Bethesda, Maryland 20892, 301–827–5320, *manasc@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: April 19, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08827 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Chimeric Antigen Receptor Approaches to AD/ADRD R61 Review Meeting.

Date: July 9, 2024.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ivan Tadeu Rebustini, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg. Room 100, Bethesda, MD 20814, (301) 555–1212, *ivan.rebustini@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 19, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08826 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Mental Health Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session will also be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

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/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Mental Health Council.

Date: May 30–31, 2024.

Open: May 30, 2024, 1:00 p.m. to 4:45 p.m.

Agenda: Presentation of the NIMH Director's Report and discussion of NIMH programs.

Place: National Institute of Mental Health, Neuroscience Center, 6001 Executive Boulevard, Rooms 1145 & 1155, Rockville, MD 20852 (In Person Meeting).

Closed: May 31, 2024, 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications and/or contract proposals.

Place: National Institute of Mental Health, Neuroscience Center, 6001 Executive Boulevard, Rooms 1145 & 1155, Rockville, MD 20852 (In-Person Meeting).

Contact Person: Tracy L. Waldeck, Ph.D., Director Division of Extramural Activities, National Institute of Mental Health, NIH, DHHS, Neuroscience Center, 6001 Executive Boulevard, Bethesda, MD 20892, (301) 480–6833, *tracy.waldeck@nih.gov*.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nimh.nih.gov/about/advisory-boards-and-groups/namhc/index.shtml.,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: April 19, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08831 Filed 4–24–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NM_FRN_MO#4500179000; NM–106239540]

Public Land Order No. 7940; Placitas Area Withdrawal, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This Public Land Order (PLO) withdraws 4,212.98 acres of public lands from location and entry under the United States mining laws, from leasing under the mineral leasing laws, and

from disposal of minerals under the Materials Act of 1947, subject to valid existing rights, for 50 years. The purpose of this withdrawal is to protect, preserve, and promote the scenic integrity, cultural importance, recreational values, and wildlife habitat connectivity within the Placitas area.

DATES: This PLO takes effect on April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Jillian Aragon, Bureau of Land Management, New Mexico State Office, 505–564–7722 or *jgaragon@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 Tele Braille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Order

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

1. Subject to valid existing rights, the following described lands are hereby withdrawn from location and entry under the United States mining laws, from leasing under the mineral leasing laws, and from disposal of minerals under the Materials Act of 1947, for a 50-year term to protect, preserve, and promote the scenic, cultural, recreational, and wildlife habitat connectivity values within the Placitas area.

New Mexico Principal Meridian, New Mexico

San Antonio de las Huertas Grant,
 Parcel C.
Town of Tejon Grant,
 Tract 40.
T. 13 N., R. 4 E.,
 sec. 13, Lots 6 thru 9 and S½;
 sec. 14, Lots 12 thru 15, E½SE¼, and SW¼SE¼;
 sec. 15, Lot 10;
 sec. 22, Lots 6 and 7, and SE¼NE¼;
 sec. 23, N½, NE¼SW¼, and SE¼;
 sec. 24, N½.
T. 12 N, R. 5 E.,
 Tract 39.
T. 13 N., R. 5 E.,
 sec. 10, Lots 14 and 15;
 sec.11, Lot 9;
 sec. 17, Lots 1 thru 4, S½SW¼, and S½SE¼;
 sec. 18, Lots 1 thru 7, SE¼SW¼, and S½SE¼;
 sec. 19, Lots 1 thru 3, NE¼, and E½NW¼;
 sec. 20, E½, E½NW¼, NW¼NW¼, and NE¼SW¼;
 sec. 29, Lots 1 thru 4;
 sec. 30, SE¼;
 sec. 31, NE¼NE¼;
 Tract 38.

The areas described aggregate 4,212.98 acres according to the official plats of the surveys of the said lands, on file with the BLM.

2. The withdrawal made by this Order does not alter the applicability of laws governing the use of public lands other than the mining laws, mineral leasing laws, and mineral material laws.

3. This withdrawal will expire 50 years from the effective date of this Order, unless, as a result of a review conducted prior to the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be extended.

(Authority: 43 U.S.C. 1714)

Dated: April 18, 2024.

Deb Haaland,

Secretary.

[FR Doc. 2024–08701 Filed 4–24–24; 8:45 am]

BILLING CODE 4331–23–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_OR_FRN_MO4500178664]

Public Meeting for the Steens Mountain Advisory Council, Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management's (BLM) Steens Mountain Advisory Council (SMAC) will meet as follows.

DATES: The SMAC will participate in a field tour of sites within the Steens Mountain Cooperative Management and Protection Area, Thursday, June 13, 2024, from 8 a.m. to 5 p.m. Pacific time (PT), and a business meeting on Friday, June 14, from 8:30 a.m. to 3:30 p.m. PT.

ADDRESSES: The business meeting and the field tour will commence and conclude at the BLM's Burns District Office at 28910 Highway 20 West in Hines, Oregon. Virtual attendance through the Zoom for Government platform will be available for the Friday meeting. The final meeting agenda and Zoom link will be published on the SMAC's web page at least 10 days in advance at *https://on.doi.gov/2PnZRcl.*

FOR FURTHER INFORMATION CONTACT: Tara Thissell, Public Affairs Specialist, BLM Burns District Office, 28910 Highway 20 West, Hines, Oregon 97738; telephone: (541) 573–4519; email: *tthissell@blm.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The SMAC was established on August 14, 2001, pursuant to the Steens Mountain Cooperative Management and Protection Act of 2000 (Pub. L. 106–399) (Act). The SMAC provides recommendations to the BLM regarding new and unique approaches to management of the public lands within the boundaries of the Steens Mountain Cooperative Management and Protection Area, and recommends cooperative programs and incentives for landscape management that meets human needs and maintains and improves the ecological and economic integrity of the Cooperative Management and Protection Area.

A field tour to the Steens Mountain area is planned for June 13. Tour stops will vary depending on road, weather, and access conditions, but may include Riddle Brothers Ranch, Page Springs Weir, South Steens Herd Management Area or campground, or fuels treatment project sites. The public is welcome to attend but must provide their own transportation and personal amenities, such as appropriate clothing and footwear, food, and water. High-clearance, four-wheel drive vehicles are recommended.

The June 14 meeting agenda will include information sharing from the Designated Federal Officer and the Andrews/Steens Field Manager, a conversation about Inflation Reduction Act projects, a discussion on specific language in parts of the Steens Act, and a presentation from the Burns Paiute Tribe about their culture and aboriginal homelands in the area. Council members also have the opportunity to share information from their constituents or present research. Any other matters that may reasonably come before the SMAC may also be included at any time throughout the meeting.

The meeting is open to the public and a public comment period is scheduled for 1:30 p.m. PT on Friday, June 14. Depending on the number of people wishing to comment and the time available, the amount of time for oral

comments may be limited. Written public comments may be sent to the BLM Burns District Office listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. All comments received at least one week prior to the meeting will be provided to the SMAC in advance of the meeting. The meeting may end early if all business items are completed ahead of schedule or may be extended if discussions warrant more time.

Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least 7 business days prior to the meeting to give the BLM sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comments, please be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 5 U.S.C. ch. 10)

Jeffrey Rose,

District Manager.

[FR Doc. 2024–08888 Filed 4–24–24; 8:45 am]

BILLING CODE 4331–24–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037808; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intended Repatriation: Augusta Museum of History, Augusta, GA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Augusta Museum of History intends to repatriate certain cultural items that meet the definition of unassociated funerary objects and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the cultural items in this notice may occur on or after May 28, 2024.

ADDRESSES: Nancy Glaser, Augusta Museum of History, 560 Reynolds Street, Augusta, GA 30901, telephone (706) 722–8454, email *amh@augustamuseum.org*.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Augusta Museum of History, and additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

A total of three cultural items have been requested for repatriation. The three unassociated funerary objects are three lots of shell beads. These items were removed from Elliott Mound (CA–SAC–88) by Smith Coin & Curio Company, likely between the years of 1924–1938. The items were acquired by former Museum Director Jouett Davenport, Sr. (1937–1963).

Determinations

The Augusta Museum of History has determined that:

- The three unassociated funerary objects described in this notice are reasonably believed to have been placed intentionally with or near human remains, and are connected, either at the time of death or later as part of the death rite or ceremony of a Native American culture according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization. The unassociated funerary objects have been identified by a preponderance of the evidence as related to human remains, specific individuals, or families, or removed from a specific burial site or burial area of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization.
- There is a reasonable connection between the cultural items described in this notice and the Wilton Rancheria, California.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after May 28, 2024. If competing requests for repatriation are received, the Augusta Museum of History must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The Augusta Museum of History is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice and to any other consulting parties.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3004 and the implementing regulations, 43 CFR 10.9.

Dated: April 15, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–08876 Filed 4–24–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037806; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Jacksonville State University, Jacksonville, AL

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), Jacksonville State University has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after May 28, 2024.

ADDRESSES: Tim Lindblom, Jacksonville State University, 700 Pelham Rd N, Jacksonville, AL 36265, telephone (256) 782–8488, email *tlindblom@jsu.edu*.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Jacksonville State University, and additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Based on the information available, human remains representing, at least, 21 individuals have been reasonably identified. The at least 1,901 associated funerary objects include lithic debris, ceramic sherds, shells, worked stone objects, wood objects, glass sherds, iron objects, a European-manufactured ceramic sherd, unidentified objects, bone fragments, lithic debitage, mixed fragmentary materials, charcoal samples, and a soil sample. The remains and associated objects are from 10 sites in Alabama. Remains and associated objects from Coosa River (exact provenience unknown), Copena Burial Cave (Talladega County, exact provenience unknown), Bains Gap (1CA625), and Polecat Ford (1CE308) were provided to Jacksonville State University by members of the public. Remains and associated objects from Morgan Mountain (1CA42), Blue Hole (1CA421), Wright's Farm (1CA18), Terrapin Creek (1CE309), and Hog Island (1CE421) were excavated by Jacksonville State University's Archaeological Research Laboratory and field school courses under the direction of Dr. Harry O. Holstein. Remains and associated objects have been curated at Jacksonville State University following excavation or donation. Records indicate that remains from De Soto State Park (1DK49) were excavated by members of the public and/or a follow-up excavation by Jacksonville State University, but have not been physically located.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is reasonably identified by the geographical location or acquisition history of the human remains and associated funerary objects described in this notice.

Determinations

Jacksonville State University has determined that:

- The human remains described in this notice represent the physical remains of at least 21 individuals of Native American ancestry.
- The at least 1,901 objects described in this notice are reasonably believed to have been placed intentionally with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a reasonable connection between the human remains and associated funerary objects described in this notice and The Muscogee (Creek) Nation.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after May 28, 2024. If competing requests for repatriation are received, Jacksonville State University must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. Jacksonville State University is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: April 15, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–08874 Filed 4–24–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037807; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intended Repatriation: Santa Barbara Museum of Natural History, Santa Barbara, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Santa Barbara Museum of Natural History intends to repatriate certain cultural items that meet the definition of a sacred objects and that has a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the cultural item in this notice may occur on or after May 28, 2024.

ADDRESSES: Luke Swetland, President and CEO, Santa Barbara Museum of Natural History, 2559 Puesta del Sol, Santa Barbara, CA 93105, telephone (805) 682–4711, email *lswetland@sbnature2.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Santa Barbara Museum of Natural History, and additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

A total of one cultural item has been requested for repatriation. The one sacred object is a Navajo Jish (medicine bundle) donated by Nancy Alexander in 1984, originally acquired from dealer Larry Frank around 1975. This bundle is believed to be a composite, made up of parts of two or more original bundles. Larry Frank (1926–2006) was a noted historian, art collector, and author, living in Arroyo Hondo (not far from Taos, NM) when Nancy Alexander made the purchase.

Determinations

The Santa Barbara Museum of Natural History has determined that:

- The one sacred object described in this notice is a specific ceremonial object needed by a traditional Native American religious leader for present-day adherents to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.
- There is a reasonable connection between the cultural item described in this notice and the Navajo Nation, Arizona, New Mexico, & Utah.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on or after May 28, 2024. If competing requests for repatriation are received, the Santa Barbara Museum of Natural History must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item are considered a single request and not competing requests. The Santa Barbara Museum of Natural History is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice and to any other consulting parties.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3004 and the implementing regulations, 43 CFR 10.9.

Dated: April 15, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–08875 Filed 4–24–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037805; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: University of California, Santa Barbara, Repository for Archaeological and Ethnographic Collections, Santa Barbara, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of California, Santa Barbara (UCSB), Repository for Archaeological and Ethnographic Collections has completed an inventory of associated funerary objects and has determined that there is a cultural affiliation between the associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the associated funerary objects in this notice may occur on or after May 28, 2024.

ADDRESSES: Hugh Radde, University of California, Santa Barbara, 4129 Cheadle Hall, Santa Barbara, CA 93106–2033, telephone (805) 893–3525, email *hradde@ucsb.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the UCSB Repository for Archaeological and Ethnographic Collections, and additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

In 2012, UCSB Repository for Archaeological and Ethnographic reported 395 ancestors and their 3,985 associated funerary objects from Santa Barbara County, CA, Kern County, CA, and Los Angeles County, CA. The Notice of Inventory Completion was published in the **Federal Register** on June 12, 2012 (77 FR 34991–34997). Upon further consultation with the culturally affiliated Tribe we discovered an additional 8,250 associated funerary objects. The following inventory consists entirely of these additional AFOs which were associated with the ancestors reported in UCSB's 2012 Notice of Inventory Completion.

In 1956 and 1957, four associated funerary objects were removed from CA–SBA–53 in Santa Barbara County, CA (Accession 101). The excavation was directed by William Harrison and Norman Gabel during salvage operations associated with grading for the construction of Aerophysics Corporation buildings. The additional four associated funerary objects are one shotgun case, one lot of processed material, one lot of large groundstone fragments, and one lot of unprocessed material.

In 1958 and 1959, 247 associated funerary objects were removed from CA–SBA–1C (also known as CA–SBA–119) at Rincon Point in Santa Barbara County, CA (Accession 104). The excavation was directed by William Harrison and P. Lyons as part of Harrison's dissertation research at the University of Arizona. The additional 247 associated funerary objects are one clam disc bead, a minimum of 103 animal bones, 40 unmodified shell fragments, a minimum of 80 small pebbles, one bone bead, 19 raptor talons, one chert drill, one stone pendant, and one lot of processed material.

In the summers of 1958 and 1959, 86 associated funerary objects were removed from CA–SBA–78 at Dos Pueblos Ranch in Santa Barbara County, CA (Accession 117). The excavations were directed by William Harrison as part of a summer field school with the permission of the private land owner. The additional 86 associated funerary objects are one asphaltum fragment, one charcoal fragment, three tarring pebbles, 28 Olivella shell beads, four undifferentiated shell beads, one stone bead, one whale bone, seven flakes, a minimum of four groundstone fragments, two mano fragments, one green glass fragment, one animal tooth, one olla fragment, 17 unmodified shells, one burned animal bone, a minimum of 10 unmodified stones, one lot of processed material, one lot of unsorted material, and one large metate fragment.

In 1958 and 1959, four associated funerary objects were removed from CA–SBA–1D (also known as CA–SBA–141) at Rincon Point, in Santa Barbara County, CA (Accession 126). The excavations were led by William Harrison and P. Lyons as part of Harrison's dissertation research. The four associated funerary objects are two drills, one lot of processed material, and one lot of large groundstone fragments.

In 1963, 35 associated funerary objects were removed from CA–SBA–60 at the west end of Goleta Slough in Santa Barbara County, CA (Accession 127A). It is believed that the excavations were led by Humphrey during a UCSB field school. The 35 associated funerary objects are 21 clam shells, nine oyster shells, two scallop fragments, two unidentified shell fragments, and one chert flake.

In 1960, three associated funerary objects were removed from CA–SBA–38 in Santa Barbara County, CA (Accession 131). The salvage excavations were directed by William Harrison. The three associated funerary objects are one lot of large groundstone fragments, one lot of processed material, and one lot of unprocessed material.

In 1961, four associated funerary objects were removed from CA–SBA–167 in the Santa Ynez Valley, Santa Barbara County, CA (Accession 140). The collection was excavated by James Deetz during a UCSB summer field school. The additional four associated funerary objects are one shell bead fragment, one lot of processed material, one lot of large groundstone fragments,

and one lot of unprocessed bulk material.

In 1961, 589 funerary objects were removed from CA–SBA–46 on Mescalitan Island in Santa Barbara County, CA (Accession 144). The excavation was directed by James Deetz (UCSB) and a student crew as part of a salvage archeological project. The additional 589 funerary objects are three asphaltum applicators, two shell beads, two bifaces, 483 unmodified animal bones, one core, one large fire-cracked rock, 27 flakes, one glass fragment, three groundstone fragments, one charcoal fragment, 10 modified animal bone tools, one norris top shell ornament, two serpentine pendants, four mortars, one pestle, 17 unmodified shell fragments, nine unmodified stone fragments, 14 asphaltum pieces, four tarring pebbles, one lot of processed material, and two large groundstone fragments.

In 1964, two associated funerary objects were removed from CA–SBA–51, west of Goleta Slough in Santa Barbara County, CA (Accession 156). The excavations were directed by Michael Glassow (UCSB) as part of an archaeological field school. The two associated funerary objects are one unmodified animal bone and one lot of processed material.

In 1965, three associated funerary objects were removed from CA–SBA–485 at the south end of Lake Cachuma, Santa Barbara County, CA (Accession 158). The excavations were led by Jay Rub (UCSB). The additional three associated funerary objects are one lot of processed material, one lot of soil samples, and one lot of large groundstone fragments.

In 1958 and 1959, two associated funerary objects were removed from CA–SBA–78 at Dos Pueblos Ranch in Santa Barbara County, CA (Accession 164). William Harrison directed the excavations under the auspices of an archaeological field school. The two associated funerary objects are one lot of processed material and one large mortar fragment.

In 1969, 564 associated funerary objects were removed from CA–SBA–46C on Mescalitan Island, Santa Barbara County, CA (Accession 177). The excavations were directed by Claude Warren as an archaeological field school. The 564 associated funerary objects are one lot of asphaltum fragments, two asphaltum basketry impressions, one bone awl, a minimum of 16 undifferentiated shell beads, four Olivella shell beads, two bone beads, two steatite beads, 489 unmodified bone fragments, one modified bone tube fragment, four bone tubes inlaid with shell beads, one ochre-stained bone, two lumps of charcoal, one drill, six unmodified stones, five flakes, two flake tools, one mano fragment, one large mortar mended with asphaltum, two ochre lumps, 13 projectile point fragments, one complete unmodified abalone, one lot of shell fragments, three limpet pendants, one lot of processed material, one soil sample, and one lot of unprocessed material.

In 1970, two associated funerary objects were removed from CA–SBA–51, west of Goleta Slough in Santa Barbara County, CA (Accession 181). Michael Glassow (UCSB) directed the excavations as part of an archaeological field school. The two associated funerary objects are one lot of unprocessed bulk material and one lot of large groundstone fragments.

In 1968, five funerary objects were removed from CA–SBA–60 on the north end of the Goleta Slough, Santa Barbara County, CA (Accession 182). The excavations were led by Claude Warren and a student crew. The additional five associated funerary objects are two unmodified stones, one drilled turtle shell ornament, one lot of processed material, and one lot of unmodified animal bones.

In 1971, 161 associated funerary objects were removed from CA–SBA–71 in Santa Barbara County, CA (Accession 185 & 187). The excavations were led by Claude Warren as part of an archaeological field school. The additional 161 associated funerary objects are one chert drill, two awl fragments, a minimum of 125 unmodified animal bones, one bone bead, two modified bone objects, one fire-cracked steatite fragment, five flakes, one flake tool, two groundstone objects, one small cylindrical item, three ochre pieces, four unmodified shell fragments, two Olivella shells, two soil samples, six unmodified stones, one stone tool, one lot of processed material, and one lot of unprocessed material.

In 1970, 469 funerary objects were removed from CA–SCRI–236 at Christy Ranch on Santa Cruz Island in Santa Barbara County, CA (Accession 186). The excavations were directed by Michael Glassow (UCSB) with permission from the private landowner. The 469 associated funerary objects are 430 animal bones, 13 wood fragments, one stone tool, two glass beads, one clam bead, nine Olivella shell beads, one mussel shell bead, eight chert bladelets, one asphaltum chunk, one flake, one lot of processed material, and one lot of unprocessed material.

In 1974, 3,859 associated funerary objects were removed from CA–SCRI–240 at Prisoner's Harbor on Santa Cruz Island in Santa Barbara County, CA (Accession 206). The excavations were led by Albert Spaulding (UCSB). The 3,859 funerary objects are one abalone shell bowl, two asphaltum fragments, six bone gorges, two chert cores, one ochre piece, 3,831 Olivella columellas, one pestle fragment, nine modified abalone ornaments, one shale stone, one stone tool, one lot of processed material, one lot of large groundstone fragments, one huge asphaltum chunk, and one lot of unprocessed material.

In 1974, 190 associated funerary objects were removed from CA–SCRI–328 near Forney Cove on the west end of Santa Cruz Island in Santa Barbara County, CA (Accession 209). The excavations were led by UCSB graduate student Steve Horne, under the direction of Albert Spaulding and Michael Glassow. The additional 190 associated funerary objects are one lot of asphaltum nodules, 159 undifferentiated shell beads, one bone bead, one lot of animal bones, four drills, two glass beads, three modified abalone pendants, 11 soil samples, one unmodified stone, one lot of redwood fragments, two braided sea grass fragments, one lot of unmodified seagrass, one lot of processed material, one large mortar fragment, and one lot of unprocessed material.

At an unknown date, 15 associated funerary objects were removed from CA–SBA–37, near Atascadero Creek in Santa Barbara County, CA (Accession 210). Later, at an unknown date the collection was donated to UCSB by D.E. Brown. The 15 associated funerary objects are eight sandstone manos, four quartz flakes, one sandstone pestle, one lot of processed materials, and one lot of large groundstone fragments.

In 1973, 666 associated funerary objects were removed from CA–SCRI–163 near Stanton Ranch on Santa Cruz Island in Santa Barbara County, CA (Accession 211). The salvage excavations were led by Michael Glassow and Albert Spaulding (UCSB) with the permission of the private landowner. The additional 666 associated funerary objects are one bag of ash, 15 asphaltum fragments, one abalone with asphaltum, four bladelets, 98 undifferentiated shell beads, 18 Olivella shell beads, 188 unmodified animal bones, one Island fox cranium, one bipointed gorge, one bird bone whistles, one modified bird bone tube, one lot of fish bones, one chert core, 43 stone drills, one donut stone, 267 flakes, one glass bead, one glass fragment, one groundstone fragment, one hammerstone, one metal nail, one sandstone mortar, one ochre fragment, one ochre applicator, four shell fishhooks, three stone fragments, one

stone net weight, seven tarring pebbles, and one lot of processed material.

In 1973, 1,261 associated funerary objects were removed from CA–SCRI–240 near Prisoner's Harbor on Santa Cruz Island in Santa Barbara County, CA (Accession 211). The excavation was directed by Michael Glassow (UCSB). The 1,261 associated funerary objects are 12 chert bladelets, one bead, one unmodified animal bone, one swordfish bill, 263 chert cores, 946 flakes, 21 hammerstones, one metal nail, one unmodified abalone shell, 13 wood fragments, and one lot of processed material.

In 1973, 12 associated funerary objects were removed from CA–SCRI–381 on Santa Cruz Island in Santa Barbara County, CA (Accession 211). The excavation was led by Michael Glassow (UCSB) with the permission of the private land owner. The 12 associated funerary objects are five flakes and seven shell beads.

In 1976, 26 associated funerary objects were removed from CA–SCRI–382 on Santa Cruz Island in Santa Barbara County, CA (Accession 211). The excavation was directed by Michael Glassow (UCSB) with the permission of the private land owner. The 26 associated funerary objects are one bird bone whistle, one modified bird bone, one shell fishhook, 17 shell beads, one drill, one flake, and four marine mammal bones.

At an unknown date, one associated funerary object was removed from Christy's Ranch on Santa Cruz Island in Santa Barbara County, CA (Accession 211–112). In 1976, the collection was donated to UCSB. The one associated funerary object is one lot of animal bones.

In 1977, four associated funerary objects were removed from CA–KER–307, on the banks of Castaic Lake, Kern County, CA (Accession 212). The excavation was led by David Jennings of Los Angeles Community College. The additional four associated funerary objects are one bag of stones, one deer humerus fragment, one lot of unmodified animal bones, and one lot of groundstone fragments.

In or around 1928, three associated funerary objects were removed from CA–SBA–28 in Santa Barbara County, CA (Accession 227). The excavation was directed by John P. Harrington and later donated to the San Diego State University. In 1970, the collection was donated to UCSB. The three associated funerary objects are one lot of animal bone, one lot of processed material, and one lot of large groundstone fragments.

At unknown date, three associated funerary objects were removed from an archaeological site approximately located in the Vandenberg area of Santa Barbara County, CA. In 1983, the collection was donated to UCSB (Accession 248–19 and Accession 250–187, –188, –189). The three associated funerary objects are one sweat stick, one lot of abalone pendants, and one lot of Olivella beads.

In 1985, one associated funerary object was removed from Diablo Peak on Santa Cruz Island in Santa Barbara County, CA (Accession 248–33). It was collected by Robert Peterson and donated to UCSB. The one associated funerary object is a single lot of shell midden.

In 1950 and 1952, 15 associated funerary objects were removed from CA–SBA–485 at the south end of Lake Cachuma in Santa Barbara County, CA (Accession 261). The excavation was led by Martin Baumhoff under the auspices of the River Basin Surveys of the Smithsonian Institute. The 15 associated funerary objects are 12 asphaltum skirt weights, one projectile point, one lot of processed material, and one lot of unprocessed groundstone fragments.

Between 1974 and 1979, seven associated funerary objects were removed from CA–SBA–143 at Dos Pueblos High School in Santa Barbara County, CA (Accession 320). The excavations were conducted by Dos Pueblos High School. The seven associated funerary objects are one lot of animal bones, one bead, one lot of processed material, one lot of large groundstone fragments, one lot of unprocessed bulk material, one lot of unprocessed groundstone material, and one lot of column samples.

In 1983, three associated funerary objects were removed from CA–SBA–75 within Tecolote Canyon in Santa Barbara County, CA (Accession 328). Jon Erlandson recovered the surface collection during an assessment of cultural resources associated with the proposed Hyatt Regency Resort and Hotel. The three associated funerary objects are one lot of processed material, one large mortar fragment, and one lot of groundstone objects.

In 1985, four associated funerary objects were removed from CA–SBA–46G on Mescalitan Island in Santa Barbara County, CA (Accession 351). The excavation was conducted by a private firm, Scientific Resource Survey. The four associated funerary objects are one lot of column samples, one lot of processed material, one lot of unprocessed material, and one lot of midden soil.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is reasonably identified by the geographical location or acquisition history of the associated funerary objects described in this notice.

Determinations

The UCSB Repository for Archaeological and Ethnographic Collections has determined that:

- The 8,250 objects described in this notice are reasonably believed to have been placed intentionally with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a reasonable connection between the associated funerary objects described in this notice and the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California.

Requests for Repatriation

Written requests for repatriation of associated funerary objects in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the associated funerary objects in this notice to a requestor may occur on or after May 28, 2024. If competing requests for repatriation are received, the UCSB Repository for Archaeological and Ethnographic Collections must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the associated funerary objects are considered a single request and not competing requests. The UCSB Repository for Archaeological and Ethnographic Collections is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: April 15, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–08873 Filed 4–24–24; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–720 and 731–TA–1688 (Preliminary)]

Ceramic Tile From India; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigation Nos. 701–TA–720 and 731–TA–1688 (Preliminary) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of ceramic tile from India, provided for in subheadings 6907.21.10, 6907.21.20, 6907.21.30, 6907.21.40, 6907.21.90, 6907.22.10, 6907.22.20, 6907.22.30, 6907.22.40, 6907.22.90, 6907.23.10, 6907.23.20, 6907.23.30, 6907.23.40, 6907.23.90, 6907.30.10, 6907.30.20, 6907.30.30, 6907.30.40, 6907.30.90, 6907.40.10, 6907.40.20, 6907.40.30, 6907.40.40, and 6907.40.90 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Government of India. Unless the Department of Commerce (''Commerce'') extends the time for initiation, the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by June 3, 2024. The Commission's views must be transmitted to Commerce within five business days thereafter, or by June 10, 2024.

DATES: April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Nitin Joshi ((202) 708–1669), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)), in response to a petition filed on April 19, 2024, by Coalition for Fair Trade in Ceramic Tile.[1]

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

Participation in the investigations and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping duty and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Office of Investigations will hold a staff conference in connection with the preliminary phase of these investigations beginning at 9:30 a.m. on Friday, May 10, 2024. Requests to appear at the conference should be emailed to *preliminaryconferences@usitc.gov* (DO NOT FILE ON EDIS) on or before Wednesday, May 8, 2024. Please provide an email address for each conference participant in the email. Information on conference procedures, format, and participation, including guidance for requests to appear as a witness via videoconference, will be available on the Commission's Public Calendar (Calendar (USITC) | United States International Trade Commission). A nonparty who has testimony that may aid the Commission's deliberations may request permission to participate by submitting a short statement.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Written submissions.—As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before 5:15 p.m. on May 15, 2024, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties shall file written testimony and supplementary material in connection with their presentation at the conference no later than noon on May 9, 2024. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

[1] The Coalition for Fair Trade in Ceramic Tile is comprised of Crossville, Inc., Crossville, TN; Dal-Tile Corporation, Dallas, TX; Del Conca USA, Inc., Loudon, TN; Wonder Porcelain, Lebanon, TN; Landmark Ceramics—UST, Inc., Mount Pleasant, TN; Florim USA, Clarksville, TN; Florida Tile, Lexington, KY; Portobello America Manufacturing LLC, Pompano Beach, FL; and StonePeak Ceramics Inc., Chicago, IL.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these investigations must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that any information that it submits to the Commission during these investigations may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of these or related investigations or reviews, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.12 of the Commission's rules.

By order of the Commission.

Issued: April 22, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–08882 Filed 4–24–24; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

[F.C.S.C. Meeting and Hearing Notice No. 01–24]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR part 503.25) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings as follows:

TIME AND DATE: Tuesday, May 7, 2024, at 10:00 a.m. EST.

PLACE: All meetings are held at the Foreign Claims Settlement Commission, 441 G Street NW, Room 6330, Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: 10:00 a.m.– Oral hearing on Objection to Commission's Proposed Decision in Claim No. ALB–352.

CONTACT PERSON FOR MORE INFORMATION: Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Patricia M. Hall, Foreign Claims Settlement Commission, 441 G St NW, Room 6234, Washington, DC 20579. Telephone: (202) 616–6975.

Brian M. Simkin,

Chief Counsel.

[FR Doc. 2024–08975 Filed 4–23–24; 4:15 pm]

BILLING CODE 4410–BA–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

On April 18, 2024, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Middle District of Florida in the lawsuit entitled *United States* v. *General Dynamics Corporation, et al.,* Civil Action No. 6:24–cv–00722. In the filed Complaint, the United States, on behalf of the U.S. Environmental Protection Agency (''EPA''), alleges that the Defendants are liable under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606 and 9607(a), for the releases and/or threatened releases of hazardous substances into the environment at the General Dynamics Longwood Superfund Site located at 1333 North U.S. Highway 17–92 Road in Longwood, Seminole County, Florida, which the Defendants owned and operated. The Consent Decree requires the Defendants to perform a Remedial Design and Remedial Action for the Site, reimburse EPA for its past response costs for the Site, and pay future costs related to the work. The estimated cost of the Remedial Design and Remedial Action is $560,784.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *General Dynamics Corporation et al.,* D.J. Ref. No. 90–11–3–12834. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Any comments submitted in writing may be filed by the United States in whole or in part on the public court docket without notice to the commenter.

During the public comment period, the proposed Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* If you require assistance accessing the proposed Consent Decree, you may request assistance by email or by mail to the addresses provided above for submitting comments.

Scott Bauer,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2024–08901 Filed 4–24–24; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

National Institute of Justice

[OJP (NIJ) Docket No. 1824]

Request for Input From the Public on Section 7.1(b) of Executive Order 14110, ''Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence''

AGENCY: National Institute of Justice, Office of Justice Programs, U.S. Department of Justice.

ACTION: Notice.

SUMMARY: The National Institute of Justice (NIJ) seeks written input from the public relevant to section 7.1(b) of Executive Order 14110, ''Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.'' NIJ is seeking information that could inform a report that addresses the use of artificial intelligence (AI) in the criminal justice system.

DATES: Written input must be received by 5 p.m. eastern time on May 28, 2024.

ADDRESSES:

How to Respond and What to Include: Submissions must include a one-page cover letter that summarizes key points and can include additional written input. The cover letter must contain the contact information of the person submitting comments, including name, address, phone number, and email

address. There is no page limit for the additional written input. All submissions must be sent electronically as an email attachment to the contact below. NIJ prefers submissions in common file formats such as PDF or Word. Please indicate ''Public Input to Section 7.1(b) of E.O. 14110'' in the subject line of the email. Input must be received by the date listed above. Organizational responses may be submitted. If an organizational response is submitted, please indicate a point of contact in the cover letter, including name, address, phone number, and email address.

FOR FURTHER INFORMATION CONTACT: Mark Greene, Office Director, Office of Technology and Standards, National Institute of Justice, 810 7th Street NW, Washington, DC 20531; telephone number: (202) 598–9481; email address: *mark.greene2@usdoj.gov.*

SUPPLEMENTARY INFORMATION: NIJ plans to review the input provided by the public as it drafts a report responsive to section 7.1(b) of Executive Order 14110. All materials will be shared with U.S. Government staff or U.S. Government contractors for evaluation purposes. NIJ does not plan to publish the input received, however all materials submitted are subject to public release under the Freedom of Information Act. Comments should not include any sensitive personal information or confidential commercial information. If you wish to voluntarily submit confidential commercial information, you must mark that content prominently as ''CONFIDENTIAL COMMERCIAL INFORMATION'' and NIJ will, to the extent permitted by law, withhold such information from public release.

NIJ publishes this notice pursuant to its authority at 34 U.S.C. 10122(c) and 6 U.S.C. 161–165.

Nancy La Vigne,

Director, National Institute of Justice.

[FR Doc. 2024–08818 Filed 4–24–24; 8:45 am]

BILLING CODE 4410–18–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: 24–029]

Adoption of a Department of the Air Force Categorical Exclusion Under the National Environmental Policy Act

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of adoption of categorical exclusion.

SUMMARY: The National Aeronautics and Space Administration (NASA) is adopting the Department of Air Force (DAF) Categorical Exclusion (CATEX) A2.3.34, Supersonic flying operations over land and above 30,000 feet Mean Sea Level, or over water and above 10,000 feet Mean Sea Level and more than 15 nautical miles from land, under the National Environmental Policy Act (NEPA) to use in NASA's program and funding opportunities administered by NASA. This notice describes the categories of proposed actions for which NASA intends to use DAF's CATEX and describes the consultation between the agencies.

DATES: The categorical exclusion is adopted April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Amy Keith, NASA Headquarters, Environmental Management Division by phone at 256–701–2815 or by email *amy.keith@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

NEPA and CATEXs

The National Environmental Policy Act, as amended (42 U.S.C. 4321–4347) (NEPA), requires all Federal agencies to assess the environmental impact of their actions. Congress enacted NEPA in order to encourage productive and enjoyable harmony between humans and the environment, recognizing the profound impact of human activity and the critical importance of restoring and maintaining environmental quality to the overall welfare of humankind. 42 U.S.C. 4321, 4331. NEPA's twin aims are to ensure agencies consider the environmental effects of their proposed actions in their decision-making processes and inform and involve the public in that process. 42 U.S.C. 4331. 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—an environmental impact statement (EIS), environmental assessment (EA), or categorical exclusion (CATEX). 42 U.S.C. 4336. If a proposed action is likely to have significant environmental effects, the agency must prepare an EIS and document its decision in a record of decision. 42 U.S.C. 4336. If the proposed action is not likely to have significant environmental effects or the effects are unknown, the agency may instead prepare an EA, which involves a more concise analysis and process than an EIS. 42 U.S.C. 4336. Following the EA, the agency may conclude the process with a finding of no significant impact if the analysis shows that the action will have no significant effects. If, however, the analysis in the EA finds that the action is likely to have significant effects which cannot be mitigated below a significant level, then an EIS is required.

Under NEPA and the CEQ regulations, a Federal agency also can establish CATEXs—categories of actions that the agency has determined normally do not significantly affect the quality of the human environment—in their 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 CATEX covers a proposed action, it then evaluates the proposed action for extraordinary circumstances in which a normally excluded action may have a significant effect. 40 CFR 1501.4(b). 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 apply the CATEX to the proposed action without preparing an EA or EIS. 42 U.S.C. 4336(a)(2), 40 CFR 1501.4. If the extraordinary circumstances have the potential to result in significant effects, the agency is required to prepare an EA or EIS.

Section 109 of NEPA, enacted as part of the Fiscal Responsibility Act of 2023, allows a Federal agency to ''adopt'' or use another agency's CATEX for a category of proposed agency actions. 42 U.S.C. 4336(c). To use another agency's CATEX under section 109, an agency must identify the relevant CATEX listed in another agency's (''establishing agency'') NEPA procedures that cover its category of proposed actions or related actions; consult with the establishing agency to ensure that the proposed adoption of the CATEX to a category of actions is appropriate; identify to the public the CATEX that the agency plans to use for its proposed actions; and document adoption of the CATEX. *Id.* This notice documents NASA's adoption of Department of the Air Force (DAF) CATEX A2.3.34., Supersonic flying operations over land and above 30,000 feet Mean Sea Level, or over water and above 10,000 feet Mean Sea Level and more than 15 nautical miles from land, under section 109 of NEPA to use in NASA's programs and funding opportunities, including those administered by NASA's Quesst mission.

NASA's Program

NASA's Quesst mission is working with the international community to develop standards needed to open the commercial market to supersonic flight.

One of the most important of these standards is for sound levels from supersonic overflight that prevent adverse impacts to populations in developed and undeveloped areas. The Quesst mission has two goals. The first is to demonstrate the viability of aerodynamic design technology that reduces the sonic boom associated with supersonic flight to a soft thump sound. The second is to collect data on the response of populations to this thump sound that will inform the development of the needed standard. The mission involves multiple supersonic flights over representative communities with diverse climates and populations in four to six discrete geographic areas of approximately 120x50 miles in the continental U.S. For each community, the Quesst mission expects to fly approximately 100 total supersonic passes over a 30-day period. The daily community overflight schedule will not exceed 3 flights per day, with one to two passes per flight, for a maximum of 6 passes per day. The flights will only occur during daytime hours (*i.e.,* no night flights will occur). The sound levels will approximate those of naturally occurring distant thunder and result in non-adverse effects on communities, wildlife, domesticated animals, or other natural or cultural resources. The flights will operate from military and/or joint use military-civilian airfields. Supersonic flight operations will take place at speeds up to approximately Mach 1.4 and at altitudes between 42 and 55 thousand feet over the communities. NASA will comply with all existing regulations and operating procedures in effect at the airfields and for operations within the National Airspace. Well in advance of any overflight, communities will be provided general information about the tests and the sounds that may be heard. In the event that a flight may pass over tribal lands, tribal nations will also be engaged. Survey participants selected from the community population will be asked to respond via mobile device with reactions to the supersonic thump. Ground measurement hardware, including microphones and weather equipment, will record and characterize the supersonic thump at ground level. This data will be analyzed to document the relationship between sound exposure (dose) and annoyance (response) that will be provided to the International Civil Aviation Organization's Committee on Aviation Environmental Protection (ICAO–CAEP) to inform the sound limits of a supersonic overflight noise standard.

II. Identification of the Categorical Exclusion (CATEX) DAF's Supersonic Flying Operations CATEX

The DAF's environmental impact analysis process is codified in 32 CFR part 989. The DAF's categorical exclusion process is set forth in 32 CFR 989.13 as follows:

(a) CATEXs define those categories of actions that do not individually or cumulatively have potential for significant effect on the environment and do not, therefore, require further environmental analysis in an EA or an EIS. The list of Air Force-approved CATEXs is in appendix B. Supplements to this part may not add CATEXs or expand the scope of the CATEXs in appendix B.

(b) Characteristics of categories of actions that usually do not require either an EIS or an EA (in the absence of extraordinary circumstances) include:

(1) Minimal adverse effect on environmental quality.

(2) No significant change to existing environmental conditions.

(3) No significant cumulative environmental impact.

(4) Socioeconomic effects only.

(5) Similarity to actions previously assessed and found to have no significant environmental impacts.

(c) CATEXs apply to actions in the United States and abroad. General exemptions specific to actions abroad are in 32 CFR part 187. The EPF or other decision-maker forwards requests for additional exemption determinations for actions abroad to HQ USAF/A7CI with a justification letter.

(d) Normally, any decision-making level may determine the applicability of a CATEX and need not formally record the determination on AF Form 813 or elsewhere, except as noted in the CATEX list.

(e) Application of a CATEX to an action does not eliminate the need to meet air conformity requirements (see § 989.30).

The DAF's list of specific categorical exclusions is set forth at appendix B to part 989—Categorical Exclusions. NASA identified CATEX A2.3.34., Supersonic flying operations over land and above 30,000 feet Mean Sea Level, or over water and above 10,000 feet Mean Sea Level and more than 15 nautical miles from land, as applicable and appropriate to use in NASA's programs and funding opportunities, including those administered by the NASA Quesst mission.

Proposed NASA Category of Actions

NASA intends to apply CATEX A2.3.34 to NASA's Quesst mission. NASA also intends to apply the CATEX to other similar NASA programs that meet the qualifications of the CATEX. NASA will consider each proposal to use CATEX A2.3.34 to ensure that the proposal is within the scope of the CATEX. NASA intends to apply this CATEX in a manner consistent with DAF's application.

III. Consideration of Extraordinary Circumstances

The DAF's implementing regulations in 32 CFR, part 989, appendix B describe when additional analysis may be required (*i.e.,* extraordinary circumstances). Circumstances may arise in which usually categorically excluded actions may have a significant environmental impact and, therefore, may generate a requirement for further environmental analysis. Examples of situations where such circumstances may be present include:

A2.2.1. Actions of greater scope or size than generally experienced for a particular category of action.

A2.2.2. Potential for degradation (even though slight) of already marginal or poor environmental conditions.

A2.2.3. Initiating a degrading influence, activity, or effect in areas not already significantly modified from their natural condition.

A2.2.4. Use of unproved technology.

A2.2.5. Use of hazardous or toxic substances that may come in contact with the surrounding environment.

A2.2.6. Presence of threatened or endangered species, archaeological remains, historical sites, or other protected resources.

A2.2.7. Proposals adversely affecting areas of critical environmental concern, such as prime or unique agricultural lands, wetlands, coastal zones, wilderness areas, floodplains, or wild and scenic river areas.

A2.2.8. Proposals with disproportionately high and adverse human health or environmental effects on minority populations or low-income populations.

When applying CATEX A2.3.34, NASA will evaluate the proposed action and ensure each circumstance prescribed both in DAF regulations (as set forth above), and in NASA's NEPA implementing regulations at 14 CFR 1216.304(c), is carefully considered and do not apply to NASA's proposed action. If an extraordinary circumstance, or circumstances, exists, NASA will determine whether the proposed action has the potential to result in a significant environmental impact before applying CATEX A2.3.34, or proceed with preparation of an EIS or EA as appropriate. NASA will comply with

environmental requirements related to the proposal, including application and receipt of any necessary permits, and other applicable federal and state regulatory agency consultations and approvals which may be required.

IV. Consultation With DAF and Determination of Appropriateness

DAF and NASA consulted on the appropriateness of NASA's adoption of CATEX A2.3.34 in February 2024. DAF and NASA's consultation included a review of DAF's experience developing and applying the CATEX, as well as the types of actions for which NASA plans to use the CATEX. These NASA actions are very similar to the type of projects for which DAF has applied the CATEX and therefore the impacts of NASA projects, in this case, the Quesst mission, will be very similar to the impacts of DAF projects, which are not significant, absent the existence of extraordinary circumstances. Therefore, NASA has determined that its proposed use of the CATEX as described in this notice is appropriate.

V. Notice to the Public and Documentation of Adoption

This notice serves to identify to the public and document NASA's adoption of DAF's CATEX A2.3.34., Supersonic flying operations over land and above 30,000 feet Mean Sea Level, or over water and above 10,000 feet Mean Sea Level and more than 15 nautical miles from land. The notice identifies the types of actions to which NASA will apply the CATEX, as well as the considerations that NASA will use in determining whether an action is within the scope of the CATEX.

Nanette Smith,

Team Lead, NASA Directives and Regulations.

[FR Doc. 2024–08815 Filed 4–24–24; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2024–030]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: We are proposing to request an extension from the Office of Management and Budget (OMB) of a currently approved information collection, 3095–0060, Volunteer Service Application (NA Form 6045), used by individuals who wish to volunteer at the National Archives Building, the National Archives at College Park, regional records services facilities, and Presidential libraries and a new form, Voluntary Internship Application (NA Form 3060A), used by individuals who wish to intern at the National Archives Building, the National Archives at College Park, regional records services facilities, and Presidential libraries. We invite you to comment on this proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: We must receive written comments on or before June 24, 2024.

ADDRESSES: Send comments to Paperwork Reduction Act Comments (MP), Room 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001, or email them to *tamee.fechhelm@nara.gov.*

FOR FURTHER INFORMATION CONTACT: Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with requests for additional information or copies of the proposed information collection and supporting statement.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. If you have comments or suggestions, they should address one or more of the following points: (a) whether the proposed information collection is necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collection and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether the collection affects small businesses.

We will summarize any comments you submit and include the summary in our request for OMB approval. All comments will become a matter of public record.

In this notice, we solicit comments concerning the following information collection:

Title: Volunteer Service Application and Voluntary Internship Application.

OMB number: 3095–0060.

Agency form numbers: NA Form 6045 (Volunteer Service Application) and NA Form 3060A, Voluntary Internship Application.

Type of review: Regular.

Affected public: Individuals or households.

Estimated number of respondents: 1,000.

Estimated time per response: 25 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 416 hours.

Abstract: We use volunteer resources to enhance our services to the public and to further our mission of providing ready access to essential evidence. Volunteers assist in outreach and public programs and provide technical and research support for administrative, archival, library, and curatorial staff, as well as other programs. We use a standard form for volunteers to apply and to assess the qualifications of potential volunteers. Members of the public who are interested in being a NARA volunteer use NA Form 6045, to signal their interest and to identify their qualifications for the work. Once we have selected someone as a volunteer, they fill out NA Form 6045a, Standards of Conduct for Volunteers, NA Form 6045b, Volunteer or Intern Emergency and Medical Consent, and NA Form 6045c, Volunteer or Intern Confidentiality Statement.

In addition to Pathways internships, NARA also uses voluntary (unpaid) interns to create a pipeline; bring fresh perspectives and ideas; and serve as NARA brand ambassadors. This opportunity provides interns with training, experience, and skills that will prepare them for their careers; and prepares participants for future employment with NARA. Engaging interns also involves the use of NA Form 3060A, Voluntary Internship Application to collect information for intern qualifications. Upon selection, applicants fill out the NA Form 3060, Voluntary Internship Agreement, as well as the other forms listed above.

Sheena Burrell,

Executive for Information Services/CIO.

[FR Doc. 2024–08864 Filed 4–24–24; 8:45 am]

BILLING CODE 7515–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–240 and CP2024–246; MC2024–241 and CP2024–247; MC2024–242 and CP2024–248; MC2024–243 and CP2024–249]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the

Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 29, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2024–240 and CP2024–2416; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 222 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 19, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* April 29, 2024.

2. *Docket No(s).:* MC2024–241 and CP2024–247; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 223 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 19, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* April 29, 2024.

3. *Docket No(s).:* MC2024–242 and CP2024–248; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 58 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 19, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* April 29, 2024.

4. *Docket No(s).:* MC2024–243 and CP2024–249; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 224 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 19, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* April 29, 2024.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2024–08898 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–235 and CP2024–241; MC2024–236 and CP2024–242; MC2024–237 and CP2024–243; MC2024–238 and CP2024–244; MC2024–239 and CP2024–245]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 26, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

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The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of

the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2024–235 and CP2024–241; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 219 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 18, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Almaroof Agoro; *Comments Due:* April 26, 2024.

2. *Docket No(s).:* MC2024–236 and CP2024–242; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 220 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 18, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Almaroof Agoro; *Comments Due:* April 26, 2024.

3. *Docket No(s).:* MC2024–237 and CP2024–243; *Filing Title:* USPS Request to Add Priority Mail Contract 789 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 18, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* April 26, 2024.

4. *Docket No(s).:* MC2024–238 and CP2024–244; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 57 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 18, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* April 26, 2024.

5. *Docket No(s).:* MC2024–238 and CP2024–244; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 221 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 18, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.,* and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* April 26, 2024.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2024–08862 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 4, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 211 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–222, CP2024–228.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08840 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 16, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 218 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–232, CP2024–238.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08837 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 18, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 789 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–237, CP2024–243.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08836 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 3, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 209 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–220, CP2024–226.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08852 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 17, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 56 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–234, CP2024–240.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08835 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 18, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 219 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–235, CP2024–241.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08843 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 4, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 210 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–221, CP2024–227.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08850 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 2, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 53 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–219, CP2024–225.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08839 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 19, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 224 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–243, CP2024–249.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08846 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 18, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 57 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–238, CP2024–244.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08842 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 19, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 222 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–240, CP2024–246.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08844 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 212 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–223, CP2024–229.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08849 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 16, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 55 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–233, CP2024–239.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08848 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 19, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 58 to Competitive Product List.* Documents

are available at *www.prc.gov,* Docket Nos. MC2024–242, CP2024–248.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08847 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 18, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 221 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–239, CP2024–245.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08853 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 18, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 220 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–236, CP2024–242.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08838 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on April 19, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 223 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–241, CP2024–247.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–08845 Filed 4–24–24; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99993; File No. SR–NYSEARCA–2024–33]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Rule 6.91P–O

April 19, 2024

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on April 5, 2024, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') 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

The Exchange proposes to modify Rule 6.91P–O (Electronic Complex Order Trading) to specify that a Complex Customer Cross Order received during a Complex Order Auction (''COA'') would result in the early end of the COA. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Rule 6.91P–O (Electronic Complex Order Trading) to specify that a Complex Customer Cross (''Complex C2C'') Order received during a COA would result in the early end of the COA. This proposed functionality is not new or novel and mirrors a recently adopted rule requiring that a COA in progress ends early upon the receipt of a Complex QCC Order in the same complex strategy as the COA.[4] As

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Rule 6.91–O(f)(3)(E). *See* Securities Exchange Act Release No. 99597 (February 23, 2024), 89 FR 14906 (February 29, 2024 (SR–

Continued

discussed below, the reasons justifying the early end of a COA upon the receipt of a Complex QCC Order apply equally to the required early end of a COA upon receipt of a Complex C2C Order in the same complex strategy.[5]

Rule 6.91P–O reflects how Electronic Complex Orders (''ECOs'') will trade on the Exchange [6] and paragraph (f) to this rule describes the handling of ECOs submitted to the Complex Order Auction (COA) process.[7] When a COA Order initiates a COA, the Exchange disseminates a Request for Response (''RFR'') to solicit potentially price-improving ECO interest—which solicited interest includes interest designated to respond to the COA (*i.e.,* ECO GTX Orders) and unrelated price-improving ECO interest (resting and newly arriving) that arrives during the Response Time Interval (each an ''RFR Response'') (collectively, the ''auction interest'').[8] The COA lasts for the duration of the Response Time Interval unless, during the COA, the Exchange receives certain options trading interest that requires the COA to conclude early.[9] When the COA concludes, the COA Order executes first with price-improving ECO interest, next with any contra-side interest, including the leg markets (if permissible),[10] and any remaining balance (that is not cancelled) is ranked in the Consolidated Book (the ''Consolidated Book'' or ''Book'').[11] Once the COA Order executes to the extent possible—whether with the best-priced Complex Orders or the best-priced interest in the leg markets—and is placed in the Book, the Exchange will update its complex order book and, if applicable, the Exchange BBO (as a result of any executions of the COA Order with the leg markets).

The Exchange proposes to modify Rule 6.91P–O(f)(3)(E) to add an additional early end scenario to specify that a COA in progress will end early any time there is a Complex C2C Order submitted in the same complex strategy as the COA Order.[12] By its terms, a Complex C2C Order ''that is not rejected'' by the Exchange, ''will immediately trade in full at its limit price.'' [13]

To avoid rejection, a Complex C2C Order must satisfy certain price validations, including that each option leg may not be priced worse than the Exchange BBO; and, that the transaction price must be equal to or better than the best-priced Complex Orders, unless the best-priced Complex Orders contains displayed Customer interest, in which case the transaction price must improve such interest.[14] In addition, the price of a Complex C2C Order must be priced at or between the DBBO; [15] provided, however, that the Complex C2C Order may not equal the DBBO if the DBBO is calculated using the Exchange BBO and the Exchange BBO for any component of the complex strategy on either side of the market includes displayed Customer interest.[16] Specifically, if the DBB (DBO) includes displayed Customer interest on the Exchange, the transaction price must improve the DBB (DBO) by at least one cent ($0.01).[17]

As noted above, until a COA concludes, the Book is not updated to reflect any COA Order executions (with price-improving auction interest or with resting ECO or leg market interest) or any balance of the COA Order ranking in the Book. Thus, to allow the later-arriving Complex C2C Order to be evaluated based on the most up-to-date Book, the Exchange proposes to end a COA upon the arrival of a Complex QCC [sic] Order in the same complex strategy. This proposed early termination would allow the Exchange to incorporate executions from the COA, or any remaining balance of the COA Order, to conduct the requisite price validations per Rule 6.62P–O(g)(2)(C) for the Complex C2C Order—including based on the Exchange BBO, the DBBO, and best-priced Complex Orders on the Exchange following the COA Order executions and ranking.

Like current Rule 6.91P–O(3)(f)(E), the proposed rule change would be consistent with current Rule 6.91P–O(f)(3)(A)–(D), which describes four circumstances that cause the early end of a COA to ensure that later-arriving interest does not trade ahead of a COA Order and to ensure that the Book is updated to reflect executions resulting from the COA. The Exchange believes that the proposed rule change achieves this same objective. As with the existing early end scenarios, the proposed early end of a COA does not prevent the COA Order from trading with any interest, including price-improving interest, that arrived prior to the early termination (*i.e.,* because of a Complex C2C Order in

NYSEARCA–2024–17) (adopting, on an immediately effective basis, Rule 6.91P–O (f)(3)(E) which specifies that a COA in progress ends early upon receipt of a Complex QCC Order in the same complex strategy). The Exchange notes that the same rule change has been adopted on its affiliated options exchange, NYSE American LLC. *See* NYSE American Rule 980NYP(f)(3)(E). *See* Securities Exchange Act Release No. 99354 (January 17, 2024), 89 FR 4358 (January 17 [sic], 2024) (SR–NYSEAMER–2024–03) (adopting, on an immediately effective basis, NYSE American Rule 980NYP(f)(3)(E) which specifies that a COA in progress ends early upon receipt of a Complex QCC Order in the same complex strategy).

[5] *See, e.g., id.,* 89 FR, at 14906.

[6] *See generally* Rule 6.91P–O (Electronic Complex Order Trading). Unless otherwise specified, all capitalized terms used herein have the same meaning as is set forth in Rule 6.91P–O.

[7] *See* Rules 6.91P–O(f) (Execution of ECOs During a COA), (f)(1) (Initiation of a COA), (f)(2) (Pricing of a COA). *See also* Rule 6.91P–O(a)(3)(A) (defining a ''COA Order'' as an ECO designated as eligible to initiate a COA).

[8] *See* Rules 6.91P–O(a)(3)(B) (defining, and detailing the information included in, each RFR); (a)(3)(C) (defining each ''RFR Response'' as, among other things, ''any ECO'' received during the Response Time Interval that is in the same complex strategy as, and is marketable against, the COA Order); and (a)(3)(D) (defining the Response Time Interval as the period during which RFR Responses may be entered, which period ''will not be less than 100 milliseconds and will not exceed one (1) second,'' as determined by the Exchange and announced by Trader Update). *See* Rule 6.91P–O(b)(2)(C) (defining a ''ECO GTX Order,'' including that such order is submitted in response to an RFR announcing a COA and will trade with the COA Order to the extent possible and then cancel).

[9] *See* Rule 6.91P–O(f)(3)(A)–(E) (setting forth the circumstances under which a COA will conclude before the end of the Response Time Interval, including, as discussed *infra,* upon receipt of a Complex QCC Order in the same complex strategy as the COA).

[10] The Exchange notes that there are certain limitations to how an ECO, including a COA Order post-COA, may interact with the leg markets. *See, e.g.,* Rule 6.91P–O(e)(1)(A) (providing, in relevant part, that the leg markets will trade first with an ECO, but only if the legs can execute with the ECO ''in full or in a permissible ratio,'' and, once the leg markets trade with the ECO to the extent possible, such ECO will trade with same-priced ECOs resting in the Book). *See also* Rule 6.91P–O(e)(1)(C)–(D) (describing ECOs that are not permitted to trade with the leg markets).

[11] *See* Rule 6.91P–O(f)(4)(A)-(C) (Allocation of COA Orders) (providing, in relevant part, that when a COA ends early or at the end of the Response Time Interval, a COA Order trades first with price-improving interest, next ''with any contra-side interest, including the leg markets, unless the COA is designated as a Complex Only Order'' and any remaining portion is ranked in the Consolidated Book and the COA Order is processed as an ECO pursuant to Rule 6.91P–O(e) (Execution of ECOs During Core Trading Hours). *See* Rule 1,1 (defining Consolidated Book as ''the Exchange's electronic book of orders and quotes.'').

[12] *See* proposed Rule 6.91P–O(f)(3)(E).

[13] *See* Rule 6.62P–O (g)(2)(A) (providing that a Customer Cross (''C2C'') Order, including a Complex C2C Order, ''that is not rejected per paragraph (g)(2)(B) [Execution of C2C Orders] or (C) [Execution of Complex C2C Orders] below will immediately trade in full at its limit price'').

[14] *See* Rule 6.62P–O(g)(2)(C) & (g)(2)(C)(ii).

[15] The DBBO establishes a derived (theoretical) bid or offer for a particular complex strategy. *See* Rule 6.91P–O(a)(5) (defining the DBBO and providing that the bid (offer) price used to calculate the DBBO on each leg will be the Exchange BB (BO) (if available), bound by the maximum allowable Away Market Deviation). The Away Market Deviation, as defined in Rule 6.91P–O(a)(1), ensures that an ECO does not execute too far away from the prevailing market. Rule 6.91P–O(a)(5) also provides for the establishment of the DBBO in the absence of an Exchange BB (BO), or ABB (ABO), or both. A Complex C2C Order will not be processed if there is no DBBO for any leg of the strategy either because there is no Exchange BBO or Away BBO for a leg of the complex strategy, or the best bid and offer prices for a leg are locked or crossed, per Rule 6.91P–O(a)(5)(B) or (a)(5)(C). *See* Rule 6.62P–O(g)(2)(C).

[16] *See* Rule 6.62P–O(g)(2)(C) & (g)(2)(C)(i).

[17] *See id.*

the same complex strategy as the COA). In addition, any portion of the COA Order that does not trade in the COA is placed on the Consolidated Book where it continues to have opportunities to trade.[18]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[19] in general, and furthers the objectives of Section 6(b)(5),[20] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendment to Rule 6.91P–O(f)(3)(E) regarding the additional circumstance that would cause a COA to end early would promote just and equitable principles of trade because it would ensure that the COA Order is executed to the extent possible and, if applicable, is ranked in the Consolidated Book before the Exchange evaluates the later-arriving Complex C2C Order. As noted above, until the COA concludes, the Book is not updated to reflect any COA Order executions (with price-improving auction interest or with resting ECO or leg market interest) or any balance of the COA Order ranking in the Book. This proposed early termination would then allow the Exchange to incorporate executions from the COA, or any remaining balance of the COA Order, to conduct the requisite price validations for the Complex C2C Order (per Rule 6.62P–O(g)(2)(C)) based on the most up-to-date Book (*i.e.,* based on the DBBO, Exchange BBO, and best-priced Complex Orders on the Exchange following the COA).

As noted herein, the proposed change is being made for the same reasons that a COA in progress would end early upon the receipt of another Cross Order—a Complex QCC Order, per Rule 6.91P–O(f)(3)(E)—and therefore raises no new or novel issues and would ensure internal consistency of Exchange rules. In addition, Rule 908NYP(f)(A)–(D) describes the other four circumstances under which a COA must end early to ensure that later-arriving interest does not trade ahead of a COA Order and to ensure that the Book is updated to reflect executions resulting from the COA. The Exchange believes that the proposed rule change achieves this same objective. As with each of the early end scenarios, the proposed early end of a COA does not prevent the COA Order from trading with any interest, including price-improving interest, that arrived prior to the early termination (*i.e.,* because of a Complex C2C Order in the same complex strategy as the COA). As such, the proposed change would benefit investors because it would ensure the timely executions of COA Orders (at potentially improved prices) and would also allow a timely execution of the Complex C2C Orders in the same complex strategy as the COA Order. In addition, the proposal would ensure that the prices used to validate a Complex C2C Order would incorporate executions from the COA, or any remaining balance of the COA Order.[21]

For the same reasons articulated when the Exchange adopted Rule 6.91P–O(f)(3)(E) (early end of a COA upon receipt of a Complex QCC Order), the Exchange believes that its proposed approach would provide the best protection to investors because ending a COA upon receipt of a C2C Order would ensure that the COA Order executes to the extent possible and that the Exchange relies on the most-up-to-date Book (following executions in the COA) to validate the price of the Complex QCC [sic] Order. Thus, the Exchange believes the proposed rule change would promote just and equitable principles of trade because it would help preserve—and maintain investor's confidence in—the integrity of the Exchange's local market.

Finally, the Exchange believes that modifying the rule as proposed would add clarity and transparency to Rule 6.91P–O regarding the handling of COA Orders.

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 intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would apply in the same manner to all similarly-situated market participants that opt to utilize the COA process, the use of which is voluntary and, as such, market participants are not required to avail themselves of this process.

The Exchange does not believe that its proposed rule change will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change is designed to ensure that both a COA Order and a C2C Order receive timely executions based on current market conditions. To the extent that other options exchanges offer complex order auctions and Complex C2C Orders, such exchanges are free to adopt (if they have not already done so) the early termination provision proposed herein.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[22] and Rule 19b–4(f)(6) thereunder.[23] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[24]

A proposed rule change filed under Rule 19b–4(f)(6)[25] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[26] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public

[18] *See* note 11, *supra* (describing that any remaining portion of a COA Order following the COA will be placed on the Consolidated Book and will be processed as an ECO).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] As noted herein, any portion of the COA Order that does not trade in the COA is placed in the Consolidated Book where it continues to have opportunities to trade. *See, e.g.,* note 11, *supra.*

[22] 15 U.S.C. 78s(b)(3)(A)(iii).

[23] 17 CFR 240.19b–4.

[24] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[25] 17 CFR 240.19b–4(f)(6).

[26] 17 CFR 240.19b–4(f)(6)(iii).

interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange states that waiver of the operative delay would allow the Exchange to immediately implement the Complex C2C functionality, including the associated early end scenarios in proposed Exchange Rule 6.91P–O(f)(3)(E). The Commission finds that waiving the operative delay is consistent with the protection of investors and the public interest because it will allow a COA Order in a complex strategy to execute to the extent possible after the Exchange receives a Complex C2C Order in the same strategy while allowing the Exchange to conduct the required price validations for the Complex C2C Order [27] based on a Book that has been updated to reflect any executions of the COA Order, thereby ensuring that the required price validations for the Complex C2C Order have accounted for all trading interest on the Exchange.[28] In addition, any portion of the COA Order that does not execute during the COA may be placed in the Consolidated Book, where it will continue to have opportunities to trade. For these reasons, the Commission designates the proposal operative upon filing.[29]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEARCA–2024–33 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–NYSEARCA–2024–33. 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–NYSEARCA–2024–33 and should be submitted on or before May 16, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–08803 Filed 4–24–24; 8:45 am]

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[27] *See* Exchange Rule 6.62P–O(g)(2)(C).

[28] The Exchange's proposal to end a COA early when it receives a Complex C2C Order for the same strategy as the COA Order is consistent with current Exchange Rule 6.91P–O(f)(3)(E). Specifically, as discussed above, Exchange Rule 6.91P–O(f)(3)(E) currently states that a COA will end early if the Exchange receives a Complex QCC Order in the same complex strategy as the COA order. The Exchange proposes to amend Exchange Rule 6.91P–O(f)(3)(E) to provide that a COA also will end early if the Exchange receives a Complex C2C Order in the same complex strategy as the COA Order. The Exchange states that the purpose of the early termination is the same for both Complex QCC and Complex C2C Orders—to allow the Exchange to conduct the required price validations for a Complex QCC Order or Complex C2C Order based on a Book that has been updated to include any executions from the COA for the same complex strategy. The Exchange states that ending the COA upon receipt of a Complex C2C Order in the same strategy as the COA Order protects investors by ensuring that the COA Order executes to the extent possible and that the Exchange relies on the most-up-to-date Book (following executions in the COA) to validate the price of the Complex C2C Order, which the Exchange believes will help to preserve the integrity of the Exchange's local market.

[29] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[30] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. IC–35173; File No. 812–15476–01]

Sound Point Meridian Capital, Inc., et al.

April 19, 2024.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice.

Notice of application for an order under section 17(d) of the Investment Company Act of 1940 (the "Act") and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by section 17(d) of the Act and rule 17d–1 under the Act.

Summary of Application: Applicants request an order to permit certain closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

Applicants: Sound Point Meridian Capital, Inc., Sound Point Meridian Management Company, LLC, Sound Point Capital Management, LP, Sound Point Harbor Master Fund LP, Sound Point Harbor Fund LP, Sound Point Harbor Offshore Fund LP, Sound Point CLO Master Fund LP, Sound Point CLO Fund LP, and Sound Point CLO Fund, Ltd.

Filing Dates: The application was filed on June 13, 2023, and amended on October 3, 2023, January 12, 2024, March 19, 2024, and April 15, 2024.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on May 14, 2024 and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a

certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: *The Commission: Secretarys-Office@sec.gov.* Applicants: Wendy Ruberti, General Counsel, Sound Point Capital Management, LP, 375 Park Avenue, 33rd Floor, New York, NY 10152 with copies to Harry S. Pangas and Philip T. Hinkle, Dechert LLP, 1900 K Street NW, Washington, DC 20006–1110.

FOR FURTHER INFORMATION CONTACT: Laura J. Riegel, Senior Counsel, or Lisa Reid Ragen, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' fourth amended and restated application, dated April 15, 2024, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system.

The SEC's EDGAR system may be searched at *http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–08796 Filed 4–24–24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99992; File No. SR–NYSE–2024–21]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To Amend Section 802.01D of the NYSE Listed Company Manual Concerning the Suspension and Delisting of a Listed Company That Has Changed its Primary Business Focus

April 19, 2024.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on April 4, 2024, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') 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 Exchange. On April 17, 2024, the Exchange filed Amendment No. 1, which supersedes the original filing in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 802.01D of the NYSE Listed Company Manual (''Manual'') to provide the Exchange with discretion to commence suspension and delisting proceedings with respect to a listed company that has changed its primary business focus to a new area of business that it was not engaged in at the time of its original listing, or which was immaterial to its operations at the time of its original listing. The text of the proposed rule change is set forth in Exhibit 5. This Amendment No. 1 to SR–NYSE–2024–21 replaces SR–NYSE–2024–21 as originally filed and supersedes such filing in its entirety.[4]

The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* note 5 *infra.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 1 to SR–NYSE–2024–21 replaces SR–NYSE–2024–21 as originally filed and supersedes such filing in its entirety.[5] Amendment No.1 amends the original filing to: (i) insert a new sentence in the proposed new paragraph in Section 802.01D stating that the Exchange would focus its analysis of a company's suitability for continued listing after a change in operations on whether it would have accepted the listed company for initial listing if it had been engaged in its modified business at the time of original listing; (ii) amend the lead-in language to Section 802.01D and the description in the Purpose section of the filing to include a parenthetical that specifies that, instead of applying the procedures outlined in Sections 802.02 and 802.03, the Exchange will instead commence immediate suspension and delisting procedures if the individual paragraph of Section 802.01D so specifies; (iii) insert a sentence in the Purpose section noting that the Exchange's analysis of a company's change in business operations will focus on the qualitative aspects of the company's suitability for listing and will not entail an application of the quantitative standards for initial listing; (iv) amend the proposed new paragraph of Section 802.01D under the heading ''Change in Primary Business Focus'' to clarify that the proposed paragraph will apply only where the company has changed its primary business focus to a new area of business that is ''substantially different'' from the business it was engaged in at the time of its original listing or, as provided in the original filing, which was immaterial to its operations at the time of its original listing; (v) clarify that any

[5] *See* SR–NYSE–2024–21 (April 4, 2024).

suspension and delisting resulting from a change in operations will be undertaken in accordance with the procedures set out in Section 804.00 of the Manual; and (vi) make conforming changes to the Statutory Basis section.

It has been the Exchange's experience that listed companies occasionally change the focus of their operations from the business they were engaged in at the time of initial listing to a business line that is completely unrelated or that was not material at the time of its original listing. The Exchange is concerned that, in such circumstances, investors who acquired the company's stock prior to this change in operations (including, in many cases, in connection with the company's initial public offering) may have made their investment decision based on the company's disclosure about its original business and might not have made their investment if they had been aware of how the company would change. In addition, a wholesale change in business operations may give rise to a concern about the suitability for listing of the company had it been in engaged in that line of business at the time of its application for listing. The Exchange notes that, in some circumstances, there has been significant downward price movement subsequent to such a change in business focus, which resulted in significant investor losses and an inability to meet exchange continued listing standards.[6]

In light of the foregoing, the Exchange proposes to amend Section 802.01D of the Manual (''Other Criteria'') to include a new paragraph (''Change in Primary Business Focus'') providing that the Exchange may in its sole discretion subject a listed company to immediate suspension and delisting in accordance with the procedures set forth in Section 804.00 of the Manual if that listed company has changed its primary business focus to a new area of business that it was not engaged in at the time of its original listing or which was immaterial to its operations at the time of its original listing. If the Exchange becomes aware of such a change in the company's primary business focus, the Exchange's Staff would conduct a thorough assessment of the company's suitability for continued listing in light of such change. The Exchange would focus its analysis on whether it would have accepted the listed company for initial listing if it had been engaged in its modified business at the time of original listing. The Exchange notes that this analysis will focus on the qualitative aspects of the company's suitability for listing and will not entail an application of the quantitative standards for initial listing. For example, the Exchange would, where appropriate, take into consideration other changes that may have occurred in connection with the change in the company's primary business focus, including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the company. The Exchange acknowledges that seeking to suspend and delist a company's stock under this revised rule would be an extraordinary action. The Exchange therefore anticipates seldom relying on this new discretionary authority, and only after thorough analysis of all relevant facts and circumstances.

The lead-in to Section 802.01D provides that if any of the factors set forth in 802.01D apply to a listed company, the Exchange may in its sole discretion subject the company to the procedures outlined in Paras. 802.02 and 802.03, which provide noncompliant companies with an opportunity to cure their deficiencies. The Exchange proposes to add a parenthetical to this lead-in language to specify that, instead of applying the procedures outlined in Paras. 802.02 and 802.03, the Exchange will instead commence immediate suspension and delisting procedures if the individual paragraph of Section 802.01D so specifies). This proposed parenthetical provision in the lead-in to Section 802.01D will make the lead-in consistent with the Exchange's proposal to include a provision in the proposed new paragraph of that rule providing that any listed company that is deemed to be unsuitable for continued listing because of a change of business operations will be subject to immediate suspension and delisting procedures.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act[8] in particular, in that it is designed 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 and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes it is consistent with the protection of investors to amend Section 802.01D to provide the Exchange with the discretion to immediately commence suspension and delisting procedures in accordance with Section 804.00 of the Manual with respect to a listed company that has changed its primary business focus to a new area of business that it was not engaged in at the time of its original listing or which was immaterial to its operations at the time of its original listing. The Exchange notes that investors who acquired the company's stock prior to this change in operations (including, in many cases, in connection with the company's initial public offering) may have made their investment decision based on the company's disclosure about its original business and might not have made their investment if they had been aware of how the company would change. In addition, the Exchange is concerned that a listed company may change its business operations to a line of business that would have given rise to a concern about the suitability for listing of the company had it been in engaged in that line of business at the time of its application for listing. The Exchange notes that taking delisting action in such cases would be discretionary and that the Exchange would undertake such action only after a careful analysis of the company's suitability for continued listing, taking into account all relevant factors, including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the company. In making these determinations, the Exchange would focus its analysis on whether it would have accepted the listed company for initial listing if it had been engaged in its modified business at the time of original listing. The Exchange notes that this analysis will focus on the qualitative aspects of the company's suitability for listing and will not entail an application of the quantitative standards for initial listing.

The proposed inclusion of new parenthetical language in the lead-in to Section 802.01D makes that lead-in consistent with the proposed new paragraph with respect to a company's change in business, as it provides that

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[6] For example, Bit Brother, a company listed on Nasdaq, initially focused on selling tea products but ultimately changed its business line to crypto. After three reverse splits, one of which was quite large (1000:1), the company was still unable to regain sustained compliance with listing standards. The stock was delisted from Nasdaq in February 2024. *See https://www.wsj.com/finance/stocks/as-trading-frenzies-grip-penny-stocks-criticism-of-nasdaq-grows-8bd4118b* (Feb 23, 2024).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

he Exchange can immediately suspend and delist a company under Section 802.01D where the applicable paragraph of the rule so provides, as is the case with the proposed new provision with respect to changes in business operations.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that there are several listing venues and that any company that the Exchange deemed unsuitable for continued listing under the proposed rule could apply for listing on one or more other exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period *up to 90 days* (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, as modified by Amendment No. 1, or

(B) institute proceedings to determine whether the proposed rule change as modified by Amendment No. 1, should be 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, as modified by Amendment No. 1, 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–NYSE–2024–21 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–NYSE–2024–21. 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–NYSE–2024–21 and should be submitted on or before May 16, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–08802 Filed 4–24–24; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99994; File No. 4–820]

Options Price Reporting Authority; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Amendment To Modify Section 5.2(c)(iii) of the OPRA Plan Relating to Dissemination of Exchange Proprietary Data Information

April 19, 2024.

I. Introduction

On November 8, 2023, the Cboe BZX Exchange, Inc. (''BZX Options''), Cboe Exchange, Inc. (''Cboe Options''), Cboe C2 Exchange, Inc. (''C2 Options''), and Cboe EDGX Exchange, Inc. (''EDGX Options'') (collectively, the ''Sponsors'' or ''Cboe'') filed with the Securities and Exchange Commission (''Commission'') a proposed amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan''). The proposed amendment was published for comment in the **Federal Register** on January 22, 2024.[1]

This order institutes proceedings, under Rule 608(b)(2)(i) of Regulation NMS,[2] to determine whether to approve or disapprove the proposed amendment or to approve the proposed amendment with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.

II. Proceedings To Determine Whether To Approve or Disapprove the Proposed Amendment

The Commission is instituting proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,[3] and Rules 700 and 701 of the Commission's Rules of Practice,[4] to determine whether to approve or disapprove the proposed amendment or to approve the proposed amendment with any changes or subject to any conditions the Commission deems necessary or appropriate. The Commission is instituting proceedings to have sufficient time to consider the issues raised by proposed amendment, including comments received.

[1] *See* Options Price Reporting Authority; Notice of Filing of Proposed Amendment to Modify Section 5.2(c)(iii) of the OPRA Plan Relating to Dissemination of Exchange Proprietary Data Information, Securities Exchange Act Release No. 99345 (Jan. 16, 2024), 89 FR 3963 (Jan. 22, 2024) (''Notice''). Comments received in response to the Notice can be found on the Commission's website at *https://www.sec.gov/comments/4-820/4-820.htm.*

[2] 17 CFR 242.608(b)(2)(i).

[3] *Id.*

[4] 17 CFR 201.700; 17 CFR 201.701.

Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed amendment to inform the Commission's analysis.

Rule 608(b)(2) of Regulation NMS provides that the Commission ''shall approve a national market system plan . . ., with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan . . . is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.'' [5] Rule 608(b)(2) further provides that the Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding.[6] In this order, pursuant to Rule 608(b)(2)(i) of Regulation NMS,[7] the Commission is providing notice of the grounds for disapproval under consideration:

- Whether, consistent with Rule 608 of Regulation NMS, the Sponsors have demonstrated that the proposed amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act.[8]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder. . . is on the plan participants that filed the NMS plan filing.'' [9] The description of the NMS plan filing, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.[10] Any failure by the Sponsors to provide such detail and specificity may result in the Commission not having a sufficient basis to make an affirmative finding that the NMS plan filing is consistent with the Exchange Act and the applicable rules and regulations thereunder.[11]

III. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposed amendment. In particular, the Commission asks that commenters address the sufficiency and merit of the Sponsors' statements in support of the proposed amendment, in addition to any other comments they may wish to submit about the proposed amendment.

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 608(b)(2)(i) of Regulation NMS,[12] any request for an opportunity to make an oral presentation.[13]

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 4–820 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 4–820. 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 website (*http://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 Sponsors' principal offices. 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 4–820 and should be submitted on or before May 16, 2024. Rebuttal comments should be submitted by May 30, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–08804 Filed 4–24–24; 8:45 am]

BILLING CODE 8011–01–P

[5] 17 CFR 242.608(b)(2) (referring to the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.,* (''Act'' or ''Exchange Act'')).

[6] *See id.*

[7] *See* 17 CFR 242.608(b)(2)(i).

[8] *See* 17 CFR 242.608(b)(2).

[9] 17 CFR 201.701(b)(3)(ii).

[10] *See id.*

[11] *See id.*

[12] 17 CFR 242.608(b)(2)(i).

[13] Rule 700(c)(ii) of the Commission's Rules of Practice provides that ''[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views.'' 17 CFR 201.700(c)(ii).

[14] 17 CFR 200.30–3(a)(85).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99995; File No. SR–NYSEAMER–2024–26]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify Rule 980NYP

April 19, 2024

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on April 12, 2024, NYSE American LLC (''NYSE American'' or ''Exchange'') 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

The Exchange proposes to modify Rule 980NYP (Electronic Complex Order Trading) to specify that a

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

Complex Customer Cross Order received during a Complex Order Auction (''COA'') would result in the early end of the COA. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Rule 980NYP (Electronic Complex Order Trading) to specify that a Complex Customer Cross (''Complex C2C'') Order received during a COA would result in the early end of the COA. This proposed functionality is not new or novel and mirrors a recently adopted rule requiring that a COA in progress ends early upon the receipt of a Complex QCC Order in the same complex strategy as the COA.[4] As discussed below, the reasons justifying the early end of a COA upon the receipt of a Complex QCC Order apply equally to the required early end of a COA upon receipt of a Complex C2C Order in the same complex strategy.[5]

Rule 980NYP reflects how Electronic Complex Orders (''ECOs'') will trade on the Exchange[6] and paragraph (f) to this rule describes the handling of ECOs submitted to the Complex Order Auction (COA) process.[7] When a COA Order initiates a COA, the Exchange disseminates a Request for Response (''RFR'') to solicit potentially price-improving ECO interest—which solicited interest includes interest designated to respond to the COA (*i.e.,* COA GTX Orders) and unrelated price-improving ECO interest (resting and newly arriving) that arrives during the Response Time Interval (each an ''RFR Response'') (collectively, the ''auction interest'').[8] The COA lasts for the duration of the Response Time Interval unless, during the COA, the Exchange receives certain options trading interest that requires the COA to conclude early.[9] When the COA concludes, the COA Order executes first with price-improving ECO interest, next with any contra-side interest, including the leg markets (if permissible),[10] and any remaining balance (that is not cancelled) is ranked in the Consolidated Book (the ''Consolidated Book'' or ''Book'').[11]

Once the COA Order executes to the extent possible—whether with the best-priced Complex Orders or the best-priced interest in the leg markets—and is placed in the Book, the Exchange will update its complex order book and, if applicable, the Exchange BBO (as a result of any executions of the COA Order with the leg markets).

The Exchange proposes to modify Rule 980NYP(f)(3)(E) to add an additional early end scenario to specify that a COA in progress will end early any time there is a Complex C2C Order submitted in the same complex strategy as the COA Order.[12] By its terms, a Complex C2C Order ''that is not rejected'' by the Exchange, ''will immediately trade in full at its limit price.''[13]

To avoid rejection, a Complex C2C Order must satisfy certain price validations, including that each option leg may not be priced worse than the Exchange BBO; and, that the transaction price must be equal to or better than the best-priced Complex Orders, unless the best-priced Complex Orders contains displayed Customer interest, in which case the transaction price must improve such interest.[14] In addition, the price of a Complex C2C Order must be priced at or between the DBBO;[15] provided, however, that the Complex C2C Order may not equal the DBBO if the DBBO is calculated using the Exchange BBO and the Exchange BBO for any component of the complex strategy on either side of the market includes displayed Customer

[4] *See* Rule 980NYP(f)(3)(E). *See also* Securities Exchange Act Release No. 99354 (January 17, 2024), 89 FR 4358 (January 232 [sic], 2024) (SR–NYSEAMER–2024–03) (adopting, on an immediately effective basis, Rule 980NYP(f)(3)(E), which specifies that a COA in progress ends early upon receipt of a Complex QCC Order in the same complex strategy). The Exchange notes that the same rule change has been adopted on its affiliated options exchange, NYSE Arca Inc. *See* Arca Rule 6.91–O(f)(3)(E). *See* Securities Exchange Act Release No. 99597 (February 23, 2024), 89 FR 14906 (February 29, 2024) (SR–NYSEARCA–2024–17) (adopting, on an immediately effective basis, Arca Rule 6.91P–O (f)(3)(E) which specifies that a COA in progress ends early upon receipt of a Complex QCC Order in the same complex strategy).

[5] *See, e.g., id.,* 89 FR, at 4359.

[6] *See generally* Rule 980NYP (Electronic Complex Order Trading). Unless otherwise specified, all capitalized terms used herein have the same meaning as is set forth in Rule 980NYP.

[7] *See* Rules 980NYP(f) (Execution of ECOs During a COA), (f)(1) (Initiation of a COA), (f)(2) (Pricing of a COA). *See also* Rule 980NYP(a)(3)(A) (defining a ''COA Order'' as an ECO designated as eligible to initiate a COA).

[8] *See* Rules 980NYP(a)(3)(B) (defining, and detailing the information included in, each RFR); (a)(3)(C) (defining each ''RFR Response'' as, among other things, ''any ECO'' received during the Response Time Interval that is in the same complex strategy as, and is marketable against, the COA Order); and (a)(3)(D) (defining the Response Time Interval as the period during which RFR Responses may be entered, which period ''will not be less than 100 milliseconds and will not exceed one (1) second,'' as determined by the Exchange and announced by Trader Update). *See* Rule 980NYP(b)(2)(C) (defining a ''COA GTX Order,'' including that such order is submitted in response to an RFR announcing a COA and will trade with the COA Order to the extent possible and then cancel).

[9] *See* Rule 980NYP(f)(3)(A)–(E) (setting forth the circumstances under which a COA will conclude before the end of the Response Time Interval, including, as discussed *infra,* upon receipt of a Complex QCC Order in the same complex strategy as the COA).

[10] The Exchange notes that there are certain limitations to how an ECO, including a COA Order post-COA, may interact with the leg markets. *See, e.g.,* Rule 980NYP(e)(1)(A) (providing, in relevant part, that the leg markets will trade first with an ECO, but only if the legs can execute with the ECO ''in full or in a permissible ratio,'' and, once the leg markets trade with the ECO to the extent possible, such ECO will trade with same-priced ECOs resting in the Book). *See also* Rule 980NYP(e)(1)(C)–(D) (describing ECOs that are not permitted to trade with the leg markets).

[11] *See* Rule 980NYP(f)(4)(A)–(C) (Allocation of COA Orders) (providing, in relevant part, that when a COA ends early or at the end of the Response Time Interval, a COA Order trades first with price-improving interest, next ''with any contra-side interest, including the leg markets, unless the COA is designated as a Complex Only Order'' and any remaining portion is ranked in the Consolidated Book and the COA Order is processed as an ECO pursuant to Rule 980NYP(e) (Execution of ECOs During Core Trading Hours). *See* Rule 900.2NY (defining Consolidated Book as ''the Exchange's electronic book of orders and quotes.'').

[12] *See* proposed Rule 980NYP(f)(3)(E).

[13] *See* Rule 900.3NYP(g)(2)(A) (providing that a Customer Cross (''C2C'') Order, including a Complex C2C Order, ''that is not rejected per paragraph (g)(2)(B) [Execution of C2C Orders] or (C) [Execution of Complex C2C Orders] below will immediately trade in full at its limit price'').

[14] *See* Rule 900.3NYP(g)(2)(C).

[15] The DBBO establishes a derived (theoretical) bid or offer for a particular complex strategy. *See* Rule 980NYP(a)(5) (defining the DBBO and providing that the bid (offer) price used to calculate the DBBO on each leg will be the Exchange BB (BO) (if available), bound by the maximum allowable Away Market Deviation). The Away Market Deviation, as defined in Rule 980NYP(a)(1), ensures that an ECO does not execute too far away from the prevailing market. Rule 980NYP(a)(5) also provides for the establishment of the DBBO in the absence of an Exchange BB (BO), or ABB (ABO), or both. A Complex C2C Order will not be processed if there is no DBBO for any leg of the strategy either because there is no Exchange BBO or Away BBO for a leg of the complex strategy, or the best bid and offer prices for a leg are locked or crossed, per Rule 980NYP(a)(5)(B) or (a)(5)(C). *See* Rule 900.3NYP(g)(2)(C).

interest.[16] Specifically, if the DBB (DBO) includes a displayed Customer interest on the Exchange, the transaction price must improve the DBB (DBO) by at least one cent ($0.01).[17]

As noted above, until a COA concludes, the Book is not updated to reflect any COA Order executions (with price-improving auction interest or with resting ECO or leg market interest) or any balance of the COA Order ranking in the Book. Thus, to allow the later-arriving Complex C2C Order to be evaluated based on the most up-to-date Book, the Exchange proposes to end a COA upon the arrival of a Complex C2C Order in the same complex strategy. This proposed early termination would allow the Exchange to incorporate executions from the COA, or any remaining balance of the COA Order, to conduct the requisite price validations per Rule 900.3NYP(g)(2)(C) for the Complex C2C Order—including based on the Exchange BBO, the DBBO, and best-priced Complex Orders on the Exchange following the COA Order executions and ranking.

Like current Rule 980NYP(3)(f)(E), the proposed rule change would be consistent with current Rule 980NYP(f)(3)(A)–(D), which describes four circumstances that cause the early end of a COA to ensure that later-arriving interest does not trade ahead of a COA Order and to ensure that the Book is updated to reflect executions resulting from the COA. The Exchange believes that the proposed rule change achieves this same objective. As with the existing early end scenarios, the proposed early end of a COA does not prevent the COA Order from trading with any interest, including price-improving interest, that arrived prior to the early termination (*i.e.,* because of a Complex C2C Order in the same complex strategy as the COA). In addition, any portion of the COA Order that does not trade in the COA is placed on the Consolidated Book where it continues to have opportunities to trade.[18]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[19] in general, and furthers the objectives of Section 6(b)(5),[20] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendment to Rule 980NYP(f)(3) regarding the additional circumstance that would cause a COA to end early would promote just and equitable principles of trade because it would ensure that the COA Order is executed to the extent possible and, if applicable, is ranked in the Consolidated Book before the Exchange evaluates the later-arriving Complex C2C Order. As noted above, until the COA concludes, the Book is not updated to reflect any COA Order executions (with price-improving auction interest or with resting ECO or leg market interest) or any balance of the COA Order ranking in the Book. This proposed early termination would then allow the Exchange to incorporate executions from the COA, or any remaining balance of the COA Order, to conduct the requisite price validations for the Complex C2C Order (per Rule 900.3NYP(g)(2)(C)) based on the most up-to-date Book (*i.e.,* based on the DBBO, Exchange BBO, and best-priced Complex Orders on the Exchange following the COA).

As noted herein, the proposed change is being made for the same reasons that a COA in progress would end early upon the receipt of another Cross Order—a Complex QCC Order, per Rule 980NYP(f)(3)(E)—and therefore raises no new or novel issues and would ensure internal consistency of Exchange rules. In addition, Rule 908NYP(f)(A)–(D) describes the other four circumstances under which a COA must end early to ensure that later-arriving interest does not trade ahead of a COA Order and to ensure that the Book is updated to reflect executions resulting from the COA. The Exchange believes that the proposed rule change achieves this same objective. As with each of the early end scenarios, the proposed early end of a COA does not prevent the COA Order from trading with any interest, including price-improving interest, that arrived prior to the early termination (*i.e.,* because of a Complex C2C Order in the same complex strategy as the COA). As such, the proposed change would benefit investors because it would ensure the timely executions of COA Orders (at potentially improved prices) and would also allow a timely execution of the Complex C2C Orders in the same complex strategy as the COA Order. In addition, the proposal would ensure that the prices used to validate a Complex C2C Order would incorporate executions from the COA, or any remaining balance of the COA Order.[21]

For the same reasons articulated when the Exchange adopted Rule 980NYP(f)(3)(E) (early end of a COA upon receipt of a Complex QCC Order), the Exchange believes that its proposed approach would provide the best protection to investors because ending a COA upon receipt of a C2C Order would ensure that the COA Order executes to the extent possible and that the Exchange relies on the most-up-to-date Book (following executions in the COA) to validate the price of the Complex QCC [sic] Order. Thus, the Exchange believes the proposed rule change would promote just and equitable principles of trade because it would help preserve—and maintain investor's confidence in—the integrity of the Exchange's local market.

Finally, the Exchange believes that modifying the rule as proposed would add clarity and transparency to Rule 980NYP regarding the handling of COA Orders.

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 intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would apply in the same manner to all similarly-situated market participants that opt to utilize the COA process, the use of which is voluntary and, as such, market participants are not required to avail themselves of this process.

The Exchange does not believe that its proposed rule change will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change is designed to ensure that both a COA Order and a C2C Order receive timely executions based on current market conditions. To the extent that other options exchanges offer complex order auctions and Complex C2C Orders, such exchanges are free to adopt (if they have not already done so) the early termination provision proposed herein.

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[16] *See* Rule 900.3NYP(g)(2)(C) & (g)(2)(C)(i).

[17] *See id.*

[18] *See* note 11, *supra* (describing that any remaining portion of a COA Order following the COA will be placed on the Consolidated Book and will be processed as an ECO).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] As noted, any portion of the COA Order that does not trade in the COA is placed in the Consolidated Book where it continues to have opportunities to trade. *See, e.g.,* note 12 [sic], *supra.*

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A) of the Act [22] and Rule 19b–4(f)(6) [23] thereunder, the Exchange has designated this proposal as one that effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[24]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [25] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange states that waiver of the operative delay would allow the Exchange to immediately implement the Complex C2C functionality, including the associated early end scenarios in proposed Exchange Rule 980NYP(f)(3)(E). The Commission finds that waiving the operative delay is consistent with the protection of investors and the public interest because it will allow a COA Order in a complex strategy to execute to the extent possible after the Exchange receives a Complex C2C Order in the same strategy while allowing the Exchange to conduct the required price validations for the Complex C2C Order [26] based on a Book that has been updated to reflect any executions of the COA Order, thereby ensuring that the required price validations for the Complex C2C Order have accounted for all trading interest on the Exchange.[27] In addition, any portion of the COA Order that does not execute during the COA may be placed in the Consolidated Book, where it will continue to have opportunities to trade. For these reasons, the Commission designates the proposal operative upon filing.[28]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEAMER–2024–26 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–NYSEAMER–2024–26. 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–NYSEAMER–2024–26 and should be submitted on or before May 16, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–08805 Filed 4–24–24; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2024–0005]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f)(6).

[24] In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[25] 17 CFR 240.19b–4(f)(6)(iii).

[26] *See* Exchange Rule 900.3NYP(g)(2)(C).

[27] The Exchange's proposal to end a COA early when it receives a Complex C2C Order for the same strategy as the COA Order is consistent with current Exchange Rule 980NYP(f)(3)(E). Specifically, as discussed above, Exchange Rule 980NYP(f)(3)(E) currently states that a COA will end early if the Exchange receives a Complex QCC Order in the same complex strategy as the COA order The Exchange proposes to amend Exchange Rule 980NYP(f)(3)(E) to provide that a COA also will end early if the Exchange receives a Complex C2C Order in the same complex strategy as the COA Order. The Exchange states that the purpose of the early termination is the same for both Complex QCC and Complex C2C Orders—to allow the Exchange to conduct the required price validations for a Complex QCC Order or Complex C2C Order based on a Book that has been updated to include any executions from the COA for the same complex strategy. The Exchange states that ending the COA upon receipt of a Complex C2C Order in the same strategy as the COA Order protects investors by ensuring that the COA Order executes to the extent possible and that the Exchange relies on the most-up-to-date Book (following executions in the COA) to validate the price of the Complex C2C Order, which the Exchange believes will help to preserve the integrity of the Exchange's local market.

[28] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[29] 17 CFR 200.30–3(a)(12), (59).

amended, this notice announces a new matching program with the Department of Defense (DOD), Defense Manpower Data Center (DMDC).

DATES: Submit comments on the proposed matching program no later than May 28, 2024.

The matching program will be applicable on May 28, 2024, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2024–0005 so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *http://www.regulations.gov.* Use the *Search* function to find docket number SSA–2024–0005 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (833) 410–1631.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov.* Comments are also available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Interested parties may submit general questions about the matching program to Cynthia Scott, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–1943, or send an email to *Cynthia.Scott@ssa.gov.*

SUPPLEMENTARY INFORMATION: Under this matching program, DoD/DMDC will disclose military retirement payment and survivor benefit payment data to SSA. SSA will use the military retirement payment and survivor benefit payment data to verify information provided by applicants, recipients, deemors (*i.e.,* someone other than the eligible individual or eligible spouse whose income and resources are considered when determining an individual's eligibility for Supplemental Security Income (SSI) and the amount of his or her payment), and beneficiaries of SSI payments and Special Veterans Benefits (SVB).

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

PARTICIPATING AGENCIES:

SSA and DoD/DMDC.

AUTHORITY FOR CONDUCTING THE MATCHING PROGRAM:

This matching agreement between SSA and DoD/DMDC is executed pursuant to the Privacy Act of 1974, as amended by the Computer Matching and Privacy Protection Act of 1988, and the Computer Matching Privacy Protections Amendments of 1990 (Privacy Act) (5 U.S.C. 552a) and the regulations and guidance promulgated thereunder, including Office of Management and Budget (OMB) Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' published at 81 **Federal Register** 94424 (Dec. 23, 2016); OMB Circular No. A–130, ''Managing Information as a Strategic Resource,'' published at 61 FR 49689 (July 15, 2016); and ''Privacy Act of 1974: Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988,'' published at 54 FR 25818 (June 19, 1989).

The legal authority for this exchange is sections 806(b) and 1631(e)(1)(B) and (f) of the Social Security Act (Act) (42 U.S.C. 1006(b) and 1383(e)(1)(B) and (f)). SSA's legal authority to disclose data to DoD/DMDC is section 1106(a) of the Act (42 U.S.C. 1306(a)) and section (b)(3) of the Privacy Act (5 U.S.C. 552a(b)(3)).

PURPOSE(S):

This agreement sets forth the terms, conditions, and safeguards under which the DoD/DMDC will disclose military retirement payment and survivor benefit payment data to the SSA. SSA will use the military retirement payment and survivor benefit payment data to verify information provided by applicants, recipients, deemors (*i.e.,* someone other than the eligible individual or eligible spouse whose income and resources are considered when determining an individual's eligibility for Supplemental Security Income (SSI) and the amount of their payment), and beneficiaries of SSI payments and Special Veterans Benefits (SVB).

The SSI and SVB applicants, recipients, deemors, and beneficiaries provide information about eligibility and entitlement factors (*e.g.,* income, resources, living arrangements). SSA obtains additional information, as necessary, before making any determinations of eligibility, payments, entitlement or benefit amounts or adjustments thereto. Military retirement payments to SSI and SVB applicants, recipients, deemors, and beneficiaries include retired members, or their survivors, of the Uniformed Services, *i.e.,* Army; Navy; Air Force; Marine Corps; Coast Guard; Space Force; and Commissioned Corps of the National Oceanic and Atmospheric Administration (but not including the Commissioned Corps of the U.S. Public Health Service). SSA will obtain military retirement payments through a computer matching program with DoD/DMDC.

CATEGORIES OF INDIVIDUALS:

The individuals whose information is involved in this matching program are SSI and SVB applicants, recipients, deemors, and beneficiaries including retired members, or their survivors, of the Uniformed Services.

CATEGORIES OF RECORDS:

SSA will provide DoD/DMDC with an electronic finder file using a mutually approved secure file transfer application, such as the MFT application. Upon receipt of the electronic file, DoD/DMDC will perform a computer match using all nine digits of the Social Security Number (SSN) against data maintained in the DoD SORN, DMDC 01, ''Defense Manpower Data Center Data Base.'' In the response file, DoD/DMDC will use a mutually approved secure file transfer, such as the MFT application to furnish SSA with matches to the Retired and Survivor Pay file.

SSA will compare DoD/DMDC's data with SSA data recorded in the Supplemental Security Income Record and Special Veterans Benefits system of records, 60–0103.

SYSTEM(S) OF RECORDS:

SSA will disclose records from the ''Supplemental Security Income Record and Special Veterans Benefits'' system of records, 60–0103, last fully published at 71 FR 1830 (January 11, 2006), and updated at 72 FR 69723 (December 10, 2007), 83 FR 31250–31251 (July 3, 2018), 83 FR. 54969 (November 1, 2018), and 89 FR 825 (January 5, 2024). DoD/DMDC will disclose records from the following system of records: DMDC 01, entitled ''Defense Manpower Data Center Data Base,'' last published in full at 84 FR 6383 (February 27, 2019), and amended at 84 FR 8698 (March 11, 2019), 84 FR 15605 (April 16, 2019), and 87 FR 32145 (May 27, 2022).

[FR Doc. 2024–08794 Filed 4–24–24; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 12359]

60-Day Notice of Proposed Information Collection: Request for Approval of Special Validation for Travel to a Restricted Country or Area

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to June 24, 2024.

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2024–0006'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: PPTSpecialValidations@state.gov.*
- *Regular Mail:* Send written comments to: Special Validations, U.S. Department of State, CA/PPT/S/A/AP, 44132 Mercure Circle, P.O. Box 1227, Sterling, VA 20166–1227.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request for Approval for Multiple-Entry Travel to a Restricted Country or Area.
- *OMB Control Number:* 1405–0228.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services, CA/PPT/S/A/AP.
- *Form Number:* No form.
- *Respondents:* Individuals requesting they be granted single or multiple-entry special validation, in accordance with 22 CFR 51.64, to use a U.S. passport to travel to, in, or through a country or area as to which U.S. passports have been declared invalid for such travel pursuant to 22 U.S.C. 211a and Executive Order 11295 (August 5, 1966) and in accordance with 22 CFR 51.63(a).
- *Estimated Number of Respondents:* 150.
- *Estimated Number of Responses:* 150.
- *Average Time per Response for single entry validation request:* 45 minutes.
- *Average Time per Response for multiple-entry validation request:* 90 minutes.
- *Total Estimated Burden Time:* 150 hours.
- *Frequency:* Once per year when the individual wishes to travel to the restricted country or area, with a single-entry validation. Once every two years for individuals with a multiple-entry validation.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- 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.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Secretary of State may exercise authority, under 22 U.S.C. 211a, Executive Order 11295 (August 5, 1966), and 22 CFR 51.63, to invalidate all U.S. passports for travel to a country or area if he determines that any of three conditions exist: The country is at war with the United States; armed hostilities are in progress in the country or area; or there is imminent danger to the public health or physical safety of U.S. travelers in the country or area. The regulations of the Department of State provide that an individual's passport may be considered for validation for travel to, in, or through a country or area despite such restriction if the individual's travel is determined to fall within one of several categories established by the regulation 22 CFR 51.64. Without the requisite validation, use of a U.S. passport for travel to, in, or through a restricted country or area may justify revocation of the passport for misuse under 22 CFR 51.62(a)(3) and subject the traveler to felony prosecution under 18 U.S.C. 1544 for misuse of a passport or other applicable laws.

The categories of persons specified in 22 CFR 51.64(b) as being eligible for consideration for passport validation are as follows:

(a) An applicant who is a professional reporter and journalist whose trip is for the purpose of collecting and making available to the public information about the restricted country or area;

(b) An applicant who is a representative of the American Red Cross or the International Committee of the Red Cross on an officially sponsored Red Cross mission;

(c) An applicant whose trip to the restricted country or area is justified by compelling humanitarian considerations; or

(d) An applicant whose trip to the restricted country or area is otherwise in the national interest.

The proposed information collection solicits data necessary for the Passport Services Directorate to determine whether an applicant is eligible to receive a special validation in their U.S. passport book permitting the applicant to make single or multiple round-trips to a restricted country or area, subject to additional requirements. The information requested consists of the applicant's name; a copy of the front and back of the applicant's valid government-issued photo identification card with the applicant's date of birth and signature; current contact information, including telephone number, email and mailing address; a

statement explaining the reason that the applicant thinks their trip is in the national interest, including proposed travel dates and the applicant's role and responsibilities on the trip; and supporting documentary evidence. For those seeking a multiple-entry special validation, applicants must also identify they are seeking the multiple-entry type of special validation and submit the following: documentation showing the applicant or their organization has a well-established history of traveling to the DPRK to work on well-monitored projects with compelling humanitarian considerations; the applicant's draft itinerary, including dates of travel and what specific work they intend to perform on each trip; and documentation that shows the applicant's humanitarian work requires that they make multiple trips to the DPRK in the next two-year period. Those who are approved for a multiple-entry special validation must also submit a final itinerary detailing dates and purpose of travel at least one month (30 days) prior to each trip to the DPRK while using their multi-entry special validation U.S. passport. Failure to provide the requested information may result in denial of a special validation to use a U.S. passport to travel to, in, or through a restricted country or area.

Effective September 1, 2017, upon determining that there is imminent danger to the public health or physical safety of U.S. travelers in the Democratic People's Republic of Korea (DPRK), the former Secretary of State imposed a passport restriction with respect to travel to the DPRK. Such restriction was further renewed in 2018, 2019, 2020, 2021, 2022, and most recently in 2023 for one year, effective September 1, 2023. The estimated number of recipients represents the Department of State's estimate of the annual number of special validations requests individuals will submit who wish to use their U.S. passport to travel to the DPRK, based on the current number of requests following the implementation of the Secretary of State's passport restriction. At this time, there are no other countries or areas that are the subject of passport restrictions pursuant to 22 CFR 51.63.

Methodology

Instructions for individuals seeking to apply for a special validation to use a U.S. passport to travel to, in, or through a restricted country or area is posted on a web page maintained by the Department (*travel.state.gov*). The web page directs applicants to submit the requested information via email to the Passport Services Directorate (*PPTSpecialValidations@state.gov*) or by mail to Special Validations, U.S. Department of State, CA/PPT/S/A/AP, 44132 Mercure Circle, P.O. Box 1227, Sterling, VA 20166–1227.

Information collected in this manner will be used to facilitate the granting of special validations to U.S. nationals who are eligible. The primary purpose of soliciting the information is to establish whether an applicant is within one of the categories specified in the regulations of the Department of State codified at 22 CFR 51.64(b) and therefore eligible to be issued a U.S. passport containing a special validation enabling him or her to make one or multiple entry round-trips to a restricted country or area, and to facilitate the application for a passport of such applicants.

Donald E. Jacobson,

Acting Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2024–08909 Filed 4–24–24; 8:45 am]

BILLING CODE 4710–05–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36745]

Massachusetts Coastal Railroad, LLC—Modified Certificate of Public Convenience and Necessity

Massachusetts Coastal Railroad, LLC (Mass Coastal), a Class III rail carrier, has filed a notice for a modified certificate of public convenience and necessity [1] under 49 CFR part 1150 subpart C—*Modified Certificate of Public Convenience and Necessity,* for Mass Coastal to operate the Plymouth line between milepost 1.7 at South Braintree, Mass., and milepost 27.1 at Plymouth, Mass. (the Line).

Mass Coastal states the Line was acquired from Penn Central Transportation Company by Massachusetts Bay Transportation Authority (MBTA) subject to an operating easement in Consolidated Rail Corporation (Conrail). (Am. Notice 5.) Conrail applied to abandon the Line under Section 308(b) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 748) in Interstate Commerce Commission (ICC) Docket No. AB 167 (Sub-No. 388), and an operating subsidy was offered by the Commonwealth of Massachusetts under agreement filed with the ICC on February 24, 1982. (Am. Notice 5.) According to Mass Coastal, the subsidy ended on May 26, 1982. (*Id.*) Bay Colony subsequently filed a notice for a modified certificate of public convenience and necessity, and the ICC found the Line qualified for operation under a modified rail certificate. (*Id.*); *see Bay Colony R.R.—Modified Rail Certificate,* FD 29963 (ICC served June 29, 1982). According to Mass Coastal, although Bay Colony's operating agreement with MBTA expired, MBTA agreed in a 1993 letter that Bay Colony would have the first right to negotiate to operate the Line for freight service. (Am. Notice 3–4.) Mass Coastal explains that it has entered into an agreement with Bay Colony to acquire all of Bay Colony's remaining operating rights and rail assets, including its first right to negotiate to operate the Line for freight service.[2] (*See* Am. Notice 3.) Mass Coastal states that MBTA has consented ''to the extent required.'' (Am. Notice 3; *see also id.,* Ex. A (Notice to and Consent of MBTA).) Mass Coastal states that it has received an inquiry from a potential freight shipper and has begun discussions with MBTA regarding an operating agreement. (Am. Notice 4.)

The Line qualifies for a modified certificate of public convenience and necessity. *See Common Carrier Status of States, State Agencies & Instrumentalities & Pol. Subdivs.,* FD 28990F (ICC served July 16, 1981); 49 CFR 1150.22. Mass Coastal states that no subsidy is involved and that there will be no preconditions that shippers must meet to receive service. (Am. Notice 6.) Mass Coastal's notice also includes a certificate of liability insurance coverage. (Am. Notice, Ex. B).

This notice will be served on the Association of American Railroads (Car Service Division), as agent for all railroads subscribing to the car-service and car-hire agreement, at 425 Third Street SW, Suite 1000, Washington, DC 20024; and on the American Short Line and Regional Railroad Association at 50 F Street NW, Suite 500, Washington, DC 20001.

Board decisions and notices are available at *www.stb.gov.*

Decided: April 22, 2024.

[1] Mass Coastal filed a notice on December 15, 2023, and filed an amended notice on March 29, 2023.

[2] On March 29, 2024, Bay Colony filed, in Docket No. FD 29963, a notice of intent to terminate service on the Line, which will become effective on May 28, 2024. *See* 49 CFR 1150.24. Because Mass Coastal now has authority to commence operations at any time, *see* 49 CFR 1150.23(a) (''Operations may commence immediately on the filing'' of the modified certificate), there will be no break in the availability of the Line for freight service.

By the Board, Mai T. Dinh., Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2024–08897 Filed 4–24–24; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No.: FAA–2024–0318; Summary Notice No. –2024–12]

Petition for Exemption; Summary of Petition Received; Stallion 51 Flight Operations LLC

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 15, 2024.

ADDRESSES: Send comments identified by docket number FAA–2024–0318 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: Jimeca Callaham, (202) 267–0312, 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 22, 2024.

Brandon Roberts,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2024–0318.

Petitioner: Stallion 51 Flight Operations LLC.

Section(s) of 14 CFR Affected: §§ 91.9, 91.111(c), 91.315, 119.5(g), and 119.21(a).

Description of Relief Sought: Stallion 51 requests relief from 14 CFR 91.9, 91.111(c), 91.315, 119.5(g), and 119.21(a) to provide a ''hands-on'' warbird flight experience to the public in its four North American P–51D (TF–51) airplanes certificated as limited category civil aircraft. These former-military aircraft are modified dual-cockpit/dual-control variants of the P–51. Customers, under the supervision of a person who holds a flight instructor certificate, will be given the opportunity to manipulate the controls under specified conditions, including aerobatic flight.

[FR Doc. 2024–08881 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2024–0029]

Agency Information Collection Activities: Notice of Request for Reinstatement of a Previously Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for reinstatement of a previously approved information collection.

SUMMARY: The FHWA has forwarded the information collection request described in this notice to the Office of Management and Budget (OMB) to reinstate an information collection. We published a **Federal Register** Notice with a 60-day public comment period on this information collection on February 9, 2024. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by May 28, 2024.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 0029 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.*

Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Wendy McAbee, 202–366–5658, Office of Bridges and Structures, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The comments and FHWA's responses to the 60-day notice published February 9, 2024, at 89 FR 9285 are below:

There was one public comment to the **Federal Register** notice referencing a Consumer Affairs report on roadway pavement conditions nationwide. The comment did not indicate what year the data analyzed for the report was collected nor whether tunnel lane miles were considered in that analysis.

Condition of the roadway wearing surface is collected in the NTI and can be used for analysis and reporting of roadway pavement conditions nationwide. The number of lane miles collected in the NTI is miniscule when compared to the number of lane miles

that represent all roadways on the National Highway System (NHS) and would have little effect on the Nation's pavement condition.

Title: National Tunnel Inspection Program.

OMB Control: 2125–0640.

Background: This collection is necessary to meet legislative requirements of Title 23 United States Code section 144, and the Code of Federal Regulations, 23 Highways Part 650, Subpart E—National Tunnel Inspection Standards which require States, Federal Agencies, and Tribal Governments to: (1) perform, and report inventory and element data from, initial, routine, damage, in-depth, and special inspections as appropriate for all highway tunnels on public roads, and (2) report critical findings on highway tunnels. The critical findings information is periodically provided to the FHWA. The tunnel information is used for multiple purposes, including: (1) the determination of the condition of the Nation's tunnels; (2) for various reports to Congress on Tunnel Safety; (3) for conducting oversight of the National Tunnel Inspection Program at the State, Federal agency, and Tribal level; and (4) for strategic national defense needs.

Respondents: 42 States, the District of Columbia, Puerto Rico and 4 Federal agencies. The number of inspections per respondent varies in accordance with the National Tunnel Inspection Standards.

Frequency: Annually.

Estimated Average Burden per Response: The estimated average burden for each tunnel inspection is 40 hours. The estimated average burden for reporting critical findings is 40 hours.

Estimated Total Annual Burden Hours: The annual burden hours associated with this renewal is 15,880 hours. This estimated figure is based on annual instances for tunnel inspections multiplied by 40 hours (13,960 hours); plus 40 hours for follow up on critical findings multiplied by 48 respondents (1,920 hours) for a combined annual burden of 15,880 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued on: April 22, 2024.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2024–08867 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0106; FMCSA–2013–0442; FMCSA–2015–0115; FMCSA–2015–0119; FMCSA–2015–0321; FMCSA–2017–0181; FMCSA–2017–0254; FMCSA–2019–0030; FMCSA–2019–0036; FMCSA–2019–0206; FMCSA–2020–0045; FMCSA–2020–0046; FMCSA–2021–0026; FMCSA–2022–0042]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 22 individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV." The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions are applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before May 28, 2024.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Docket No. FMCSA–2013–0106, Docket No. FMCSA–2013–0442, Docket No. FMCSA–2015–0115, Docket No. FMCSA–2015–0119, Docket No. FMCSA–2015–0321, Docket No. FMCSA–2017–0181, Docket No. FMCSA–2017–0254, Docket No. FMCSA–2019–0030, Docket No. FMCSA–2019–0036, Docket No. FMCSA–2019–0206, Docket No. FMCSA–2020–0045, Docket No. FMCSA–2020–0046, Docket No. FMCSA–2021–0026, or Docket No. FMCSA–2022–0042 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov/,* insert the docket number (FMCSA–2013–0106, FMCSA–2013–0442, FMCSA–2015–0115, FMCSA–2015–0119, FMCSA–2015–0321, FMCSA–2017–0181, FMCSA–2017–0254, FMCSA–2019–0030, FMCSA–2019–0036, FMCSA–2019–0206, FMCSA–2020–0045, FMCSA–2020–0046, FMCSA–2021–0026, or FMCSA–2022–0042) in the keyword box and click "Search." Next, sort the results by "Posted (Newer-Older)," choose the first notice listed, and click on the "Comment" button. Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2013–0106, Docket No. FMCSA–2013–0442, Docket No. FMCSA–2015–0115, Docket No. FMCSA–2015–0119, Docket No. FMCSA–2015–0321, Docket No. FMCSA–2017–0181, Docket No. FMCSA–2017–0254, Docket No. FMCSA–2019–0030, Docket No. FMCSA–2019–0036, Docket No.

FMCSA–2019–0206, Docket No. FMCSA–2020–0045, Docket No. FMCSA–2020–0046, Docket No. FMCSA–2021–0026, or Docket No. FMCSA–2022–0042), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *www.regulations.gov/,* insert the docket number (FMCSA–2013–0106, FMCSA–2013–0442, FMCSA–2015–0115, FMCSA–2015–0119, FMCSA–2015–0321, FMCSA–2017–0181, FMCSA–2017–0254, FMCSA–2019–0030, FMCSA–2019–0036, FMCSA–2019–0206, FMCSA–2020–0045, FMCSA–2020–0046, FMCSA–2021–0026, or FMCSA–2022–0042) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

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. FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2013–0106, FMCSA–2013–0442, FMCSA–2015–0115, FMCSA–2015–0119, FMCSA–2015–0321, FMCSA–2017–0181, FMCSA–2017–0254, FMCSA–2019–0030, FMCSA–2019–0036, FMCSA–2019–0206, FMCSA–2020–0045, FMCSA–2020–0046, FMCSA–2021–0026, or FMCSA–2022–0042) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. 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 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statutes also allow the Agency to renew exemptions at the end of the 5-year period. However, FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The 22 individuals listed in this notice have requested renewal of their exemptions from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 22 applicants has satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition. The 22 drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. In addition, for commercial driver's license (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of May and are discussed below.

As of May 6, 2024, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following nine individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Gary Clark (KY)
Michael Curtis (DE)
Callon Hegman (IL)
Zachary Henson (IL)
Gregory Johnson (NC)
Robert Lombardo (CA)

Armando Macias-Tovar (FL)
Joseph Mendoza (IN)
Douglas Slagel (OH)

The drivers were included in docket number FMCSA–2013–0106, FMCSA–2017–0181, FMCSA–2021–0026, or FMCSA–2022–0042 Their exemptions are applicable as of May 6, 2024 and will expire on May 6, 2026.

As of May 15, 2024, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Barry Dull (OH)
Robert J. Forney (WI)
Matthew Heinen (MN)
Logan Hertzler (PA)
Preston Kanagy (TN)
Kenneth Lewis (NC)
Kevin Market (OH)
Gary Olsen (MN)
Randy Pinto (PA)
Jeffrey Totten (KS)
Paul Vitous (WA)
Thomas Vivirito (PA)
Robert J. Wenner (MN)

The drivers were included in docket number FMCSA–2013–0442, FMCSA–2015–0115, FMCSA–2015–0119, FMCSA–2015–0321, FMCSA–2017–0181, FMCSA–2017–0254, FMCSA–2019–0030, FMCSA–2019–0036, FMCSA–2020–0045, or FMCSA–2020–0046. Their exemptions are applicable as of May 15, 2024 and will expire on May 15, 2026.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) each driver must remain seizure-free and maintain a stable treatment during the 2-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified ME, as defined by § 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based on its evaluation of the 22 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2024–08811 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No.: FTA–2023–0006]

Notice of Availability of Programmatic Assessment of Greenhouse Gas Emissions From Transit Projects

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of availability.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of a Programmatic Assessment of Greenhouse Gas Emissions from Transit Projects (Programmatic Assessment). On September 25, 2023, FTA announced in the **Federal Register** the availability of the draft Programmatic Assessment and requested public comment. FTA received six comment letters and presents its responses to those comments in this notice.

DATES: The final Programmatic Assessment is effective immediately.

ADDRESSES: The final Programmatic Assessment will be made available in the U.S. Government's electronic docket site at *https://www.regulations.gov/docket/FTA-2023-0006* and on the FTA website at *https://www.transit.dot.gov/regulations-and-programs/environmental-programs/climate-considerations.*

FOR FURTHER INFORMATION CONTACT: Megan Blum, Office of Environmental Programs, (202) 366–0463, *Megan.Blum@dot.gov,* or Alexandra Brun, Office of Environmental Programs, (202) 366–7469, *Alexandra.Brun@dot.gov;* Mark Montgomery, Office of Chief Counsel, (202) 366–1017, *Mark.Montgomery@dot.gov.* Office hours are from 9:00 a.m. to 5:00 p.m. ET, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

The National Environmental Policy Act (NEPA) requires Federal agencies to disclose and analyze the environmental effects of their proposed actions. In 2016, the Council on Environmental Quality (CEQ) issued the Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (81 FR 51866) (2016 CEQ guidance), which provided a framework for agencies to consider the effects of a proposed action on climate change, as indicated by its estimated GHG emissions and advised agencies to assess the effects of climate change on their proposed actions. The 2016 CEQ guidance also acknowledged that incorporation by reference is of great value in considering GHG emissions or the implications of climate change for the proposed action and its environmental effects. The 2016 CEQ guidance noted that an agency may decide that it would be useful and efficient to provide an aggregate analysis of GHG emissions or climate change effects in a programmatic analysis and then incorporate that analysis by reference into future NEPA reviews. FTA considers it practicable to assess the effects of GHG emissions and climate change for transit projects at a programmatic level, where possible.

In January 2017, FTA published a Programmatic Assessment of Greenhouse Gas Emissions from Transit Projects (82 FR 5636) based on the 2016 CEQ guidance framework. In January 2023, CEQ issued the National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change (88 FR 1196) (2023 CEQ guidance) to assist agencies in analyzing greenhouse gas (GHG) emissions and climate change effects of their proposed actions under NEPA. The 2023 CEQ guidance continues to support a programmatic approach for assessing GHG emissions from transit projects.

The 2024 Programmatic Assessment of Greenhouse Gas Emissions from

Transit Projects (Programmatic Assessment) updates and supersedes the 2017 Programmatic Assessment in accordance with the 2023 CEQ guidance. The 2024 Programmatic Assessment is a NEPA streamlining tool that creates greater efficiency by: (1) reporting on whether certain types of proposed transit projects merit detailed analysis of their GHG emissions at the project-level; and (2) providing a source of data and analysis for FTA and its project sponsors to reference in future environmental documents for projects where detailed, project-level GHG analysis would provide only limited information beyond what is collected and considered in the Programmatic Assessment. The Programmatic Assessment is intended to update and supersede FTA's January 2017 Programmatic Assessment of Greenhouse Gas Emissions from Transit Projects (82 FR 5636).

The Programmatic Assessment presents results from an analysis to estimate direct and indirect GHG emissions generated from the construction, operations, and maintenance phases for a sample of bus rapid transit, streetcar rail, light rail, commuter rail, and heavy rail projects, as well as an estimate of personal vehicle emissions displaced due to transit's ''ridership effect.'' Emissions estimates were calculated using FTA's Transit Greenhouse Gas Estimator (GHG Estimator), version 3.0 (*https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/ftas-transit-greenhouse-gas-emissions-estimator*), which is an Excel-based tool that allows users to calculate partial lifecycle GHG emissions estimates by transit mode based on limited data inputs. The 2023 CEQ guidance also indicates that project proponents should place potential GHG emissions and their impacts in appropriate context. In order to provide additional context for the GHG estimates included in the Programmatic Assessment, the net social benefits of reduced operational emissions resulting from each transit project in the sample were estimated.

The Programmatic Assessment provides a reference for FTA and its project sponsors to use in future NEPA documents to describe the effects of proposed transit investments on partial lifecycle GHG emissions. The Programmatic Assessment's results can inform transit project proponents who are considering the GHG emissions of future transit investments or who might independently want to evaluate the GHG emissions benefits and cost of such investments.

Comments Received

On September 25, 2023, FTA announced in the **Federal Register** the availability of the draft Programmatic Assessment and requested public comment. As of the date of issuance of this notice of availability, FTA considered all comments received in the docket. FTA received comments from one transit agency, two state Departments of Transportation (DOT), one trade association, one nonprofit organization, and one member of the public. This notice discusses the comments FTA received, organized here by topic, and provides FTA's responses to those comments.

Comment: One state DOT commented that the Programmatic Assessment does not include GHG emissions associated with the induced VMT that can occur if new highway capacity is constructed in lieu of transit.

Response: The Programmatic Assessment is intended to serve as a NEPA streamlining tool for transit projects. FTA is not attempting to quantify GHG emissions for highway projects, nor is the Programmatic Assessment aiming to compare potential transit projects to potential highway projects. Furthermore, highway capacity projects are not usually considered reasonable alternatives to proposed transit projects during the environmental review (the stage in which a transit agency would be expected to refer to the Programmatic Assessment).

Comment: A state DOT asserted the sample size of transit projects used in the analysis could lead to unreliable results.

Response: FTA first stresses that the use of the Programmatic Assessment (or the GHG Estimator) as a reference and NEPA streamlining tool is entirely voluntary. FTA also notes that the sample of transit projects analyzed in the Programmatic Assessment included 68 transit projects that applied for funding through the 49 U.S.C. 5309 Capital Investment Grants (CIG) Program. This represents an increase of 32 transit projects as compared to the sample used in the 2017 Programmatic Assessment (36 transit projects). FTA believes the sample relied upon is representative of transit project types that will seek FTA funding and, consequently, require compliance with NEPA. In cases in which a proposed project's characteristics and assumptions are similar to the sample, FTA recommends that transit agencies considering bus rapid transit, streetcar, light rail, and commuter rail projects incorporate the Programmatic Assessment by reference into their NEPA analyses.

Comment: A state DOT questioned the use of forecasts of automobile VMT reductions as the metric by which transit operations and GHG emissions be measured, pointing out that ratios of displaced automobile VMT to transit VMT in the Programmatic Assessment ranged from 1:1 to 48:1.

Response: FTA acknowledges there are other metrics by which transit operations can be measured. The results presented in the Programmatic Assessment rely on an analysis that uses GHG emissions per VMT as the metric to evaluate vehicle operations. Other metrics, such as emissions per revenue vehicle hour, which measures operational efficiency, and emissions per passenger- or seat-mile, which takes service productivity into account, offer useful benchmarks. The Programmatic Assessment does recast results to account for passenger loads for each transit mode. Those results suggested that even during times of lower than usual transit ridership, all transit modes can be expected to result in net annual GHG emissions reductions when considering GHG emissions on a per-passenger basis. Adding further information is inconsistent with the information transit agencies provide in CIG templates—the primary data source for the transit project sample. Additionally, the methodology used in the Programmatic Assessment is optional and may be tailored to a specific transit project. FTA notes that Appendix B offers characteristics for each individual project in the sample of transit projects referred to for the assessment. FTA also reiterates the Programmatic Assessment's point that the ratios that the comment identified were all for the sample heavy rail projects. Given the limited number of projects within that heavy rail sample and the wide variation in the estimated GHG emissions across it, the Programmatic Assessment recommends that FTA's GHG Estimator or another locally recommended approach be used to make project-specific GHG emissions estimates in NEPA analyses for heavy rail projects.

Comment: A state DOT stated that findings for transit projects other than large-scale, fixed-guideway projects are not included.

Response: FTA clarifies that the Programmatic Assessment examines the GHG impacts of project types included in CIG templates. The analysis presented is intended to be a voluntary NEPA streamlining tool, providing a source of data and analysis for FTA and its project sponsors to reference in

future environmental documents for projects where detailed, project-level GHG analysis would provide only limited information beyond what is collected and considered in the Programmatic Assessment.

Comment: A state DOT asserted that region-based electricity factors should be used.

Response: The Programmatic Assessment methodology relies on the best available data and tools to estimate the GHG emissions associated with transit projects. In the Programmatic Assessment, the emissions factors associated with electrically powered vehicles use the ''U.S. Mix'' region from the Environmental Protection Agency's (EPA's) eGRID2020, which represents an average value for the country. FTA acknowledges here and in the Programmatic Assessment that the ''U.S. Mix'' may differ from region-specific factors. For regions with cleaner electricity generation mixes than the U.S. Mix, this approach will overestimate emissions for electrically powered vehicles. Likewise, this approach will underestimate emissions for the same in regions where electricity production is less clean than the U.S. Mix. Figure 4–2 in the Programmatic Assessment illustrates the differences in the GHG emissions associated with an example light rail project across different eGRID subregions. Appendix A in the Programmatic Assessment includes the eGRID sub-region electricity emission factors; these factors are incorporated in the Programmatic Assessment's accompanying Estimator Tool. Transit agencies can replicate the methodology that the Programmatic Assessment establishes using locally available data sets, if they choose to do so.

Comment: One state DOT requested additional clarification about the sample projects.

Response: FTA developed the Programmatic Assessment to provide transit agencies with an analysis of the effects of GHG emissions for certain types of projects that they can reference in future environmental review documents to meet NEPA requirements without necessitating a project-specific evaluation for that impact area. The sample of transit projects analyzed in the Programmatic Assessment included 68 transit projects that applied for funding through the CIG Program. Specific characteristics of those projects are in Appendix B of the Programmatic Assessment. Additional information regarding CIG projects is available in annual reports to Congress that FTA is required by law to prepare (*https://www.transit.dot.gov/funding/grant-programs/capital-investments/annual-report-funding-recommendations*).

Comment: One state DOT recommended that more details be provided to explain the differences in results included in the draft Programmatic Assessment relative to the results reported in the superseded 2017 Programmatic Assessment.

Response: For construction GHG emissions data, the 2017 Programmatic Assessment relied on the Infrastructure Carbon Estimator version 1 (ICE v1). A second version of that tool, ICE v2, was developed in the interim between the 2017 Programmatic Assessment and the current Programmatic Assessment. The current Programmatic Assessment relied on ICE v2. Construction GHG emission rates included in ICE v2 are higher than those in ICE v1 due to the use of higher quality data and modeling. Furthermore, for bus rapid transit projects specifically, FTA reduced the period over which GHG emissions were amortized from 50 years to 40 years to reflect minimum useful lifespans, per FTA Circular 5010.1E, more accurately. These changes result in GHG emissions estimates that appear higher in the current Programmatic Assessment than in the 2017 Programmatic Assessment. FTA will note the ICE versioning differences in a footnote in the Programmatic Assessment and clarify the minimum useful lifespan figure used for bus rapid transit.

Comment: One state DOT recommended additional factors be considered when applying the GHG calculation methodology to the no action alternatives in Appendix C.

Response: The 2023 CEQ guidance suggests that NEPA reviews identify the current and projected future state of the affected environment without the proposed action (*i.e.,* the no action alternative), which serves as the baseline for considering the effects of the proposed action and its reasonable alternatives. In the context of the Programmatic Assessment, the effects of the no action alternative are represented by the GHG emissions from automobile use that is expected to occur in the absence of the transit project (*i.e.,* automobile VMT displaced in the action alternative). Other than displaced automobile VMT, data on other aspects of the no action alternative, such as displaced GHG emissions from road maintenance and construction, were not included. Use of the Programmatic Assessment by transit agencies is voluntary; transit agencies that want to develop more holistic estimates of GHG emissions for a project-specific no action alternative may opt to do so.

Comment: One nonprofit organization: (1) requested additional clarification on when project-specific analysis is required; and (2) recommended that FTA work with the Federal Highway Administration (FHWA) to conduct programmatic GHG-related emissions evaluations during the long-range transportation planning process.

Response: FTA reiterates its recommendation that in cases in which the project characteristics and assumptions are similar to the sample of analyzed projects, transit agencies considering bus rapid transit, streetcar, light rail, and commuter rail projects may incorporate the Programmatic Assessment by reference into their NEPA analyses. In these cases, no additional project-specific GHG emissions analyses would be necessary for purposes of NEPA. Use of the Programmatic Assessment is voluntary, and transit agencies may choose to conduct their own GHG emissions analyses if they determine the Programmatic Assessment does not meet their project needs. FTA will evaluate the Programmatic Assessment and the accompanying Estimator, as appropriate, to provide better estimates of GHG emissions for transit projects. The Estimator is available for transit agencies that wish to have a more tailored estimate of emissions or for which a project differs substantially from those used to create the Programmatic Assessment.

On the second general point, during development of the 2017 Programmatic Assessment FTA worked with FHWA to discuss approaches to considering GHG emissions consistent with the 2016 CEQ guidance. FTA will continue to explore best practices for considering GHG emissions at other stages during transportation project development, including long-range transportation planning.

Comment: One trade association suggested that FTA exclude maintenance projects from requirements for GHG assessments.

Response: FTA notes that use of Programmatic Assessment as a reference and NEPA streamlining tool is entirely voluntary. The Programmatic Assessment does not introduce any new requirements. Rather, the Programmatic Assessment recommends that NEPA reviews for new individual light rail, street car, bus rapid transit, and commuter rail projects incorporate by reference the analysis of construction-related, operations-related, and maintenance-related upstream and downstream GHG emissions in cases in which the project characteristics and

assumptions are similar to the sample projects analyzed The Programmatic Assessment does not consider emissions from or provide recommendations for projects that maintain existing systems.

Comment: One trade association suggested that FTA recognize the critical influence of transit on energy-efficient community design.

Response: FTA revised the Programmatic Assessment to further highlight energy-efficient community design as a benefit of transit. The report notes that transit enables denser, more energy-efficient land use patterns that keep GHG emissions low through fewer and/or shorter driving trips, more trips on foot or by bicycle, and a reduction in car ownership and use.

Authority: 42 U.S.C. 4321 *et seq.;* 40 CFR 1507.3; 49 CFR 1.81(a)(5) and 1.91(c).

Mark Ferroni,

Acting Associate Administrator for Planning and Environment.

[FR Doc. 2024–08915 Filed 4–24–24; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF THE TREASURY

Solicitation of Nominations for Membership on the Treasury Advisory Committee on Racial Equity

AGENCY: Department of the Treasury.

ACTION: Solicitation of nominations for membership of the Treasury Advisory Committee on Racial Equity; application deadline extension.

SUMMARY: The Treasury Department is soliciting nominations for membership on the Treasury Advisory Committee on Racial Equity (TACRE). The TACRE is composed of up to 15 members who will provide information, advice and recommendations to the Department of the Treasury on matters relating to the advancement of racial equity. This notice extends the deadline for applications for committee membership.

DATES: The application deadline for the notice published March 14, 2024 at 89 FR 18703, is extended. Applications are due on or before May 20, 2024.

FOR FURTHER INFORMATION CONTACT: Rhianna Rogers, Chief Diversity, Equity, inclusion, and Accessibility (DEIA) Officer, Department of Treasury, by emailing *Equity@Treasury.gov* or by calling (202) 622–3644 (this is not a toll-free number). For persons who are deaf, hard of hearing, have a speech disability or difficulty speaking may dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

Application Process for Advisory Committee Appointment

Applicants are required to submit the following documents specifically referencing the objectives and duties outlined above:

- A one (1) page cover letter detailing their qualifications and areas of expertise as they relate to the key issues before the committee; and
- A two (2) page resume/curriculum vitae, which should clearly highlight relevant experience that addresses the focus areas of TACRE.

Nominations may be submitted by the candidate themselves or by the person/organization recommending the candidate.

Some members of the Committee may be required to adhere to the conflict-of-interest rules applicable to Special Government Employees, as such employees are defined in 18 U.S.C. 202(a). These rules include relevant provisions in 18 U.S.C. related to criminal activity, Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635), and Executive Order 12674 (as modified by Executive Order 12731).

In accordance with Department of Treasury Directive 21–03, a clearance process includes fingerprints, tax checks, and a Federal Bureau of Investigation criminal check. *Applicants must state in their application that they agree to submit to these pre-appointment checks.*

The application period for interested candidates will extend to the date outlined above. Applications should be submitted in sufficient time to be received by the close of business on the closing date and should be sent to *Equity@treasury.gov.* If you require reasonable accommodation to submit your application, please contact the Departmental Offices Reasonable Accommodations Coordinator at *ReasonableAccommodationRequests@treasury.gov.* Please make sure your request to the Reasonable Accommodations Coordinator is made at least five (5) days prior to the close of the application period, if possible.

Pursuant to the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001 *et seq.,* as amended), the Department of the Treasury (''Department'') established the TACRE in order to carry out the provisions of Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Throughout the Federal Government.*

On March 14, 2024 (89 FR 18703), the Department announced in the **Federal Register** the application process for committee membership. The application deadline announced in the notice was April 20, 2024. In order to provide additional opportunity for applications, the Department is extending the deadline to May 20, 2024.

Dated: April 19, 2024.

Snider Page,

Director, Office of Civil Rights and EEO and Designated Federal Officer.

[FR Doc. 2024–08812 Filed 4–24–24; 8:45 am]

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FEDERAL REGISTER

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Part II

Environmental Protection Agency

40 CFR Parts 9 and 98

Revisions and Confidentiality Determinations for Data Elements Under the Greenhouse Gas Reporting Rule; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 98

[EPA–HQ–OAR–2019–0424; FRL–7230–01–OAR]

RIN 2060–AU35

Revisions and Confidentiality Determinations for Data Elements Under the Greenhouse Gas Reporting Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is amending specific provisions in the Greenhouse Gas Reporting Rule to improve data quality and consistency. This action updates the General Provisions to reflect revised global warming potentials; expands reporting to additional sectors; improves the calculation, recordkeeping, and reporting requirements by updating existing methodologies; improves data verifications; and provides for collection of additional data to better inform and be relevant to a wide variety of Clean Air Act provisions that the EPA carries out. This action adds greenhouse gas monitoring and reporting for five source categories including coke calcining; ceramics manufacturing; calcium carbide production; caprolactam, glyoxal, and glyoxylic acid production; and facilities conducting geologic sequestration of carbon dioxide with enhanced oil recovery. These revisions also include changes that will improve implementation of the rule such as updates to applicability estimation methodologies, simplifying calculation and monitoring methodologies, streamlining recordkeeping and reporting, and other minor technical corrections or clarifications. This action also establishes and amends confidentiality determinations for the reporting of certain data elements to be added or substantially revised in these amendments.

DATES: This rule is effective January 1, 2025. The incorporation by reference of certain material listed in this final rule is approved by the Director of the Federal Register beginning January 1, 2025. The incorporation by reference of certain other material listed in the rule was approved by the Director of the Federal Register as of January 1, 2018.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2019–0424. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (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. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Jennifer Bohman, Climate Change Division, Office of Atmospheric Programs (MC–6207A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: (202) 343–9548; email address: *GHGReporting@epa.gov.* For technical information, please go to the Greenhouse Gas Reporting Program (GHGRP) website, *www.epa.gov/ghgreporting.* To submit a question, select Help Center, followed by ‘‘Contact Us.’’

World Wide Web (WWW). In addition to being available in the docket, an electronic copy of this final rule will also be available through the WWW. Following the Administrator’s signature, a copy of this final rule will be posted on the EPA’s GHGRP website at *www.epa.gov/ghgreporting.*

SUPPLEMENTARY INFORMATION:

Regulated entities. These final revisions affect certain entities that must submit annual greenhouse gas (GHG) reports under the GHGRP (codified at 40 CFR part 98). These are amendments to existing regulations and will affect owners or operators of certain industry sectors that are suppliers and direct emitters of GHGs. Regulated categories and entities include, but are not limited to, those listed in table 1 of this preamble:

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	North American Industry Classification System (NAICS)	Examples of facilities that may be subject to part 98:+
General Stationary Fuel Combustion Sources		Facilities operating boilers, process heaters, incinerators, turbines, and internal combustion engines.
	211	Extractors of crude petroleum and natural gas.
	321	Manufacturers of lumber and wood products.
	322	Pulp and paper mills.
	325	Chemical manufacturers.
	324	Petroleum refineries, and manufacturers of coal products.
	316, 326, 339	Manufacturers of rubber and miscellaneous plastic products.
	331	Steel works, blast furnaces.
	332	Electroplating, plating, polishing, anodizing, and coloring.
	336	Manufacturers of motor vehicle parts and accessories.
	221	Electric, gas, and sanitary services.
	622	Health services.
	611	Educational services.
Electric Power Generation	2211	Generation facilities that produce electric energy.
Adipic Acid Production	325199	All other basic organic chemical manufacturing: Adipic acid manufacturing.
Aluminum Production	331313	Primary aluminum production facilities.
Ammonia Manufacturing	325311	Anhydrous ammonia manufacturing facilities.
Calcium Carbide Production	325180	Other basic inorganic chemical manufacturing: calcium carbide manufacturing.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY—Continued

Category	North American Industry Classification System (NAICS)	Examples of facilities that may be subject to part 98:+
Carbon Dioxide Enhanced Oil Recovery Projects	211120	Oil and gas extraction projects using carbon dioxide enhanced oil recovery.
Caprolactam, Glyoxal, and Glyoxylic Acid Production	325199	All other basic organic chemical manufacturing.
Cement Production	327310	Cement manufacturing.
Ceramics Manufacturing	327110	Pottery, ceramics, and plumbing fixture manufacturing.
	327120	Clay building material and refractories manufacturing.
Coke Calcining	299901	Coke; coke, petroleum; coke, calcined petroleum.
Electronics Manufacturing	334111	Microcomputers manufacturing facilities.
	334413	Semiconductor, photovoltaic (PV) (solid-state) device manufacturing facilities.
	334419	Liquid crystal display (LCD) unit screens manufacturing facilities; Microelectromechanical (MEMS) manufacturing facilities.
Electrical Equipment Manufacture or Refurbishment	33531	Power transmission and distribution switchgear and specialty transformers manufacturing facilities.
Electricity generation units that report through 40 CFR part 75.	221112	Electric power generation, fossil fuel (*e.g.,* coal, oil, gas).
Electrical Equipment Use	221121	Electric bulk power transmission and control facilities.
Electrical transmission and distribution equipment manufacture or refurbishment.	33361	Engine, Turbine, and Power Transmission Equipment Manufacturing.
Ferroalloy Production	331110	Ferroalloys manufacturing.
Fluorinated Greenhouse Gas Production	325120	Industrial gases manufacturing facilities.
Geologic Sequestration	NA	CO_2 geologic sequestration sites.
Glass Production	327211	Flat glass manufacturing facilities.
	327213	Glass container manufacturing facilities.
	327212	Other pressed and blown glass and glassware manufacturing facilities.
HCFC–22 Production	325120	Industrial gas manufacturing: Hydrochlorofluorocarbon (HCFC) gases manufacturing.
HFC–23 destruction processes that are not collocated with a HCFC–22 production facility and that destroy more than 2.14 metric tons of HFC–23 per year.	325120	Industrial gas manufacturing: Hydrofluorocarbon (HFC) gases manufacturing.
Hydrogen Production	325120	Hydrogen manufacturing facilities.
Industrial Waste Landfill	562212	Solid waste landfills.
Industrial Wastewater Treatment	221310	Water treatment plants.
Injection of Carbon Dioxide	211	Oil and gas extraction.
Iron and Steel Production	333110	Integrated iron and steel mills, steel companies, sinter plants, blast furnaces, basic oxygen process furnace (BOPF) shops.
Lead Production	331	Primary metal manufacturing.
Lime Manufacturing	327410	Lime production.
Magnesium Production	331410	Nonferrous metal (except aluminum) smelting and refining: Magnesium refining, primary.
Nitric Acid Production	325311	Nitrogenous fertilizer manufacturing: Nitric acid manufacturing.
Petroleum and Natural Gas Systems	486210	Pipeline transportation of natural gas.
	221210	Natural gas distribution facilities.
	211120	Crude petroleum extraction.
	211130	Natural gas extraction.
Petrochemical Production	324110	Petrochemicals made in petroleum refineries.
Petroleum Refineries	324110	Petroleum refineries.
Phosphoric Acid Production	325312	Phosphatic fertilizer manufacturing.
Pulp and Paper Manufacturing	322110	Pulp mills.
	322120	Paper mills.
	322130	Paperboard mills.
Miscellaneous Uses of Carbonate	Facilities included elsewhere.	
Municipal Solid Waste Landfills	562212	Solid waste landfills.
	221320	Sewage treatment facilities.
Silicon Carbide Production	327910	Silicon carbide abrasives manufacturing.
Soda Ash Production	325180	Other basic inorganic chemical manufacturing: Soda ash manufacturing.
Suppliers of Carbon Dioxide	325120	Industrial gas manufacturing facilities.
Suppliers of Industrial Greenhouse Gases	325120	Industrial greenhouse gas manufacturing facilities.
Titanium Dioxide Production	325180	Other basic inorganic chemical manufacturing: Titanium dioxide manufacturing.
Underground Coal Mines	212115	Underground coal mining.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY—Continued

Category	North American Industry Classification System (NAICS)	Examples of facilities that may be subject to part 98:+
Zinc Production	331410	Nonferrous metal (except aluminum) smelting and refining: Zinc refining, primary.
Suppliers of Coal-based Liquid Fuels	211130	Coal liquefaction at mine sites.
Suppliers of Natural Gas and Natural Gas Liquids	221210	Natural gas distribution facilities.
	211112	Natural gas liquid extraction facilities.
Suppliers of Petroleum Products	324110	Petroleum refineries.
Suppliers of Carbon Dioxide	325120	Industrial gas manufacturing facilities.
Suppliers of Industrial Greenhouse Gases	325120	Industrial greenhouse gas manufacturing facilities.
Importers and Exporters of Pre-charged Equipment and Closed-Cell Foams.	423730	Air-conditioning equipment (except room units) merchant wholesalers.
	333415	Air-conditioning equipment (except motor vehicle) manufacturing.
	423620	Air-conditioners, room, merchant wholesalers.
	449210	Electronics and appliance retailers.
	326150	Polyurethane foam products manufacturing.
	335313	Circuit breakers, power, manufacturing.
	423610	Circuit breakers and related equipment merchant wholesalers.

Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. This table lists the types of facilities that the EPA is now aware could potentially be affected by this action. Other types of facilities than those listed in the table could also be subject to reporting requirements. To determine whether you will be affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 98, subpart A (General Provisions) and each source category. Many facilities that are affected by 40 CFR part 98 have greenhouse gas emissions from multiple source categories listed in table 1 of this preamble. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Acronyms and abbreviations. The following acronyms and abbreviations are used in this document.

ACE Automated Commercial Environment
AIM American Innovation and Manufacturing Act of 2020
ANSI American National Standards Institute
API American Petroleum Institute
ASME American Society of Mechanical Engineers
ASTM ASTM, International
BAMM best available monitoring methods
BCFCs bromochlorofluorocarbons
BEF byproduct emission factor
BFCs bromofluorocarbons
CAA Clean Air Act
CaO calcium oxide (lime)
CARB California Air Resources Board
CAS Chemical Abstracts Service
CBI confidential business information
CBP U.S. Customs and Border Protection
CCS carbon capture and sequestration
CECS combustion emissions control system
CEMS continuous emissions monitoring system
CFC chlorofluorocarbon
CFR Code of Federal Regulations
CF_4 perfluoromethane
CGA cylinder gas audit
CHP combined heat and power
CH_4 methane
CKD cement kiln dust
CO_2 carbon dioxide
CO_2e carbon dioxide equivalent
COF_2 carbonic difluoride
CRA Congressional Review Act
CSA CSA Group
DAC direct air capture
DCU delayed coking unit
DOC degradable organic carbon
DOE U.S. Department of Energy
DRE destruction or removal efficiency
EAF electric arc furnace
EDC ethylene dichloride
EF emission factor
EGU electricity generating unit
e-GGRT electronic Greenhouse Gas Reporting Tool
EG emission guidelines
EOR enhanced oil recovery
EPA U.S. Environmental Protection Agency
EREF Environmental Research and Education Foundation
F–GHG fluorinated greenhouse gas
F–HTF fluorinated heat transfer fluids
FLIGHT Facility Level Information on Greenhouse Gases Tool
FR Federal Register
FTIR Fourier Transform Infrared
GCCS gas collection and capture system
GHG greenhouse gas
GHGRP Greenhouse Gas Reporting Program
GIE gas-insulated equipment
GWP global warming potential
HBCFC hydrobromochlorofluorocarbon
HBFC hydrobromofluorocarbon
HC hydrocarbon
HCFC hydrochlorofluorocarbon
HCFE hydrochlorofluoroether
HFC hydrofluorocarbon
HFE hydrofluoroether
HHV high heating value
HTF heat transfer fluid
HTS Harmonized Tariff System
ICR Information Collection Request
IPCC Intergovernmental Panel on Climate Change
ISO International Standards Organization
IVT Inputs Verification Tool
k first order decay rate
kg kilogram
kV kilovolt
LCD liquid crystal display
LDC local distribution company
LMOP Landfill Methane Outreach Program
MEMS Microelectromechanical systems
MgO magnesium oxide
mmBtu million British thermal units
MRV monitoring, reporting, and verification plan
MW molecular weight
MSW municipal solid waste
mt metric tons
$mtCO_2e$ metric tons carbon dioxide equivalent
MTBS Mean Time Between Service
NAICS North American Industry Classification System
NIST National Institute of Standards and Technology
NSPS new source performance standards
N_2O nitrous oxide
OAR Office of Air and Radiation
OMB Office of Management and Budget
OMP operations management plan
PFC perfluorocarbon
POU point of use
POX partial oxidation
ppmv parts per million volume
PRA Paperwork Reduction Act
PSA pressure swing absorption
psi pounds per square inch
psia pounds per square inch, absolute
PV photovoltaic
QA/QC quality assurance/quality control

RFA Regulatory Flexibility Act
RPC remote plasma cleaning
RY reporting year
scf standard cubic feet
SEM surface-emissions monitoring
SF_6 sulfur hexafluoride
SMR steam methane reforming
SSM startup, shutdown, and malfunction
TSD technical support document
UMRA Unfunded Mandates Reform Act of 1995
UNFCCC United Nations Framework Convention on Climate Change
U.S. United States
VCM vinyl chloride monomer
WGS water gas shift
WMO World Meteorological Organization
WWW World Wide Web

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I. Background

A. How is this preamble organized?

Section I. of this preamble contains background information on the June 21, 2022 proposed rule (87 FR 36920, hereafter referred to as ''2022 Data Quality Improvements Proposal'') and the May 22, 2023 supplemental proposed rule (88 FR 32852, hereafter referred to as ''2023 Supplemental Proposal''). This section also discusses the EPA's legal authority under the CAA to promulgate (including subsequent amendments to) the GHG Reporting Rule, codified at 40 CFR part 98 (hereinafter referred to as ''part 98''), and the EPA's legal authority to make confidentiality determinations for new or revised data elements corresponding to these amendments or for existing data elements for which the EPA is finalizing a new determination. Section II. of this preamble describes the types of amendments included in this final rule. Section III. of this preamble is organized by part 98 subpart and contains detailed information on the final new requirements for, or revisions to, each subpart. Section IV. of this preamble describes the final revisions to 40 CFR part 9. Section V. of this preamble explains the effective date of the final revisions and how the revisions are required to be implemented in reporting year (RY) 2024 and RY2025 reports. Section VI. of this preamble discusses the final confidentiality determinations for new or substantially revised (*i.e.,* requiring additional or different data to be reported) data reporting elements, as well as for certain existing data elements for which the EPA is finalizing a new determination. Section VII. of this preamble discusses the impacts of the final amendments. Finally, section VIII. of this preamble describes the statutory and Executive order requirements applicable to this action.

B. Executive Summary

The EPA is finalizing certain proposed revisions to part 98 included in the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal, with some changes made after consideration of public comments. The final amendments include improvements to requirements that, broadly, will enhance the quality and the scope of information collected, clarify elements of the rule, and streamline elements of reporting and recordkeeping. These final revisions include a comprehensive update to the global warming potentials (GWPs) in table A–1 to subpart A of part 98; updates to provide for collection of additional data to understand new source categories or new emission sources for specific sectors; updates to emission factors to more accurately reflect industry emissions; refinements to existing emissions calculation methodologies to reflect an improved understanding of emissions sources and end uses of GHGs; additions or modifications to reporting requirements in order to eliminate data gaps and improve verification of reported emissions; revisions that address prior commenter concerns or clarify requirements; and editorial corrections that are intended to improve the public's understanding of the rule. The final amendments also include streamlining measures such as revisions to applicability for certain industry sectors to account for changes in usage of certain GHGs or instances where the current applicability estimation methodology may overestimate emissions; revisions that provide flexibility for or simplify monitoring and calculation methods; and revisions to streamline reported data elements or recordkeeping where the current requirements are redundant, where reported data are not currently useful for verification or analysis, or for which continued collection of the data at the same frequency would not likely

provide new insights or knowledge of the industry sector, emissions, or trends at this time. This action also finalizes confidentiality determinations for the reporting of data elements added or substantially revised in these final amendments, and for certain existing data elements for which no confidentiality determination has been made previously or for which the EPA proposed to revise the existing determination.

In some cases, and as further described in section III. of this preamble, the EPA is not taking final action in this final rule on certain proposed revisions included in the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal. For example, after review of comments received in response to the proposed requirements to report purchased electricity and thermal energy consumption information under the proposed subpart B (Energy Consumption), the EPA is not taking action at this time on those proposed provisions. The EPA believes additional time is needed to consider the comments received before taking final action. Similarly, the EPA is not taking final action at this time on certain proposed changes for some subparts. In some cases, *e.g.,* for subparts G (Ammonia Production), P (Hydrogen Production), S (Lime Production), and HH (Municipal Solid Waste Landfills), we are not taking final action at this time on certain revisions to the calculation or monitoring methodologies that would have revised how data are collected and reported in the EPA's electronic greenhouse gas reporting tool (e-GGRT). In several cases, we are also not taking final action at this time on proposed revisions to add reporting requirements. For example, under subpart C (General Stationary Fuel Combustion), we are not taking final action at this time on proposed revisions to the requirements for units in either an aggregation of units or common pipe configuration that would have required reporters to provide additional information such as the unit type, maximum rated heat input capacity, and fraction of the actual total heat input for each unit in the aggregation or the common pipe configuration. Also under subpart C, we are not taking final action at this time on proposed requirements that would have required reporters to identify, for any configuration, whether the unit is an electricity generating unit, and, for group configurations (*i.e.,* common stack/duct, common pipe, and aggregation of units) that contain an electricity generating unit, the estimated decimal fraction of total emissions attributable to the electricity generating unit. Similarly, we are not taking final action at this time on certain data elements that were proposed to be added to subparts A (General Provisions), F (Aluminum Production), G, H (Cement Production), P, S, HH, OO (Suppliers of Industrial Greenhouse Gases), and QQ (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment and Closed-Cell Foams). Additional proposed revisions that EPA is not taking final action on at this time are discussed in section III. of this preamble.

This final rule also includes an amendment to 40 CFR part 9 to include the Office of Management and Budget (OMB) control number issued under the Paperwork Reduction Act (PRA) for the information collection request for the GHGRP.

The final amendments will become effective on January 1, 2025. As provided under the existing regulations in subpart A of part 98, the GWP amendments to table A–1 to subpart A will apply to reports submitted by current reporters that are submitted in calendar year 2025 and subsequent years (*i.e.,* starting with reports submitted for RY2024 on March 31, 2025). All other final revisions, which apply to both existing and new reporters, will be implemented for reports prepared for RY2025 and submitted March 31, 2026. Reporters who are newly subject to the rule will be required to implement all requirements to collect data, including any required monitoring and recordkeeping, on January 1, 2025.

These final amendments are anticipated to result in an overall increase in burden for part 98 reporters in cases where the amendments expand current applicability, add or revise reporting requirements, or require additional emissions data to be reported. The primary burden associated with the final rule is due to revisions to applicability, including revisions to the global warming potentials in table A–1 to subpart A of part 98, that will change the number of reporters currently at or near the 25,000 metric tons carbon dioxide equivalent ($mtCO_2e$) threshold; revisions to establish requirements for new source categories for coke calcining, calcium carbide, caprolactam, glyoxal, and glyoxylic acid production, ceramics manufacturing, and facilities conducting geologic sequestration of carbon dioxide with enhanced oil recovery; and revisions to expand reporting to include new emission sources for specific sectors, such as the addition of captive (non-merchant) hydrogen production facilities. The final revisions will affect approximately 254 new reporters across 13 source categories, including the hydrogen production, petroleum and natural gas systems, petroleum refineries, electrical transmission and distribution systems, industrial wastewater treatment, municipal solid waste landfills, fluorinated GHG suppliers, and industrial waste landfills source categories, as well as the new source categories added in these final revisions. The EPA anticipates some decrease in burden where the final revisions will adjust or improve the estimation methodologies for determining applicability, simplify calculation methodologies or monitoring requirements, or simplify the data that must be reported. In several cases, we are also finalizing changes where we anticipate increased clarity or more flexibility for reporters that could result in a potential decrease in burden. The incremental implementation labor costs for all subparts include $2,684,681 in RY2025, and $2,671,831 in each subsequent year (RY2026 and RY2027). The incremental implementation labor costs over the next three years (RY2025 through RY2027) total $8,028,343. There is an additional incremental burden of $2,733,937 for capital and operation and maintenance (O&M) costs in RY2025 and in each subsequent year (RY2026 and RY2027), which reflects changes to applicability and monitoring for subparts with new or additional reporters. The incremental non-labor costs for RY2025 through RY2027 total $8,201,812 over the next three years.

C. Background on This Final Rule

The GHGRP requires annual reporting of GHG data and other relevant information from large facilities and suppliers in the United States. In its 2022 Data Quality Improvements Proposal, the EPA proposed amendments to specific provisions of part 98 where we identified opportunities to improve the quality of the data collected under the rule. This included revisions that would provide for the collection of additional data that may be necessary to better understand emissions from specific sectors or inform future policy decisions under the CAA; update emission factors; and refine emissions estimation methodologies. The proposed rule also included revisions that provided for the collection of additional data that would be useful to improve verification of collected data and complement or

inform other EPA programs. These proposed revisions included the incorporation of a new source category to add calculation and reporting requirements for quantifying geologic sequestration of CO_2 in association with enhanced oil recovery (EOR) operations. In several cases, the 2022 Data Quality Improvements Proposal included revisions that would resolve gaps in the current coverage of the GHGRP that leave out potentially significant sources of GHG emissions or end uses. The EPA also proposed revisions that clarified or updated provisions that may be unclear, and that would streamline calculation, monitoring, or reporting in specific provisions in part 98 to provide flexibility or increase the efficiency of data collection. The EPA included a request for comment on expanding the GHGRP to include several new source categories (see section IV. of the preamble to the 2022 Data Quality Improvements Proposal at 87 FR 37016) and requested comment on potential future amendments to add new calculation, monitoring, and reporting requirements for these categories. The EPA also proposed confidentiality determinations for new or substantially revised data reporting elements that would be amended under the proposed rule, as well as for certain existing data elements for which the EPA proposed a new or revised determination. The EPA received comments on the 2022 Data Quality Improvements Proposal from June 21, 2022, through October 6, 2022.

The EPA subsequently proposed additional amendments to part 98 where the Agency had received or identified new information to further improve the data collected under the GHGRP. The 2023 Supplemental Proposal included amendments that were informed by a review of comments and information provided by stakeholders on the 2022 Data Quality Improvements Proposal, as well as newly proposed amendments that the EPA had identified from program implementation, *e.g.,* where additional data would improve verification of data reported to the GHGRP or would further aid our understanding of changing industry emission trends. The 2023 Supplemental Proposal included a proposed comprehensive update to the GWPs in table A–1 to subpart A of part 98; proposed amendments to establish new subparts with specific reporting provisions under part 98 for five new source categories; and several proposed revisions where the EPA had identified new data supporting improvements to the calculation, monitoring, and recordkeeping requirements. The 2023 Supplemental Proposal also clarified or corrected specific proposed provisions of the 2022 Data Quality Improvements Proposal. The amendments included in the 2023 Supplemental Proposal were proposed as part of the EPA's continued efforts to address potential data gaps and improve the quality of the data collected in the GHGRP. The EPA also proposed confidentiality determinations for new or substantially revised data reporting elements that would be revised under the supplemental proposed amendments. The EPA received comments on the 2023 Supplemental Proposal from May 22, 2023, through July 21, 2023.

The revisions included in the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal were based on the EPA's assessment of advances in scientific understanding of GHG emissions sources, updated guidance on GHG estimation methods, and a review of the data collected and emissions trends established following more than 10 years of implementation of the program. The EPA is finalizing amendments and confidentiality determinations in this action, with certain changes from the proposed rules following consideration of comments submitted and based on the EPA's updated assessment. The revisions reflect the EPA's efforts to update and improve the GHGRP by better capturing the changing landscape of GHG emissions, providing for more complete coverage of U.S. GHG emission sources, and providing a more comprehensive approach to understanding GHG emissions. Responses to major comments submitted on the proposed amendments from the 2022 Data Quality Improvement Proposal and the 2023 Supplemental Proposal considered in the development of this final rule can be found in sections III. and VI. of this preamble. Documentation of all comments received as well as the EPA's responses can be found in the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule,'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424.

This final rule does not address implementation of provisions of the Inflation Reduction Act, which was signed into law on August 16, 2022. Section 60113 of the Inflation Reduction Act amended the CAA by adding section 136, ''Methane Emissions and Waste Reduction Incentive Program for Petroleum and Natural Gas Systems.'' Although the EPA proposed amendments to subpart W of part 98 (Petroleum and Natural Gas Systems) in the 2022 Data Quality Improvements Proposal, these were developed prior to the Congressional direction provided in CAA section 136. The EPA noted in the preamble to the 2023 Supplemental Proposal (see section I.B., 88 FR 32855) that we intend to issue one or more separate actions to implement the requirements of CAA section 136, including revisions to certain requirements of subpart W. Subsequently, the EPA published a proposed rule for subpart W on August 1, 2023 (88 FR 50282, hereinafter referred to as the ''2023 Subpart W Proposal''), as well as a proposed rule to implement CAA section 136(c), ''Waste Emissions Charge,'' that was signed by the Administrator on January 12, 2024 and published on January 26, 2024 (89 FR 5318),[1] to comply with CAA section 136. As discussed in the 2023 Subpart W Proposal, the EPA considered the 2022 Data Quality Improvements Proposal as well as additional proposed revisions in the development of the 2023 Subpart W Proposal. Accordingly, the EPA is not taking final action on the revisions to subpart W, including harmonizing revisions to subparts A (General Provisions) and C (General Stationary Fuel Combustion Sources) related to subpart W, that were proposed in the 2022 Data Quality Improvements Proposal in this final rule.

D. Legal Authority

The EPA is finalizing these rule amendments under its existing CAA authority provided in CAA section 114. As stated in the preamble to the *Mandatory Reporting of Greenhouse Gases* final rule (74 FR 56260, October 30, 2009), CAA section 114(a)(1) provides the EPA authority to require the information gathered by this rule because such data will inform and are relevant to the EPA's carrying out of a variety of CAA provisions. Thus, when promulgating amendments to the GHGRP, the EPA has assessed the reasonableness of requiring the information to be provided and explained how the data are relevant to the EPA's ability to carry out the provisions of the CAA. See the preambles to the proposed GHG

[1] CAA section 136(c), ''Waste Emissions Charge,'' directs the Administrator to impose and collect a charge on methane (CH_4) emissions that exceed statutorily specified waste emissions thresholds from an owner or operator of an applicable facility that reports more than 25,000 metric tons carbon dioxide equivalent pursuant to the Greenhouse Gas Reporting Rule's requirements for the petroleum and natural gas systems source category (codified as subpart W in EPA's Greenhouse Gas Reporting Rule regulations).

Reporting Rule (74 FR 16448, April 10, 2009) and the final GHG Reporting Rule (74 FR 56260, October 30, 2009) for further discussion of this authority. Additionally, in enacting CAA section 136 (discussed above in preamble section I.C.), Congress implicitly recognized EPA's appropriate use of CAA authority in promulgating the GHGRP. The provisions of CAA section 136 reference and are in part based on the Greenhouse Gas Reporting Rule requirements under subpart W for the petroleum and natural gas systems source category and require further revisions to subpart W for purposes of supporting implementation of section 136.

The Administrator has determined that this action is subject to the provisions of section 307(d) of the CAA (see also section VIII.L. of this preamble). Section 307(d) contains a set of procedures relating to the issuance and review of certain CAA rules.

In addition, pursuant to sections 114, 301, and 307 of the CAA, the EPA is publishing final confidentiality determinations for the new or substantially revised data elements required by these amendments. Section 114(c) requires that the EPA make information obtained under section 114 available to the public, except for information (excluding emission data) that qualifies for confidential treatment.

II. Overview of Final Revisions to 40 CFR Part 98 and 40 CFR Part 9

Relevant to this final rule, the EPA previously proposed revisions to part 98 in two separate documents: the 2022 Data Quality Improvements Proposal (June 21, 2022, 87 FR 36920) and the 2023 Supplemental Proposal (May 22, 2023, 88 FR 32852). In the proposed rules, the EPA identified two primary categories of revisions that we are finalizing in this rule. First, the EPA identified revisions that would modify the rule to improve the quality of the data collected and better inform the EPA's understanding of U.S. GHG emissions sources. Specifically, the EPA identified six types of revisions to improve the quality of the data collected under part 98 that we are finalizing in this rule, as follows:

- Revisions to table A–1 to the General Provisions of part 98 to update GWPs to reflect advances in scientific knowledge and better characterize the climate impacts of certain GHGs, by including values agreed to under the United Nations Framework Convention on Climate Change, and to maintain comparability and consistency with the Inventory of U.S. Greenhouse Gas Emissions and Sinks (hereafter referred to as ''the Inventory'') and other analyses produced by the EPA;
- Revisions to expand source categories or add new source categories to address potential gaps in reporting of data on U.S. GHG emissions or supply in order to improve the accuracy and completeness of the data provided by the GHGRP;
- Amendments to update emission factors to incorporate new measurement data that more accurately reflect industry emissions;
- Revisions to refine existing emissions calculation methodologies to reflect an improved understanding of emissions sources and end uses of GHGs, or to incorporate more recent research on GHG emissions or formation;
- Additions or modifications to reporting requirements to eliminate data gaps and improve verification of emissions estimates; and
- Revisions that clarify requirements that reporters have previously found vague to ensure that accurate data are being collected, and editorial corrections or harmonizing changes that will improve the public's understanding of the rule.

Second, the EPA identified revisions that would streamline the calculation, monitoring, or reporting requirements of part 98 to provide flexibility or increase the efficiency of data collection. In the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Notice, the EPA identified several streamlining revisions that we are finalizing in this rule, as follows:

- Revisions to applicability criteria for certain industry sectors without the 25,000 $mtCO_2e$ per year reporting threshold to account for changes in usage of certain GHGs, or where the current applicability estimation methodology may overestimate emissions;
- Revisions that provide flexibility for and simplify monitoring and calculation methods where further monitoring and data collection will not likely significantly improve our understanding of emission sources at this time, or where we currently allow similar less burdensome methodologies for other sources; and
- Revisions to reported data elements or recordkeeping where the current requirements are redundant or where reported data are not currently useful for verification or analysis, or for which continued collection of the data at the same frequency will not likely provide new insights or knowledge of the industry sector, emissions, or trends at this time.

The revisions included in this final rule will advance the EPA's goal of updating the GHGRP to reflect advances in scientific knowledge, better reflect the EPA's current understanding of U.S. GHG emissions and trends and improve data collection and reporting to better understand emissions from specific sectors or inform future policy decisions under the CAA. The types of streamlining revisions we are finalizing will simplify requirements while maintaining the quality of the data collected under part 98, where continued collection of information assists in evaluation and support of EPA programs and policies.

The EPA has frequently considered and relied on data collected under the GHGRP to carry out provisions of the CAA; to inform policy options; and to support regulatory and non-regulatory actions. For example, GHGRP landfill data from subpart HH of part 98 (Municipal Solid Waste Landfills) were previously analyzed to inform the development of the 2016 new source performance standards (NSPS) and emission guidelines (EG) for landfills (89 FR 59322; August 29, 2016). Specifically, the EPA used data from part 98 reporting to update the characteristics and technical attributes of over 1,200 landfills in the EPA's landfills data set, as well as to estimate emission reductions and costs, to inform the revised performance standards. Most recently, the EPA used GHGRP data collected under subparts RR (Geologic Sequestration of Carbon Dioxide) and UU (Injection of Carbon Dioxide) of part 98 to inform the development of the proposed NSPS and EG for GHG emissions from fossil fuel-fired electric generating units (EGUs) (88 FR 33240, May 23, 2023, hereafter ''EGU NSPS/EG proposed rule''), including to assess the geographic availability of geologic sequestration and enhanced oil recovery. These final revisions to the GHGRP will, as discussed herein, improve the GHG emissions data and supplier data that is collected under the GHGRP to better inform the EPA in carrying out provisions of the CAA (such as providing a better understanding of upstream production, downstream emissions, and potential impacts) and otherwise supporting the continued development of climate and air quality standards under the CAA.

As the EPA has explained since the GHGRP was first promulgated, the data also will inform the EPA's implementation of CAA section 103(g) regarding improvements in nonregulatory strategies and technologies for preventing or reducing air pollutants (*e.g.,* EPA's voluntary

GHG reduction programs such as the non-CO_2 partnership programs and ENERGY STAR) (74 FR 56265). The final rule will support the overall goals of the GHGRP to collect high-quality GHG data and to incorporate metrics and methodologies that reflect scientific updates. For example, we are finalizing revisions to table A–1 to subpart A of part 98 to update the chemical-specific GWP values of certain GHGs to (1) reflect GWPs from the Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Report (hereinafter referred to as ''AR5''); [2] (2) for certain GHGs that do not have chemical-specific GWPs listed in AR5, to adopt GWP values from the IPCC Sixth Assessment Report (hereinafter referred to as ''AR6''); [3] and (3) to revise and expand the set of default GWPs which are applied to GHGs for which peer-reviewed chemical-specific GWPs are not available.

In several cases, we are finalizing updates to emissions and default factors where we have received or identified updated measurement data. For example, we are finalizing updates to the default biogenic fraction for tire combustion in subpart C of part 98 (General Stationary Fuel Combustion) based on updated data obtained by the EPA on the weighted average composition of natural rubber in tires, allowing for the estimation of an emission factor that is more representative of these sources. Similarly, we are finalizing updates to the emission factors and default destruction and removal efficiency values in subpart I of part 98 (Electronics Manufacturing). The updated emission factors are based on newly submitted data from the 2017 and 2020 technology assessment reports submitted under the GHGRP with RY2016 and RY2019 annual reports, as well as consideration of new emission factors available in the *2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories* (hereafter ''2019 Refinement'').[4]

In other cases, we are finalizing updates to calculation methodologies to incorporate updates that are based on an improved understanding of emission sources. For example, for subpart I of part 98 (Electronics Manufacturing), the EPA is implementing emissions estimation improvements from the 2019 Refinement such as updates to the method used to calculate the fraction of fluorinated input gases and byproducts exhausted from tools with abatement systems during stack tests; revising equations that calculate the weighted average DREs for individual fluorinated greenhouse gases (F–GHGs) across process types; requiring that all stack systems be tested if the stack test method is used; and updating a set of equations that will more accurately account for emissions when pre-control emissions of a F–GHG approach or exceed the consumption of that gas during the test period. For subpart Y (Petroleum Refineries), we are amending the calculation methodology for delayed coking units to more accurately reflect the activities conducted at certain facilities that were not captured by the current emissions estimation methodology, which relies on a steam generation model. The incorporation of updated metrics and methodologies will improve the quality and accuracy of the data collected under the GHGRP, increase the Agency's understanding of the relative distribution of GHGs that are emitted, and better inform EPA policy and programs under the CAA.

The improvements to part 98 will further provide a more comprehensive, nationwide GHG emissions profile reflective of the origin and distribution of GHG emissions in the United States and will more accurately inform EPA policy options for potential regulatory or non-regulatory CAA programs. The EPA is finalizing several amendments that will reduce gaps in the reporting of GHG emissions and supply from specific sectors, including the broadening of existing source categories; and establishing new source categories that will add calculation, monitoring, reporting, and recordkeeping requirements for certain sectors of the economy. The final revisions add five new source categories, including coke calcining; ceramics manufacturing; calcium carbide production; caprolactam, glyoxal, and glyoxylic acid production; and facilities conducting geologic sequestration of carbon dioxide with enhanced oil recovery. These source categories were identified upon evaluation of emission sources that potentially contribute significant GHG emissions that are not currently reported or where facilities representative of these source categories may currently report under another part 98 source category using methodologies that may not provide complete or accurate emissions. Additionally, the inclusion of certain source categories will improve the completeness of the emissions estimates presented in the Inventory, such as collection of data on ceramics manufacturing; calcium carbide production; and caprolactam, glyoxal, and glyoxylic acid production. The EPA is also finalizing updates to certain subparts to add reporting of new emissions or emissions sources for existing sectors to address potential gaps in reporting. For example, we are adding requirements for the monitoring, calculation, and reporting of F–GHGs other than sulfur hexafluoride (SF_6) and perfluorocarbons (PFCs) under subparts DD (Electrical Equipment and Distribution Equipment Use) and SS (Electrical Equipment Manufacture or Refurbishment) to account for the introduction of alternative technologies and replacements for SF_6.

Likewise, we are finalizing revisions that will improve reporting under subpart HH to better account for CH_4 emissions from these facilities. Following review of recent studies indicating that CH_4 emissions from landfills may be considerably higher than what is currently reported to part 98 due in part to emissions from poorly operating gas collection systems or destruction devices, we are revising the calculation methodologies in subpart HH to better account for these scenarios. These changes are necessary for the EPA to continue to analyze the relative emissions and distribution of emissions from specific industries, improve the overall quality of the data collected under the GHGRP, and better inform future EPA policy and programs under the CAA. For example, the final revisions to subpart HH will be used to further improve the data in the EPA's landfills data set by providing more

[2] IPCC, 2013: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535 pp. The GWPs are listed in table 8.A.1 of Appendix 8.A: Lifetimes, Radiative Efficiencies and Metric Values, which appears on pp. 731–737 of Chapter 8, ''Anthropogenic and Natural Radiative Forcing.''

[3] Smith, C., Z.R.J. Nicholls, K. Armour, W. Collins, P. Forster, M. Meinshausen, M.D. Palmer, and M. Watanabe, 2021: The Earth's Energy Budget, Climate Feedbacks, and Climate Sensitivity Supplementary Material. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Available from *www.ipcc.ch/* The AR6 GWPs are listed in table 7.SM.7, which appears on page 16 of the Supplementary Material.

[4] Intergovernmental Panel on Climate Change. 2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories, Calvo Buendia, E., Tanabe, K., Kranjc, A., Baasansuren, J., Fukuda, M., Ngarize, S., Osako, A., Pyrozhenko, Y., Shermanau, P. and Federici, S. (eds). Published: IPCC, Switzerland. 2019. *https://www.ipcc-nggip.iges.or.jp/public/2019rf/index.html.*

comprehensive and accurate information on landfill emissions and the efficacy of gas collection systems and destruction devices.

The final revisions also help ensure that the data collected in the GHGRP can be compared to the data collected and presented by other EPA programs under the CAA. For example, we are finalizing several revisions to the reporting requirements for subpart HH, including more clearly identifying reporting elements associated with each gas collection system, each measurement location within a gas collection system, and each control device associated with a measurement location in subpart HH of part 98. These revisions can be used to estimate the relative volume of gas flared versus sent to landfill-gas-to-energy projects to better understand the amount of recovered CH_4 that is beneficially used in energy recovery projects. Understanding the energy recovery of these facilities is critical for evaluating and identifying progress towards renewable energy targets. Specifically, these data will allow the Agency to identify industry-specific trends of beneficial use of landfill gas, communicate best operating practices for reducing GHG emissions, and evaluate options for expanding the use of these best practices or other potential policy options under the CAA.

Similarly, we are finalizing revisions to clarify subpart RR (Geologic Sequestration of Carbon Dioxide) and add subpart VV (Geologic Sequestration of Carbon Dioxide With Enhanced Oil Recovery Using ISO 27916) to part 98. Subpart VV provides for the reporting of incidental CO_2 storage associated with enhanced oil recovery based on the CSA Group (CSA)/American National Standards Institute (ANSI) International Standards Organization (ISO) 27916:19.

In the EGU NSPS/EG proposed rule, the EPA proposed that any affected EGU that employs CCS technology that captures enough CO_2 to meet the proposed standard and injects the CO_2 underground must assure that the CO_2 is managed at a facility reporting under subpart RR or new subpart VV of part 98. As such, this final rule complements the EGU NSPS/EG proposed rule.

In other cases, the revisions include collection of data that could be compared to other national and international inventories, improving, for example, the estimates provided to the Inventory. For instance, we are finalizing revisions to subpart N (Glass Production) to require reporting of the annual quantities of cullet (*i.e.,* recycled scrap glass) used as a raw material. Because differences in the quantities of cullet used can lead to variations in emissions from the production of different glass types, the annual quantities of cullet used will provide a useful metric for understanding variations and differences in emissions estimates as well as improve the analysis, transparency, and accuracy of the glass manufacturing sector in the Inventory and other EPA programs. Likewise, the addition of reporting for new source categories will improve the completeness of the emissions estimates presented in the Inventory, such as collection of data on ceramics manufacturing, calcium carbide production, and caprolactam, glyoxal, and glyoxylic acid production.

The EPA is finalizing several amendments to improve verification of the annual GHG reports. For example, we are finalizing amendments to subpart H (Cement Production) to collect additional data including annual averages for certain chemical composition input data on a facility-basis, which the Agency will use to build verification checks. These edits will provide the EPA the ability to check reported emissions data from subpart H reporters using both the mass balance and direct measurement estimation methods, allowing the EPA to back-estimate process emissions, which will result in more accurate reporting. Similarly, we are amending subparts OO (Suppliers of Industrial Greenhouse Gases) and QQ (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams) of part 98 to require reporting of the Harmonized Tariff System code for each F–GHG, fluorinated heat transfer fluid (F–HTF), or nitrous oxide (N_2O) shipped, which will reduce instances of reporting where the data provided is unclear or unable to be compared to outside data sources for verification.

Lastly, the changes in this final rule will further advance the ability of the GHGRP to provide access to quality data on greenhouse gas emissions. Since its implementation, the collection of data under the GHGRP has allowed the Agency and relevant stakeholders to identify changes in industry and emissions trends, such as transitions in equipment technology or use of alternative lower-GWP greenhouses gases, that may be beneficial for informing other EPA programs under the CAA. The GHGRP provides an important data resource for communities and the public to understand GHG emissions. Since facilities are required to use prescribed calculation and monitoring methods, emissions data can be compared and analyzed, including locations of emissions sources. GHGRP data are easily accessible to the public via the EPA's online data publication tool, also known as FLIGHT at: *https://ghgdata.epa.gov/ghgp/main.do.* FLIGHT allows users to view and sort GHG data for every reporting year starting with 2010 from over 8,000 entities in a variety of ways including by location, industrial sector, and type of GHG emitted. This powerful data resource provides a critical tool for communities to identify nearby sources of GHGs and provide information to state and local governments. Overall, the final revisions in this action will improve the quality of the data collected under the program and available to communities.

These final revisions will, as such, maximize the effectiveness of part 98. Section III. of this preamble describes the specific changes that we are finalizing for each subpart to part 98 in more detail. Additional discussion of the benefits of the final rule are in section VII. of this preamble.

Additionally, we are finalizing a technical amendment to 40 CFR part 9 to update the table that lists the OMB control numbers issued under the PRA to include the information collection request (ICR) for 40 CFR part 98. This amendment satisfies the display requirements of the PRA and OMB's implementing regulations at 5 CFR part 1320 and is further described in section IV. of this preamble.

III. Final Revisions to Each Subpart of Part 98 and Summary of Comments and Responses

This section summarizes the final amendments to each part 98 subpart, as generally described in section II. of this preamble. Major changes to the final rule as compared to the proposed revisions are identified in this section. The amendments to each subpart are followed by a summary of the major comments on those amendments, and the EPA's responses to those comments. Other minor corrections and clarifications are reflected in the final redline regulatory text in the docket for this rulemaking (Docket ID. No. EPA–HQ–OAR–2019–0424).

A. Subpart A—General Provisions

The EPA is finalizing several amendments to subpart A of part 98 (General Provisions) as proposed. In some cases, we are finalizing the proposed amendments with revisions. Section III.A.1. of this preamble discusses the final revisions to subpart A. The EPA received several comments on the proposed subpart A revisions which are discussed in section III.A.2.

of this preamble. We are not finalizing the proposed confidentiality determinations for data elements that were included in the proposed revisions to subpart A, as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart A

This section summarizes the final amendments to subpart A. Major changes in this final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart A can be found in section III.A.2. of this preamble. Additional information for these amendments and their supporting basis is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

a. Revisions to Global Warming Potentials

As proposed, we are revising table A–1 to subpart A of part 98 to reflect more accurate GWPs to better characterize the climate impacts of individual GHGs and to ensure continued consistency with other U.S. climate programs, including the Inventory. The amendments to the GWPs in table A–1 that we are finalizing in this document are discussed in this section of this preamble. The EPA's response to comments received on the proposed revisions to table A–1 are in section III.A.2.a. of this preamble.

In the 2022 Data Quality Improvements Proposal, the EPA proposed two updates to table A–1 to subpart A of part 98 to update GWP values to reflect advances in scientific knowledge. First, we proposed to adopt a chemical-specific GWP of 0.14 for carbonic difluoride (COF_2) using the atmospheric lifetime and radiative efficiency published by the World Meteorological Organization (WMO) in its Scientific Assessment of Ozone Depletion.[5] We also proposed to expand one of the F–GHG groups to which a default GWP is assigned. Default GWPs are applied to GHGs for which peer-reviewed chemical-specific GWPs are not available. Specifically, we proposed to expand the ninth F–GHG group in table A–1 to subpart A of part 98, which includes unsaturated PFCs, unsaturated HFCs, unsaturated hydrochlorofluorocarbons (HCFCs), unsaturated halogenated ethers, unsaturated halogenated esters, fluorinated aldehydes, and fluorinated ketones, to include additional unsaturated fluorocarbons. Given the very short atmospheric lifetimes of unsaturated GHGs and review of available evaluations of individual unsaturated chlorofluorocarbons and unsaturated bromofluorocarbons in the 2018 WMO Scientific Assessment, we proposed to add unsaturated bromofluorocarbons, unsaturated chlorofluorocarbons, unsaturated bromochlorofluorocarbons, unsaturated hydrobromofluorocarbons, and unsaturated hydrobromochlorofluorocarbons to this F–GHG group, which will apply a default GWP of 1 to these compounds. Additional information on these amendments and their supporting basis is available in section III.A.1. of the preamble to the 2022 Data Quality Improvements Proposal.

As the 2022 Data Quality Improvements Proposal was nearing publication, the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) fully specified which GWPs countries should use for purposes of GHG reporting.[6] The EPA subsequently proposed a comprehensive update to table A–1 to subpart A of part 98 in the 2023 Supplemental Proposal, consistent with recent science and the UNFCCC decision. This update carried out the intent that the EPA expressed at the time the GHGRP was first promulgated and in subsequent updates to part 98 to periodically update table A–1 as science and UNFCCC decisions evolve. Specifically, the EPA proposed revisions to table A–1 to update the chemical-specific GWPs values of certain GHGs to reflect values from the IPCC AR5 [7] and, for certain GHGs that do not have chemical-specific GWPs listed in AR5, to adopt GWP values from the IPCC AR6.[8] We proposed to adopt the AR5 and AR6 GWPs based on a 100-year time horizon. We also proposed to revise and expand the set of default GWPs in table A–1 for GHGs for which peer-reviewed chemical-specific GWPs are not available, including adding two new fluorinated GHG groups for saturated chlorofluorocarbons (CFCs) and for cyclic forms of unsaturated halogenated compounds, modifying the ninth F–GHG group to more clearly apply to non-cyclic unsaturated halogenated compounds, and updating the existing default GWP values to reflect values estimated from the chemical-specific GWPs that we proposed to adopt from AR5 and AR6. See sections II.A. and III.A.1. of the preamble to the 2023 Supplemental Proposal for additional information.

As proposed, we are amending table A–1 to subpart A of part 98 to update and add chemical-specific and default GWPs. Consistent with the 2021 UNFCCC decision, we are updating table A–1 to use, for GHGs with GWPs in AR5, the AR5 GWP values in table 8.A.1 (that reflect the climate-carbon feedbacks of CO_2 but not the GHG whose GWP is being evaluated), and for CH_4, the GWP that is not the GWP for fossil CH_4 in table 8.A.1 (*i.e.,* the GWP for CH_4 that does not reflect either the climate-carbon feedbacks for CH_4 or the atmospheric CO_2 that would result from the oxidation of CH_4 in the atmosphere). We are also updating table A–1 to adopt AR6 GWP values for 31 F–GHGs that have GWPs listed in AR6 but not AR5. Table 2 of this preamble lists the final GWP values for each GHG.

[5] WMO. Scientific Assessment of Ozone Depletion: 2018, Global Ozone Research and Monitoring Project–Report No. 58, 588 pp., Geneva, Switzerland, 2018. *www.esrl.noaa.gov/csd/assessments/ozone/2018/downloads/018OzoneAssessment.pdf.* Retrieved July 29, 2019. Available in the docket for this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424.

[6] As explained in section III.A.1. of the preamble to the 2023 Supplemental Proposal, the Parties to the UNFCCC specified the agreed-on GWPs in November 2021, which was too late to allow the EPA to consider proposing a comprehensive GWP update in the 2022 Data Quality Improvement Proposal.

[7] IPCC, 2013: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535 pp. The GWPs are listed in table 8.A.1 of Appendix 8.A: Lifetimes, Radiative Efficiencies and Metric Values, which appears on pp. 731–737 of Chapter 8, ''Anthropogenic and Natural Radiative Forcing.''

[8] Smith, C., Z.R.J. Nicholls, K. Armour, W. Collins, P. Forster, M. Meinshausen, M.D. Palmer, and M. Watanabe, 2021: The Earth's Energy Budget, Climate Feedbacks, and Climate Sensitivity Supplementary Material. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Pe´an, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Available from: *www.ipcc.ch/.* The AR6 GWPs are listed in table 7.SM.7, which appears on page 16 of the Supplementary Material.

TABLE 2—REVISED CHEMICAL-SPECIFIC GWPS FOR COMPOUNDS IN TABLE A–1

Name	CAS No.	Chemical formula	GWP (100-year)
Chemical-Specific GWPs			
Carbon dioxide	124–38–9	CO_2	1
Methane	74–82–8	CH_4	28
Nitrous oxide	10024–97–2	N_2O	265
Fully Fluorinated GHGs			
Sulfur hexafluoride	2551–62–4	SF_6	23,500
Trifluoromethyl sulphur pentafluoride	373–80–8	SF_5CF_3	17,400
Nitrogen trifluoride	7783–54–2	NF_3	16,100
PFC–14 (Perfluoromethane)	75–73–0	CF_4	6,630
PFC–116 (Perfluoroethane)	76–16–4	C_2F_6	11,100
PFC–218 (Perfluoropropane)	76–19–7	C_3F_8	8,900
Perfluorocyclopropane	931–91–9	c-C_3F_6	9,200
PFC–3–1–10 (Perfluorobutane)	355–25–9	C_4F_{10}	9,200
PFC–318 (Perfluorocyclobutane)	115–25–3	c-C_4F_8	9,540
Perfluorotetrahydrofuran	773–14–8	c-C_4F_8O	13,900
PFC–4–1–12 (Perfluoropentane)	678–26–2	C_5F_{12}	8,550
PFC–5–1–14 (Perfluorohexane, FC–72)	355–42–0	C_6F_{14}	7,910
PFC–6–1–12	335–57–9	C_7F_{16}; $CF_3(CF_2)_5CF_3$	7,820
PFC–7–1–18	307–34–6	C_8F_{18}; $CF_3(CF_2)_6CF_3$	7,620
PFC–9–1–18	306–94–5	$C_{10}F_{18}$	7,190
PFPMIE (HT–70)	NA	$CF_3OCF(CF_3)CF_2OCF_2OCF_3$	9,710
Perfluorodecalin (cis)	60433–11–6	Z–$C_{10}F_{18}$	7,240
Perfluorodecalin (trans)	60433–12–7	E–$C_{10}F_{18}$	6,290
Perfluorotriethylamine	359–70–6	$N(C_2F_5)_3$	10,300
Perfluorotripropylamine	338–83–0	$N(CF_2CF_2CF_3)_3$	9,030
Perfluorotributylamine	311–89–7	$N(CF_2CF_2CF_2CF_3)_3$	8,490
Perfluorotripentylamine	338–84–1	$N(CF_2CF_2CF_2CF_2CF_3)_3$	7,260
Saturated Hydrofluorocarbons (HFCs) With Two or Fewer Carbon-Hydrogen Bonds			
(4s,5s)-1,1,2,2,3,3,4,5-octafluorocyclopentane	158389–18–5	trans-cyc (-$CF_2CF_2CF_2CHFCHF$-)	258
HFC–23	75–46–7	CHF_3	12,400
HFC–32	75–10–5	CH_2F_2	677
HFC–125	354–33–6	C_2HF_5	3,170
HFC–134	359–35–3	$C_2H_2F_4$	1,120
HFC–134a	811–97–2	CH_2FCF_3	1,300
HFC–227ca	220732–84–8	$CF_3CF_2CHF_2$	2,640
HFC–227ea	431–89–0	C_3HF_7	3,350
HFC–236cb	677–56–5	$CH_2FCF_2CF_3$	1,210
HFC–236ea	431–63–0	CHF_2CHFCF_3	1,330
HFC–236fa	690–39–1	$C_3H_2F_6$	8,060
HFC–329p	375–17–7	$CHF_2CF_2CF_2CF_3$	2,360
HFC–43–10mee	138495–42–8	$CF_3CFHCFHCF_2CF_3$	1,650
Saturated Hydrofluorocarbons (HFCs) With Three or More Carbon-Hydrogen Bonds			
1,1,2,2,3,3-hexafluorocyclopentane	123768–18–3	cyc (-$CF_2CF_2CF_2CH_2CH_2$-)	120
1,1,2,2,3,3,4-heptafluorocyclopentane	1073290–77–4	cyc (-$CF_2CF_2CF_2CHFCH_2$-)	231
HFC–41	593–53–3	CH_3F	116
HFC–143	430–66–0	$C_2H_3F_3$	328
HFC–143a	420–46–2	$C_2H_3F_3$	4,800
HFC–10732	624–72–6	CH_2FCH_2F	16
HFC–10732a	75–37–6	CH_3CHF_2	138
HFC–161	353–36–6	CH_3CH_2F	4
HFC–245ca	679–86–7	$C_3H_3F_5$	716
HFC–245cb	1814–88–6	$CF_3CF_2CH_3$	4,620
HFC–245ea	24270–66–4	$CHF_2CHFCHF_2$	235
HFC–245eb	431–31–2	$CH_2FCHFCF_3$	290
HFC–245fa	460–73–1	$CHF_2CH_2CF_3$	858
HFC–263fb	421–07–8	$CH_3CH_2CF_3$	76
HFC–272ca	420–45–1	$CH_3CF_2CH_3$	144
HFC–365mfc	406–58–6	$CH_3CF_2CH_2CF_3$	804
Saturated Hydrofluoroethers (HFEs) and Hydrochlorofluoroethers (HCFEs) With One Carbon-Hydrogen Bond			
HFE–125	3822–68–2	CHF_2OCF_3	12,400
HFE–227ea	2356–62–9	$CF_3CHFOCF_3$	6,450
HFE–329mcc2	134769–21–4	$CF_3CF_2OCF_2CHF_2$	3,070
HFE–329me3	428454–68–6	$CF_3CFHCF_2OCF_3$	4,550
1,1,1,2,2,3,3-Heptafluoro-3-(1,2,2,2-tetrafluoroethoxy)-propane	3330–15–2	$CF_3CF_2CF_2OCHFCF_3$	6,490
Saturated HFEs and HCFEs With Two Carbon-Hydrogen Bonds			
HFE–134 (HG–00)	1691–17–4	CHF_2OCHF_2	5,560
HFE–236ca	32778–11–3	$CHF_2OCF_2CHF_2$	4,240
HFE–236ca12 (HG–10)	7807322–47–1	$CHF_2OCF_2OCHF_2$	5,350
HFE–236ea2 (Desflurane)	57041–67–5	$CHF_2OCHFCF_3$	1,790
HFE–236fa	20193–67–3	$CF_3CH_2OCF_3$	979

TABLE 2—REVISED CHEMICAL-SPECIFIC GWPS FOR COMPOUNDS IN TABLE A–1—Continued

Name	CAS No.	Chemical formula	GWP (100-year)
HFE–338mcf2	156053–88–2	$CF_3CF_2OCH_2CF_3$	929
HFE–338mmz1	26103–08–2	$CHF_2OCH(CF_3)_2$	2,620
HFE–338pcc13 (HG–01)	188690–78–0	$CHF_2OCF_2CF_2OCHF_2$	2,910
HFE–43–10pccc (H-Galden 1040x, HG–11)	E1730133	$CHF_2OCF_2OC_2F_4OCHF_2$	2,820
HCFE–235ca2 (Enflurane)	13838–16–9	CHF_2OCF_2CHFCl	583
HCFE–235da2 (Isoflurane)	26675–46–7	$CHF_2OCHClCF_3$	491
HG–02	205367–61–9	$HF_2C\text{-}(OCF_2CF_2)_2\text{-}OCF_2H$	2,730
HG–03	173350–37–3	$HF_2C\text{-}(OCF_2CF_2)_3\text{-}OCF_2H$	2,850
HG–20	249932–25–0	$HF_2C\text{-}(OCF_2)_2\text{-}OCF_2H$	5,300
HG–21	249932–26–1	$HF_2C\text{-}OCF_2CF_2OCF_2OCF_2O\text{-}CF_2H$	3,890
HG–30	188690–77–9	$HF_2C\text{-}(OCF_2)_3\text{-}OCF_2H$	7,330
1,1,3,3,4,4, 6,6,7,7,9,9, 10,10,12,12, 13,13,15, 15-eicosafluoro-2,5,8,11,14-Pentaoxapentadecane.	173350–38–4	$HCF_2O(CF_2CF_2O)_4CF_2H$	3,630
1,1,2-Trifluoro-2-(trifluoromethoxy)-ethane	84011–06–3	$CHF_2CHFOCF_3$	1,240
Trifluoro(fluoromethoxy)methane	2261–01–0	CH_2FOCF_3	751
Saturated HFEs and HCFEs With Three or More Carbon-Hydrogen Bonds			
HFE–143a	421–14–7	CH_3OCF_3	523
HFE–245cb2	22410–44–2	$CH_3OCF_2CF_3$	654
HFE–245fa1	84011–15–4	$CHF_2CH_2OCF_3$	828
HFE–245fa2	1885–48–9	$CHF_2OCH_2CF_3$	812
HFE–254cb1	425–88–7	$CH_3OCF_2CHF_2$	301
HFE–263fb2	460–43–5	$CF_3CH_2OCH_3$	1
HFE–263m1; R–E–143a	690–22–2	$CF_3OCH_2CH_3$	29
HFE–347mcc3 (HFE–7000)	375–03–1	$CH_3OCF_2CF_2CF_3$	530
HFE–347mcf2	171182–95–9	$CF_3CF_2OCH_2CHF_2$	854
HFE–347mmy1	2200732–84–2	$CH_3OCF(CF_3)_2$	363
HFE–347mmz1 (Sevoflurane)	2807323–86–6	$(CF_3)_2CHOCH_2F$	216
HFE–347pcf2	406–78–0	$CHF_2CF_2OCH_2CF_3$	889
HFE–356mec3	382–34–3	$CH_3OCF_2CHFCF_3$	387
HFE–356mff2	333–36–8	$CF_3CH_2OCH_2CF_3$	17
HFE–356mmz1	13171–18–1	$(CF_3)_2CHOCH_3$	14
HFE–356pcc3	160620–20–2	$CH_3OCF_2CF_2CHF_2$	413
HFE–356pcf2	50807–77–7	$CHF_2CH_2OCF_2CHF_2$	719
HFE–356pcf3	35042–99–0	$CHF_2OCH_2CF_2CHF_2$	446
HFE–365mcf2	2200732–81–9	$CF_3CF_2OCH_2CH_3$	58
HFE–365mcf3	378–16–5	$CF_3CF_2CH_2OCH_3$	0.99
HFE–374pc2	512–51–6	$CH_3CH_2OCF_2CHF_2$	627
HFE–449s1 (HFE–7100) Chemical blend	163702–07–6 163702–08–7	$C_4F_9OCH_3$ $(CF_3)_2CFCF_2OCH_3$.	421
HFE–569sf2 (HFE–7200) Chemical blend	163702–05–4 163702–06–5	$C_4F_9OC_2H_5$ $(CF_3)_2CFCF_2OC_2H_5$.	57
HFE–7300	132182–92–4	$(CF_3)_2CFCFOC_2H_5CF_2CF_2CF_3$	405
HFE–7500	297730–93–9	$n\text{-}C_3F_7CFOC_2H_5CF(CF_3)_2$	13
HG′-01	73287–23–7	$CH_3OCF_2CF_2OCH_3$	222
HG′-02	485399–46–0	$CH_3O(CF_2CF_2O)_2CH_3$	236
HG′-03	485399–48–2	$CH_3O(CF_2CF_2O)_3CH_3$	221
Difluoro(methoxy)methane	359–15–9	CH_3OCHF_2	144
2-Chloro-1,1,2-trifluoro-1-methoxyethane	425–87–6	CH_3OCF_2CHFCl	122
1-Ethoxy-1,1,2,2,3,3,3-heptafluoropropane	22052–86–4	$CF_3CF_2CF_2OCH_2CH_3$	61
2-Ethoxy-3,3,4,4,5-pentafluorotetrahydro-2,5-bis[1,2,2,2-tetrafluoro-1-(trifluoromethyl)ethyl]-furan.	920979–28–8	$C_{12}H_5F_{19}O_2$	56
1-Ethoxy-1,1,2,3,3,3-hexafluoropropane	380–34–7	$CF_3CHFCF_2OCH_2CH_3$	23
Fluoro(methoxy)methane	460–22–0	CH_3OCH_2F	13
1,1,2,2-Tetrafluoro-3-methoxy-propane; Methyl 2,2,3,3-tetrafluoropropyl ether	60598–17–6	$CHF_2CF_2CH_2OCH_3$	0.49
1,1,2,2-Tetrafluoro-1-(fluoromethoxy)ethane	37031–31–5	$CH_2FOCF_2CF_2H$	871
Difluoro(fluoromethoxy)methane	461–63–2	CH_2FOCHF_2	617
Fluoro(fluoromethoxy)methane	462–51–1	CH_2FOCH_2F	130
Saturated Chlorofluorocarbons (CFCs)			
E–R316c	3832–15–3	trans-cyc ($\text{-}CClFCF_2CF_2CClF\text{-}$)	4,230
Z–R316c	3934–26–7	cis-cyc ($\text{-}CClFCF_2CF_2CClF\text{-}$)	5,660
Fluorinated Formates			
Trifluoromethyl formate	85358–65–2	$HCOOCF_3$	588
Perfluoroethyl formate	313064–40–3	$HCOOCF_2CF_3$	580
1,2,2,2-Tetrafluoroethyl formate	481631–19–0	$HCOOCHFCF_3$	470
Perfluorobutyl formate	197218–56–7	$HCOOCF_2CF_2CF_2CF_3$	392
Perfluoropropyl formate	271257–42–2	$HCOOCF_2CF_2CF_3$	376
1,1,1,3,3,3-Hexafluoropropan-2-yl formate	856766–70–6	$HCOOCH(CF_3)_2$	333
2,2,2-Trifluoroethyl formate	32042–38–9	$HCOOCH_2CF_3$	33
3,3,3-Trifluoropropyl formate	1344118–09–7	$HCOOCH_2CH_2CF_3$	17
Fluorinated Acetates			
Methyl 2,2,2-trifluoroacetate	431–47–0	CF_3COOCH_3	52
1,1-Difluoroethyl 2,2,2-trifluoroacetate	1344118–13–3	$CF_3COOCF_2CH_3$	31
Difluoromethyl 2,2,2-trifluoroacetate	2024–86–4	$CF_3COOCHF_2$	27

TABLE 2—REVISED CHEMICAL-SPECIFIC GWPS FOR COMPOUNDS IN TABLE A–1—Continued

Name	CAS No.	Chemical formula	GWP (100-year)
2,2,2-Trifluoroethyl 2,2,2-trifluoroacetate	407–38–5	$CF_3COOCH_2CF_3$	7
Methyl 2,2-difluoroacetate	433–53–4	HCF_2COOCH_3	3
Perfluoroethyl acetate	343269–97–6	$CH_3COOCF_2CF_3$	2
Trifluoromethyl acetate	74123–20–9	CH_3COOCF_3	2
Perfluoropropyl acetate	1344118–10–0	$CH_3COOCF_2CF_2CF_3$	2
Perfluorobutyl acetate	209597–28–4	$CH_3COOCF_2CF_2CF_2CF_3$	2
Ethyl 2,2,2-trifluoroacetate	383–63–1	$CF_3COOCH_2CH_3$	1
Carbonofluoridates			
Methyl carbonofluoridate	1538–06–3	$FCOOCH_3$	95
1,1-Difluoroethyl carbonofluoridate	1344118–11–1	$FCOOCF_2CH_3$	27
Fluorinated Alcohols Other Than Fluorotelomer Alcohols			
Bis(trifluoromethyl)-methanol	920–66–1	$(CF_3)_2CHOH$	182
2,2,3,3,4,4,5,5-Octafluorocyclopentanol	16621–87–7	cyc $(-(CF_2)_4CH(OH)-)$	13
2,2,3,3,3-Pentafluoropropanol	422–05–9	$CF_3CF_2CH_2OH$	19
2,2,3,3,4,4,4-Heptafluorobutan-1-ol	375–01–9	C_3F_7CH2OH	34
2,2,2-Trifluoroethanol	75–89–8	CF_3CH_2OH	20
2,2,3,4,4,4-Hexafluoro-1-butanol	382–31–0	$CF_3CHFCF_2CH_2OH$	17
2,2,3,3-Tetrafluoro-1-propanol	76–37–9	$CHF_2CF_2CH_2OH$	13
2,2-Difluoroethanol	359–13–7	CHF_2CH2OH	3
2-Fluoroethanol	371–62–0	CH_2FCH_2OH	1.1
4,4,4-Trifluorobutan-1-ol	461–18–7	$CF_3(CH_2)_2CH_2OH$	0.05
Non-Cyclic, Unsaturated Perfluorocarbons (PFCs)			
PFC–1114; TFE	116–14–3	$CF_2{=}CF_2$; C_2F_4	0.004
PFC–1216; Dyneon HFP	116–15–4	C_3F_6; $CF_3CF{=}CF_2$	0.05
Perfluorobut-2-ene	360–89–4	$CF_3CF{=}CFCF_3$	1.82
Perfluorobut-1-ene	357–26–6	$CF_3CF_2CF{=}CF_2$	0.10
Perfluorobuta-1,3-diene	685–63–2	$CF_2{=}CFCF{=}CF_2$	0.003
Non-Cyclic, Unsaturated Hydrofluorocarbons (HFCs) and Hydrochlorofluorocarbons (HCFCs)			
HFC–1132a; VF2	75–38–7	$C_2H_2F_2$, $CF_2{=}CH_2$	0.04
HFC–1141; VF	75–02–5	C_2H_3F, $CH_2{=}CHF$	0.02
(E)-HFC–1225ye	5595–10–8	$CF_3CF{=}CHF(E)$	0.06
(Z)-HFC–1225ye	507328–43–8	$CF_3CF{=}CHF(Z)$	0.22
Solstice 1233zd(E)	102687–65–0	$C_3H_2ClF_3$; $CHCl{=}CHCF_3$	1.34
HCFO–1233zd(Z)	99728–16–2	(Z)-$CF_3CH{=}CHCl$	0.45
HFC–1234yf; HFO–1234yf	754–12–1	$C_3H_2F_4$; $CF_3CF{=}CH_2$	0.31
HFC–1234ze(E)	1645–83–6	$C_3H_2F_4$; trans-$CF_3CH{=}CHF$	0.97
HFC–1234ze(Z)	29118–25–0	$C_3H_2F_4$; cis-$CF_3CH{=}CHF$; $CF_3CH{=}CHF$	0.29
HFC–1243zf; TFP	677–21–4	$C_3H_3F_3$, $CF_3CH{=}CH_2$	0.12
(Z)-HFC–1336	692–49–9	$CF_3CH{=}CHCF_3(Z)$	1.58
HFO–1336mzz(E)	66711–86–2	(E)-$CF_3CH{=}CHCF_3$	18
HFC–1345zfc	374–27–6	$C_2F_5CH{=}CH_2$	0.09
HFO–1123	359–11–5	$CHF{=}CF_2$	0.005
HFO–1438ezy(E)	14149–41–8	(E)-$(CF_3)_2CFCH{=}CHF$	8.2
HFO–1447fz	355–08–8	$CF_3(CF_2)_2CH{=}CH_2$	0.24
Capstone 42–U	19430–93–4	$C_6H_3F_9$, $CF_3(CF_2)_3CH{=}CH_2$	0.16
Capstone 62–U	2073291–17–2	$C_8H_3F_{13}$, $CF_3(CF_2)_5CH{=}CH_2$	0.11
Capstone 82–U	2160732–58–4	$C_{10}H_3F_{17}$, $CF_3(CF_2)_7CH{=}CH_2$	0.09
(e)-1-chloro-2-fluoroethene	460–16–2	(E)-$CHCl{=}CHF$	0.004
3,3,3-trifluoro-2-(trifluoromethyl)prop-1-ene	382–10–5	$(CF_3)_2C{=}CH_2$	0.38
Non-Cyclic, Unsaturated CFCs			
CFC–1112	598–88–9	$CClF{=}CClF$	0.13
CFC–1112a	79–35–6	$CCl_2{=}CF_2$	0.021
Non-Cyclic, Unsaturated Halogenated Ethers			
PMVE; HFE–216	1187–93–5	$CF_3OCF{=}CF_2$	0.17
Fluoroxene	406–90–6	$CF_3CH_2OCH{=}CH_2$	0.05
Methyl-perfluoroheptene-ethers	N/A	$CH_3OC_7F_{13}$	15
Non-Cyclic, Unsaturated Halogenated Esters			
Ethenyl 2,2,2-trifluoroacetate	433–28–3	$CF_3COOCH{=}CH_2$	0.008
Prop-2-enyl 2,2,2-trifluoroacetate	383–67–5	$CF_3COOCH_2CH{=}CH_2$	0.007
Cyclic, Unsaturated HFCs and PFCs			
PFC C–1418	559–40–0	c-C_5F_8	2
Hexafluorocyclobutene	697–11–0	cyc $(-CF{=}CFCF_2CF_2-)$	126
1,3,3,4,4,5,5-heptafluorocyclopentene	1892–03–1	cyc $(-CF_2CF_2CF_2CF{=}CH-)$	45
1,3,3,4,4-pentafluorocyclobutene	374–31–2	cyc $(-CH{=}CFCF_2CF_2-)$	92
3,3,4,4-tetrafluorocyclobutene	2714–38–7	cyc $(-CH{=}CHCF_2CF_2-)$	26

TABLE 2—REVISED CHEMICAL-SPECIFIC GWPS FOR COMPOUNDS IN TABLE A–1—Continued

Name	CAS No.	Chemical formula	GWP (100-year)
Fluorinated Aldehydes			
3,3,3-Trifluoro-propanal	460–40–2	CF_3CH_2CHO	0.01
Fluorinated Ketones			
Novec 1230 (perfluoro (2-methyl-3-pentanone))	756–13–8	$CF_3CF_2C(O)CF(CF3)_2$	0.1
1,1,1-trifluoropropan-2-one	421–50–1	CF_3COCH_3	0.09
1,1,1-trifluorobutan-2-one	381–88–4	$CF_3COCH_2CH_3$	0.095
Fluorotelomer			
3,3,4,4,5,5,6,6,7,7,7-Undecafluoroheptan-1-ol	185689–57–0	$CF_3(CF_2)_4CH_2CH_2OH$	0.43
3,3,3-Trifluoropropan-1-ol	2240–88–2	$CF_3CH_2CH_2OH$	0.35
3,3,4,4,5,5,6,6,7,7,8,8,9,9,9-Pentadecafluorononan-1-ol	755–02–2	$CF_3(CF_2)_6CH_2CH_2OH$	0.33
3,3,4,4,5,5,6,6,7,7,8,8,9,9,10,10,11,11,11-Nonadecafluoroundecan-1-ol	87017–97–8	$CF_3(CF_2)_8CH_2CH_2OH$	0.19
Fluorinated GHGs With Carbon-Iodine Bond(s)			
Trifluoroiodomethane	2314–97–8	CF_3I	0.4
Remaining Fluorinated GHGs with Chemical-Specific GWPs			
Dibromodifluoromethane (Halon 1202)	75–61–6	CBr_2F_2	231
2-Bromo-2-chloro-1,1,1-trifluoroethane (Halon-2311/Halothane)	151–67–7	$CHBrClCF_3$	41
Heptafluoroisobutyronitrile	42532–60–5	$(CF_3)_2CFCN$	2,750
Carbonyl fluoride	353–50–4	COF_2	0.14

As proposed, we are also amending table A–1 to subpart A of part 98 to revise the default GWPs. We are modifying the default GWP groups to add a group for saturated CFCs and a group for cyclic forms of unsaturated halogenated compounds. Based on the numerical differences between the GWP for cyclic unsaturated halogenated compounds and non-cyclic unsaturated halogenated compounds, we are also modifying the ninth F–GHG group to reflect non-cyclic forms of unsaturated halogenated compounds. The amendments update the default GWPs of each group based on the average of the updated chemical-specific GWPs (adopted from either the IPCC AR5 or AR6) for the compounds that belong to that group. We are also finalizing our proposal to rename the fluorinated GHG group ''Other fluorinated GHGs'' to ''Remaining fluorinated GHGs.'' The new and revised fluorinated GHG groups and their new and revised GWPs are listed in table 3 of this preamble.

TABLE 3—FLUORINATED GHG GROUPS AND DEFAULT GWPS FOR TABLE A–1

Fluorinated GHG group	GWP (100-year)
Fully fluorinated GHGs	9,200
Saturated hydrofluorocarbons (HFCs) with two or fewer carbon-hydrogen bonds.	3,000
Saturated HFCs with three or more carbon-hydrogen bonds.	840
Saturated hydrofluoroethers (HFEs) and hydrochlorofluoroethers (HCFEs) with one carbon-hydrogen bond.	6,600
Saturated HFEs and HCFEs with two carbon-hydrogen bonds.	2,900
Saturated HFEs and HCFEs with three or more carbon-hydrogen bonds.	320
Saturated chlorofluorocarbons (CFCs).	4,900
Fluorinated formates	350
Cyclic forms of the following: unsaturated perfluorocarbons (PFCs), unsaturated HFCs, unsaturated CFCs, unsaturated hydrochlorofluorocarbons (HCFCs), unsaturated bromofluorocarbons (BFCs), unsaturated bromochlorofluorocarbons (BCFCs), unsaturated hydrobromofluorocarbons (HBFCs), unsaturated hydrobromochlorofluorocarbons (HBCFCs), unsaturated halogenated ethers, and unsaturated halogenated esters.	58
Fluorinated acetates, carbonofluoridates, and fluorinated alcohols other than fluorotelomer alcohols.	25
Fluorinated aldehydes, fluorinated ketones, and non-cyclic forms of the following: unsaturated PFCs, unsaturated HFCs, unsaturated CFCs, unsaturated HCFCs, unsaturated BFCs, unsaturated BCFCs, unsaturated HBFCs, unsaturated HBCFCs, unsaturated halogenated ethers, and unsaturated halogenated esters.	1
Fluorotelomer alcohols	1
Fluorinated GHGs with carbon-iodine bond(s).	1
Remaining fluorinated GHGs	1,800

b. Other Revisions To Improve the Quality of Data Collected for Subpart A

The EPA is finalizing several revisions to improve the quality of data collected for subpart A as proposed. In some cases, we are finalizing the proposed amendments with revisions. First, we are clarifying in 40 CFR 98.2(i)(1) and (2), as proposed, that the provision to allow cessation of reporting or ''off-ramping,'' due to meeting either the 15,000 $mtCO_2e$ level or the 25,000 $mtCO_2e$ level for the number of years specified in 40 CFR 98.2(i), is based on the CO_2e reported, calculated in accordance with 40 CFR 98.3(c)(4)(i) (*i.e.,* the annual emissions report value as specified in that provision). The final amendments also clarify that after an

owner or operator off-ramps, the owner or operator must use equation A–1 to subpart A and follow the requirements of 40 CFR 98.2(b)(4) (the emission estimation methods used for determination of applicability) in subsequent years to determine if emissions exceed the 25,000 $mtCO_2e$ applicability threshold and whether the facility or supplier must resume reporting.

Additionally, the EPA is amending 40 CFR 98.2(f)(1) and adding new paragraph (k) as proposed to clarify the calculation of GHG quantities for comparison to the 25,000 $mtCO_2e$ threshold for importers and exporters of industrial greenhouse gases. The final amendments to 40 CFR 98.2(f)(1) state that importers and exporters must include the F–HTFs that are imported or exported during the year. New paragraph (k) specifies how to calculate the quantities of F–GHGs and F–HTFs destroyed for purposes of comparing them to the 25,000 $mtCO_2e$ threshold for stand-alone industrial F–GHG or F–HTF destruction facilities. The EPA is also finalizing as proposed revisions to 40 CFR 98.3(h)(4) to limit the total number of days a reporter can request to extend the time period for resolving a substantive error, either by submitting a revised report or providing information demonstrating that the previously submitted report does not contain the substantive error, to 180 days. Specifically, the Administrator will only approve extension requests for a total of 180 days from the initial notification of a substantive error. See section III.A.1. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on these revisions and their supporting basis.

We are finalizing minor clarifications to the reporting and special provisions for best available monitoring methods in 40 CFR 98.3(k) and (l) as proposed, which apply to owners or operators of facilities or suppliers that first become subject to any subpart of part 98 due to amendment(s) to table A–1 to subpart A. The final requirements revise the term ''published'' to add ''in the **Federal Register** as a final rulemaking'' to clarify the EPA's intent that the requirements apply to facilities or suppliers that are first subject to the GHGRP in the year after the year the GWP is published as part of a final rule.

The EPA is finalizing an additional edit to subpart A to the electronic reporting provisions of 40 CFR 98.5(b). The revisions clarify that 40 CFR 98.5(b) applies to any data that is specified as verification software records in a subpart's applicable recordkeeping section.

The EPA is finalizing several revisions to subpart A to incorporate new and revised source categories. We are revising tables A–3 and A–4 to subpart A to clarify the reporting applicability for facilities included in the new source categories of coke calcining; ceramics manufacturing; calcium carbide production; caprolactam, glyoxal, and glyoxylic acid production; and facilities conducting geologic sequestration of carbon dioxide with enhanced oil recovery. We are revising table A–3 to subpart A to add new subparts that are ''all-in'' source categories, including subpart VV (Geologic Sequestration of Carbon Dioxide with Enhanced Oil Recovery Using ISO 27916) (section III.AA. of this preamble), subpart WW (Coke Calciners) (section III.BB. of this preamble), subpart XX (Calcium Carbide Production) (section III.CC. of this preamble), and subpart YY (Caprolactam, Glyoxal, and Glyoxylic Acid Production) (section III.DD. of this preamble). We are revising table A–4 to add new subpart ZZ (Ceramics Manufacturing) and assign a threshold of 25,000 $mtCO_2e$, as proposed. As discussed in section III.EE. of this preamble, subpart ZZ to part 98 applies to certain ceramics manufacturing processes that exceed a minimum production level (*i.e.,* annually consume at least 2,000 tons of carbonates, either as raw materials or as a constituent in clay, heated to a temperature sufficient to allow the calcination reaction to occur) and that exceed the 25,000 $mtCO_2e$ threshold. The revisions to tables A–3 and A–4 to subpart A clarify that these new source categories apply in RY2025 and future years.

The EPA is finalizing several revisions to defined terms in 40 CFR 98.6 as proposed to provide further clarity. These revisions to definitions include:

- Revising the definition of ''bulk'' to clarify that the import and export of gas includes small containers and does not exclude a minimum container size below which reporting will not be required (except for small shipments (*i.e.,* those including less than 25 kilograms)), and to align with the definition of ''bulk'' under the American Innovation and Manufacturing Act of 2020 (AIM) regulations at 40 CFR part 84.
- Revising the definition of ''greenhouse gas or GHG'' to clarify the treatment of fluorinated greenhouse gases by removing the partial list of fluorinated GHGs currently included in the definition and to simply refer to the definition of ''fluorinated greenhouse gas (GHG).''
- Adding the acronym ''(GHGs)'' after the term ''fluorinated greenhouse gas'' both in the definition of ''greenhouse gas or GHG'' and in the definition of ''fluorinated greenhouse gas'' to avoid redundancy and potential confusion between the definitions of ''greenhouse gas'' and ''fluorinated greenhouse gas.''
- Consistent with the revisions of the fluorinated GHG groups used to assign default GWPs discussed in section III.A.1.a. of this preamble, adding a definition of ''cyclic'' as it applies to molecular structures of various fluorinated GHGs; adding definitions of ''unsaturated chlorofluorocarbons (CFCs),'' ''saturated chlorofluorocarbons (CFCs),'' ''unsaturated bromofluorocarbons (BFCs),'' ''unsaturated bromochlorofluorocarbons (BCFCs),'' ''unsaturated hydrobromofluorocarbons (HBFCs),'' and ''unsaturated hydrobromochlorofluorocarbons (HBCFCs)''; and revising the definition of ''fluorinated greenhouse (GHG) group'' to include the new and revised groups.
- Revising the term ''other fluorinated GHGs'' to ''remaining fluorinated GHGs'' and to revise the definition of the term to reflect the new and revised fluorinated GHG groups discussed in section III.A.1.a. of this preamble.
- Revising the definition of ''fluorinated heat transfer fluids'' and moving it from 40 CFR 98.98 to 98.6 to harmonize with changes to subpart OO of part 98 (Suppliers of Industrial Greenhouse Gases) (see section III.U. of this preamble). The revised definition (1) explicitly includes industries other than electronics manufacturing, and (2) excludes most HFCs which are widely used as heat transfer fluids outside of electronics manufacturing and are regulated under the AIM regulations at 40 CFR part 84.
- Consistent with final revisions to subpart PP (Suppliers of Carbon Dioxide) (see section III.V. of this preamble), we are finalizing revisions to 40 CFR 98.6 to add a definition for ''Direct air capture'' and to amend the definition of ''Carbon dioxide stream.''

The EPA is making one revision to the definitions in the final rule from proposed to correct the definition of ''ASTM''. This change updates the definition to include the current name of the standards organization, ''ASTM, International''.

Consistent with final revisions to subparts Q (Iron and Steel Production), VV (Geologic Sequestration of Carbon Dioxide with Enhanced Oil Recovery Using ISO 27916), WW (Coke Calciners), and XX (Calcium Carbide Production), we are finalizing revisions to 40 CFR

98.7 to incorporate by reference ASTM International (ASTM) E415–17, *Standard Test Method for Analysis of Carbon and Low-Alloy Steel by Spark Atomic Emission Spectrometry* (2017) (subpart Q); CSA/ANSI ISO 27916:19, *Carbon dioxide capture, transportation and geological storage—Carbon dioxide storage using enhanced oil recovery* (CO_2–EOR) (2019) (subpart VV) (as proposed in the 2023 Supplemental Proposal); ASTM D3176–15 *Standard Practice for Ultimate Analysis of Coal and Coke* (2015), ASTM D5291–16 *Standard Test Methods for Instrumental Determination of Carbon, Hydrogen, and Nitrogen in Petroleum Products and Lubricants* (2016), ASTM D5373–21 *Standard Test Methods for Determination of Carbon, Hydrogen, and Nitrogen in Analysis Samples of Coal and Carbon in Analysis Samples of Coal and Coke* (2021), and NIST HB 44–2023: *Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices,* 2023 edition (subpart WW); and ASTM D5373–08 *Standard Test Methods for Instrumental Determination of Carbon, Hydrogen, and Nitrogen in Laboratory Samples of Coal* (2008) and ASTM C25–06, *Standard Test Methods for Chemical Analysis of Limestone, Quicklime, and Hydrated Lime* (2006) (subpart XX). The EPA has revised the regulatory text of 40 CFR 98.7 from proposal to incorporate these revisions and to reorganize the existing referenced ASTM standards in alphanumeric order.

The EPA is not finalizing proposed amendments to subpart A from the 2022 Data Quality Improvements Proposal that correlate with proposed amendments to subpart W of part 98 (Petroleum and Natural Gas Systems) from the 2022 Data Quality Improvements Proposal in this action. As noted in section I.C. of this preamble, the EPA has issued a subsequent proposed rule for subpart W on August 1, 2023, and has reproposed related amendments to subpart A in that action. Additionally, the EPA is not taking final action at this time on proposed amendments to subpart A from the 2023 Supplemental Proposal that were proposed harmonizing revisions intended to integrate proposed subpart B (Energy Consumption), including proposed reporting and recordkeeping under 40 CFR 98.2(a)(1), 98.3(c)(4), and 98.3(g)(5). Finally, we are not taking final action, at this time, on proposed amendments to 40 CFR 98.7 to incorporate by reference standards for electric metering. As discussed in section III.B. of this document, the EPA is not taking final action on subpart B at this time.

c. Revisions To Streamline and Improve Implementation for Subpart A

The EPA is finalizing several revisions to subpart A proposed in the 2022 Data Quality Improvements Proposal that will streamline and improve implementation for part 98. First, we are revising tables A–3 and table A–4 to subpart A to revise the applicability of subparts DD (Electrical Transmission and Distribution Equipment Use) and SS (Electrical Equipment Manufacture of Refurbishment) of part 98 as proposed. For subpart DD, the final revisions to table A–3 change the threshold such that facilities must account for the total estimated emissions from F–GHGs, as determined under 40 CFR 98.301 (subpart DD), for comparison to a threshold equivalent to 25,000 $mtCO_2e$ or more per year. We are also moving subpart SS from table A–3 to table A–4 to subpart A and specifying that subpart SS facilities must account for emissions of F–GHGs, as determined under the requirements of 40 CFR 98.451 (subpart SS), for comparison to a threshold equivalent to 25,000 $mtCO_2e$ or more per year. The final rule updates the threshold of subparts DD and SS to be consistent with the threshold set for the majority of subparts under part 98, and accounts for additional fluorinated gases (including F–GHG mixtures) reported by industry. For subpart DD, these final changes also focus Agency resources on the substantial emission sources within the sector by excluding facilities or operations that may report emissions that are consistently and substantially below 25,000 $mtCO_2e$ per year. See sections III.Q. and III.Y. of this preamble for additional information.

2. Summary of Comments and Responses on Subpart A

This section summarizes the major comments and responses related to the proposed amendments to subpart A. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart A.

a. Comments on Revisions To Global Warming Potentials

Comment: Several commenters supported the proposed revisions to table A–1 to subpart A to update the GWP values to use values from table 8.A.1 from the IPCC AR5, and for certain GHGs without GWP values listed in AR5, to adopt values from the IPCC AR6. Commenters remarked that the updates to the GWP values will be more accurate, align with UNFCCC guidance and the Inventory, and provide consistency to reporters who may also report under various voluntary standards, such as the GHG Protocol or Sustainability Accounting Standards Board.

Some commenters requested that the EPA clarify the effects of changing the GWP (particularly for CH_4) on the reported total CO_2e emissions, despite any actual change in mass emissions. The commenters asserted that it is important to inform stakeholders that future increases in CO_2e emissions due to the change in GWP are not reflective of any actual mass emission increases and may obscure decreases in annual mass emissions. The commenters also recommended that the EPA acknowledge how combustion CO_2e emissions will be affected.

Response: In the final rule, the EPA is finalizing its proposal (in the 2023 Supplemental Proposal) to adopt the 100-year GWPs from AR5, and for certain GHGs without GWPs listed in AR5, to adopt values from AR6. Regarding the commenters' concern that the change in GWPs may result in apparent, but not real, upward or downward trends in the data, the EPA has always published emissions using consistent GWPs for every year and will continue to do so. Prior to publication, the EPA updates all reported CO_2e values to reflect the current GWP values in table A–1 to subpart A of part 98. The CO_2e published by the EPA are based on the same GWP values across all reporting years. Hence, there will be no apparent upward or downward trend in emissions that are due only to a change in a GWP value.

Comment: A number of commenters supported the continued use of a 100-year GWP; one commenter stated that the 100-year GWP is consistent with Article 2 of the UNFCCC and that any movement to a framework that reduces the mitigation focus on CO_2 emissions and adds to long-term warming potential compared to the 100-year GWP framework would not be well justified. Several commenters specifically commented on the proposed GWP for CH_4; a number of commenters generally supported revising the CH_4 GWP value from 25 to 28 using the 100-year GWP. Other commenters recommended that the EPA consider incorporating GWP values on multiple time horizons in the reporting requirement, or when publicizing reported emissions. One

commenter stated that the 100-year GWP does not capture the near-term potency of short-lived gases like methane and hydrogen and is insufficient to reflect a pollutant's warming power over time. Commenters requested that the EPA incorporate the use of additional time horizons, such as the 20-year GWP, to acknowledge the near-term warming potency of short-lived gases such as CH_4, because they play a critical role in driving the rate of warming for the near future. Commenters argued that the 20-year GWP more accurately represents the powerful, short-term impact of methane on the atmosphere. Commenters noted that this would also align with several state regulatory programs, including California, New York, and New Jersey, that currently consider 20-year GWPs. Commenters stressed that adopting short-lived climate pollutant strategies and emissions controls to limit near-term warming is critical from a policy perspective and directly relevant to the EPA's efforts under the Clean Air Act. Commenters also requested that historic inventories be updated to reflect the role that short-lived climate pollutants play and to demonstrate that near-term CH_4 emissions reductions are as important as long-term CO_2 reductions.

Response: As has been the case since the inception of the GHGRP, we are finalizing 100-year GWPs for all GHGs. As noted in the ''Response to Comments on Final Rule, Volume 3: General Monitoring Approach, the Need for Detailed Reporting, and Other General Rationale Comments'' (see Docket ID. No. EPA–HQ–OAR–2008–0508–2260), the EPA selected the 100-year GWPs because these values are the internationally accepted standard for reporting GHG emissions. For example, the parties to the UNFCCC agreed to use GWPs that are based on a 100-year time period for preparing national inventories, and the reports submitted by other signatories to the UNFCCC use GWPs based on a 100-year time period, including the GWP for CH_4 and certain GHGs identified as short-lived climate pollutants. These values were subsequently adopted and used in multiple EPA climate initiatives, including the EPA's Significant New Alternatives Policy (SNAP) program and the Inventory, as well as EPA voluntary reduction partnerships (*e.g.,* Natural Gas STAR). Human-influenced climate change occurs on both short (decadal) and long (millennial) time scales. While there is no single best way to value both short- and long-term impacts in a single metric, the 100-year GWP is a reasonable approach that has been widely accepted by the international community. If the EPA were to adopt a 20-year GWP solely for CH_4, or for certain other compounds, it would introduce a metric that is inconsistent with both the GWPs used for the remaining table A–1 gases and with the reporting guidelines issued by the UNFCCC and used by the Inventory and other EPA programs. Additionally, the EPA and other Federal agencies, which calculate the impact of short-lived GHGs using 100-year GWPs, are making reduction of short-lived GHGs a priority, such as through the U.S. Global Methane Initiative. In addition, it is beneficial for both regulatory agencies and industry to use the same GWP values for these GHG compounds because it allows for more efficient review of data collected through the GHGRP and other U.S. climate programs, reduces potential errors that may arise when comparing multiple data sets or converting GHG emissions or supply based on separate GWPs, and reduces the burden for reporters and agencies to keep track of separate GWPs. For the reasons described above, the EPA is retaining a 100-year time horizon as the standard metric for defining GWPs in the GHGRP.

b. Comments on Other Revisions To Improve the Quality of Data Collected for Subpart A

Comment: Several commenters opposed the EPA's proposed revisions to 40 CFR 98.3(h)(4) to limit the total number of days a reporter can request to extend the time period for resolving a substantive error, either by submitting a revised report or providing information demonstrating that the previously submitted report does not contain the substantive error, to 180 days. Commenters requested that the Agency not put an inflexible cap on the number of days to resolve reporting issues; the commenters asserted that the extensions can be helpful for newly affected sources, when there is a change in facility ownership, and in other situations. One commenter stated that the proposed revision may result in arbitrarily short time-periods in which an operator may correct an error, especially in cases where the correction may not be accepted. The commenter contended that the EPA must add additional language to clarify that the 180-day limit will restart if the correction is not accepted. Commenters also requested that the EPA increase the limit of the total number of days a reporter can request an extension beyond the proposed 180 days to provide reporters more time to work through the new provisions in the program. One commenter requested the EPA restart the 180-day extension request opportunity for each instance in which an operator is notified of a substantive error or rejected correction (*e.g.,* if a correction is rejected, if additional corrections are requested, if corrections span more than one reporting year, or if EPA responses to operator questions are delayed).

Response: The EPA expects that 180 days is a reasonable amount of time for a facility to examine company records, gather additional data, and/or perform recalculations to submit a revised report or provide the necessary information such that the report may be verified. This represents more than four 30-day additional extensions beyond the initial 45-day period. As noted in the preamble to the final rule promulgated on October 30, 2009 (74 FR 52620, hereafter referred to as the ''2009 Final Rule''), the EPA concluded that this initial 45-day period would be sufficient since facilities have three months from the end of a reporting period to submit the initial annual report and have already collected and retained data needed for the analyses, so revisions to address a known error would likely require less time (see 74 FR 56278). A subsequent series of extensions of up to an additional 135 days is a reasonable amount of time to accommodate any additional changes that may be needed to the revision.

B. Subpart B—Energy Consumption

The EPA is not taking final action on the proposed addition of subpart B of part 98 (Energy Consumption) in this final rule. The EPA received a number of comments for proposed subpart B. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to proposed subpart B.

In the 2022 Data Quality Improvements Proposal, the EPA requested comment on collecting data on energy consumption in order to improve the quality of the data collected under the GHGRP. Specifically, we provided background on the EPA's original request for comment on the collection of data related to electricity consumption in the development of part 98 and the EPA's response in the 2009 Final Rule, and requested comment on whether and how the EPA should collect energy consumption data in order to support data analyses related to informing voluntary energy efficiency

programs, provide information on industrial sectors where currently little data are reported to GHGRP, and inform quality assurance/quality control (QA/QC) of the Inventory. We requested comment on specific considerations for the potential addition of the energy consumption source category (see section IV.F. of the preamble to the 2022 Data Quality Improvements Proposal for additional information).

Following consideration of comments received in response to the EPA's request for comment, we subsequently proposed, in the 2023 Supplemental Proposal, the addition of subpart B to part 98. At that time, we reiterated our interest in collecting data on energy consumption to gain an improved understanding of the energy intensity (*i.e.,* the amount of energy required to produce a given level of product or activity, both through on-site energy produced from fuel combustion and purchased energy) of specific facilities or sectors, and to better inform our understanding of energy needs and the potential indirect GHG emissions associated with certain sectors. The proposed rule included specific monitoring and reporting requirements for direct emitting facilities that report under part 98 and purchase metered electricity or metered thermal energy products. In the proposed rule, the EPA outlined a source category definition, rationale for the proposed applicability of the subpart to direct emitting facilities in lieu of a threshold, and specific monitoring, missing data, recordkeeping, and reporting requirements. The EPA did not propose requirements for facilities to calculate or report indirect emissions estimates associated with purchased metered electricity or metered thermal energy products. Additional information on the proposed amendments is available in the preamble to the 2023 Supplemental Proposal.

In response to the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal, the EPA received many comments on the proposed subpart from a variety of stakeholders providing input on the definition, applicability criteria, monitoring, reporting, recordkeeping, and additional requirements of the source category, as proposed, as well as a number of comments on the EPA's authority to collect the energy consumption data proposed under subpart B. The EPA is not taking final action on proposed subpart B at this time. The EPA intends to further review and consider these comments and other relevant information and may consider any next steps on the collection of data related to energy consumption in a future rulemaking. Therefore, none of the proposed requirements related to subpart B are included in this final rule. The EPA is also not taking final action on related amendments to subpart A (General Provisions) of part 98 that were proposed harmonizing changes for the implementation subpart B, including reporting requirements, as discussed in section III.A.1.b. of this preamble.

C. Subpart C—General Stationary Fuel Combustion

The EPA is finalizing several amendments to subpart C of part 98 (General Stationary Fuel Combustion) as proposed. In some cases, we are finalizing the proposed amendments with revisions. In other cases, we are not taking final action on the proposed amendments. Section III.C.1. of this preamble discusses the final revisions to subpart C. The EPA received several comments on the proposed subpart C revisions which are discussed in section III.C.2. of this preamble. We are also finalizing as proposed confidentiality determinations for new data elements resulting from the final revisions to subpart C, as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart C

This section summarizes the final amendments to subpart C. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart C can be found in this section and section III.C.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

a. Revisions To Improve the Quality of Data Collected for Subpart C

The EPA is finalizing several revisions to improve the quality of data collected for subpart C. First, the EPA is finalizing modifications to the Tier 3 calculation methodology, including revisions to 40 CFR 98.33(a)(3)(iii) to provide new equations C–5A and C–5B, as proposed. The updated equations provide for calculating a weighted annual average carbon content and a weighted annual average molecular weight, respectively, and correct the calculation method for Tier 3 gaseous fuels. The new equations incorporate the molar volume conversion factor at standard conditions (as defined at 40 CFR 98.6) and, for annual average carbon content, the measured molecular weight of the fuel, in order to convert the fuel flow to the appropriate units of measure. The final rule includes corrections to the proposed paragraph references included in the definition of the variable ''MW'' (*i.e.,* molecular weight) to equation C–5.

The EPA is also finalizing as proposed revisions to provisions pertaining to the calculation of biogenic emissions from tire combustion. These revisions include:

- Removing the additional provision in 40 CFR 98.33(b)(1)(vii) on how to apply the threshold to only municipal solid waste (MSW) fuel when MSW and tires are both combusted and the reporter elects not to separately calculate and report biogenic CO_2 emissions from the combustion of tires, since biogenic CO_2 emissions from tire combustion must now be calculated and reported in all cases;
- Removing the language in 40 CFR 98.33(e) and 98.36(e)(2)(xi) referring to optional biogenic CO_2 emissions reporting from tire combustion;
- Removing the restriction in 40 CFR 98.33(e)(3)(iv) that the default factor that is used to determine biogenic CO_2 emissions may only be used to estimate the annual biogenic CO_2 emissions from the combustion of tires if the combustion of tires represents ''no more than 10 percent annual heat input to a unit'';
- Revising 40 CFR 98.33(e)(3)(iv)(A) so that total annual CO_2 emissions will be calculated using the applicable methodology in 40 CFR 98.33(a)(1) through (3) for units using Tier 1 through 3 for purposes of 40 CFR 98.33(a), and using the Tier 1 calculation methodology in 40 CFR 98.33(a)(1) for units using the Tier 4 or part 75 calculation methodologies for purposes of 40 CFR 98.33(a), when determining the biogenic component of MSW and/or tires under 40 CFR 98.33(e)(3)(iv);
- Revising 40 CFR 98.33(e)(3)(iv)(B) to update the default factor that is used to determine biogenic CO_2 emissions from the combustion of tires from 0.20 to 0.24; and
- Correcting 40 CFR 98.34(d) to reference 40 CFR 98.33(e)(3)(iv) instead of 40 CFR 98.33(b)(1)(vi) and (vii) and correcting 40 CFR 98.33(e)(1) to delete the parenthetical clause ''(except MSW and tires).''

These final revisions will update the default factor to be based on more recent data collected on the average composition of natural rubber in tires, remove potentially confusing or conflicting requirements, and result in a more accurate characterization of biogenic emissions from these sources.

See section III.B.1. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on these revisions and their supporting basis. The EPA is also finalizing one additional revision related to the estimation of biogenic emissions after consideration of comments received on the 2022 Data Quality Improvements Proposal. Commenters requested that the EPA expand the monitoring requirements at 40 CFR 98.34(e) to include all combined biomass and fossil fuels and to allow for testing at one source when a common fuel is combusted. The EPA agrees that testing one emission source is reasonable when multiple combustion units are fed from a common fuel source. Accordingly, the EPA is revising 40 CFR 98.34(e) to allow for quarterly ASTM D6866–16 and ASTM D7459–08 testing of one representative unit for a common fuel source for all combined biomass (or fuels with a biomass component) and fossil fuels. See section III.C.2. of this preamble for additional information on related comments and the EPA's response.

We are finalizing corrections to the variable ''R'' in equation C–11. The term ''R'' is currently defined as ''The number of moles of CO_2 released upon capture of one mole of the acid gas species being removed (R = 1.00 when the sorbent is $CaCO_3$ and the targeted acid gas species is SO_2)'' and is being amended to ''The number of moles of CO_2 released per mole of sorbent used (R = 1.00 when the sorbent is $CaCO_3$ and the targeted acid gas species is SO_2).'' We are finalizing amendments to 40 CFR 98.33(c)(6)(i), (ii), (ii)(A), and (iii)(C), and to remove and reserve 40 CFR 98.33(c)(6)(iii)(B) (to clarify the methods used to calculate CH_4 and N_2O emissions for blended fuels when heat input is determined after the fuels are mixed and combusted), as proposed.

The EPA identified one additional minor correction to subpart C in review of changes for the final rule. Subsequently, we are correcting the definition of the term emission factor ''EF'' in equation C–10 from ''Fuel-specific emission factor for CH_4 or N_2O, from table C–2 of this section'' to ''Fuel-specific emission factor for CH_4 or N_2O, from table C–2 to this subpart.''

The EPA is finalizing as proposed two additional clarifications to the reporting and recordkeeping requirements. We are revising the first sentence of 40 CFR 98.36(e)(2)(ii)(C) to clarify that both the annual average, and where applicable, monthly high heat values are required to be reported. This change clarifies that the annual average high heat value is also a reporting requirement (for reporters who do not use the electronic inputs verification tool (IVT) within the e-GGRT). We are finalizing revisions to the 40 CFR 98.37(b) introductory paragraph and paragraphs (b)(9) through (11), (14), (18), (20), (22), and (23) to specify recordkeeping data that is currently contained in the file generated by the verification software that is already required to be retained by reporters under 40 CFR 98.37(b). These revisions correct omissions that currently exist in the verification software recordkeeping requirements specific to equations C–2a, C–2b, C–3, C–4, and C–5. They also align the verification software recordkeeping requirements with the final revisions to equation C–5 at 40 CFR 98.33(a)(3)(iii).

In the 2022 Data Quality Improvements Proposal, we proposed additional reporting requirements, for each unit greater than or equal to 10 mmBtu/hour in either an aggregation of units or common pipe configuration. The proposed reporting included, for each individual unit with maximum rated heat input capacity greater than or equal to 10 mmBtu/hour included in the group, the unit type, maximum rated heat input capacity, and an estimate of the fraction of the total group annual heat input attributable to each unit (proposed 40 CFR 98.36(c)(1)(ii) and (c)(3)(xi)). Following consideration of public comments, the EPA is not taking final action on the proposed reporting requirements (*i.e.,* identifying the unit type, maximum rated heat input capacity, and fraction of the total annual heat input for each unit in the aggregation of unit or common pipe). See section III.C.2. of this preamble for a summary of the related comments and the EPA's response.

In the 2023 Supplemental Proposal, the EPA proposed to add a requirement to report whether the unit is an EGU for each configuration that reports emissions, under either the individual unit provisions at 40 CFR 98.36(b)(12) or the multi-unit provisions at 40 CFR 98.36(c)(1)(xii), (c)(2)(xii), and (c)(3)(xii). For multi-unit reporting configurations, we also proposed adding a requirement for facilities to report an estimated decimal fraction of total emissions from the group that are attributable to EGU(s) included in the group. Following consideration of public comments, the EPA is not taking final action on the proposed revisions to the reporting requirements in this rule. See section III.C.2. of this preamble for a summary of the related comments and the EPA's response.

The EPA is also not taking final action in this final rule on proposed revisions to subpart C correlated with proposed amendments to subpart W (Petroleum and Natural Gas Systems). As noted in section I.C. of this preamble, the EPA has issued a subsequent proposed rule for subpart W on August 1, 2023 and has reproposed related amendments to subpart C in that separate action.

b. Revisions To Streamline and Improve Implementation for Subpart C

The EPA is finalizing all revisions to streamline and improvement implementation for subpart C as proposed. Specifically, the EPA is finalizing (1) amendments to 40 CFR 98.34(c)(6) to allow cylinder gas audits (CGAs) to be performed using calibration gas concentrations of 40–60 percent and 80–100 percent of CO_2 span, whenever the required CO_2 span value for a flue gas does is not appropriate for the prescribed audit ranges in appendix F of 40 CFR part 60; and (2) amendments to provisions in 40 CFR 98.36(c)(1)(vi) and 98.36(c)(3)(vi) to remove language requiring that facilities with the aggregation of units or common pipe configuration types report the total annual CO_2 mass emissions from all fossil fuels combined. See section III.B.2. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on these changes and their supporting basis.

2. Summary of Comments and Responses on Subpart C

This section summarizes the major comments and responses related to the proposed amendments to subpart C. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart C.

Comment: One commenter provided a correction to the proposed revisions to equation C–5 related to the revisions to the Tier 3 calculation methodology. The commenter noted that the proposed revisions to variable ''MW'' of equation C–5 which specify the procedures to be used to determine the annual average molecular weight included an incorrect reference to paragraphs (a)(3)(iii)(A)(3) and (4), and should point to (a)(3)(iii)(B)(1) and (2).

Response: We agree that the proposal inadvertently contained incorrect cross-references for the variable ''MW'' of equation C–5, and the EPA has corrected these cross-references in the final rule.

Comment: Commenters generally supported the EPA's proposed revisions

to update the calculation methodology for biogenic emissions from tire combustion. One commenter requested that the EPA consider expanding the requirements of 40 CFR 98.34(e), which requires quarterly testing to determine biogenic CO_2 when biomass and non-biogenic fuels are co-fired in a unit. The commenter noted that 40 CFR 98.34(e) currently allows for testing of a single representative unit for facilities with multiple units in which tires are the primary fuel combusted and the units are fed from a common fuel source. The commenter noted that for facilities with multiple units combusting the same fuel, testing each source quarterly imposes an additional burden without enhancing the accuracy of reported emissions. The commenter requested that the EPA expand the provisions to include all combined biomass and fossil fuels and to allow for testing one representative unit when fuel from a common fuel source is combusted.

Response: The EPA acknowledges the commenter's support for the proposed revisions. The EPA agrees with the commenter that testing one emission source when multiple emission sources are fed from a common fuel source should be allowed for all combined biomass (or fuels with a biomass component) and fossil fuels. Accordingly, the EPA has finalized quarterly ASTM D6866–16 and ASTM D7459–08 testing of one representative unit for multiple units fed from a common fuel source, for all combined biomass (or fuels with a biomass component) and fossil fuels.

Comment: Some commenters supported the EPA's proposal to revise 40 CFR 98.36(c)(1) and (3) to require reporting of additional information for each unit in either an aggregation of units or common pipe configuration (excluding units with maximum rated heat input capacity less than 10 mmBtu/hour), including the unit type, maximum rated heat input capacity, and an estimate of the fraction of the total annual heat input to the unit. These commenters agreed that unit-specific data is necessary to understand both the distribution of emissions across unit types and sizes, but also the abatement potential through various decarbonization strategies (*e.g.,* certain abatement strategies may be better suited for certain unit types and uses). The commenters stated that the requested data could assist the EPA in the development of NSPS or EG under CAA section 111. The commenters noted that, given the prevalence of reporting using combined configurations, this data would fill large data gaps in the current characterization of industrial sectors. One commenter asserted that the requirement should be extended to facilities that report using the common stack configuration or the alternative part 75 configuration, which would ensure that all emissions under the subpart are similarly affected by the proposed revisions and would provide a full picture of the GHG abatement potential of various source categories. Commenters also requested the EPA consider lowering or eliminate the size threshold below 10 mmBtu/hour; the commenter stated that although smaller units do not account for a large share of total capacity, they often present the most viable opportunities for greenhouse gas emissions abatement such as electrification with heat pump technology.

Other commenters opposed the proposed requirements. Opposing commenters stated that the EPA's explanation for collecting the data was ambiguous and did not sufficiently explain what data gaps are missing or how the collection of the additional information would resolve issues within the currently collected data. One commenter opposed disaggregating total emissions from the grouped combustion equipment, asserting that aggregating the emissions by individual equipment (excluding units rated less than 10 mmBtu/hour) using estimation techniques would not provide useful information. Several commenters asserted that the proposed approach could not reliably provide accurate estimates of actual heat input and is likely not to be technically feasible. For example, one commenter stated that the physical configuration of certain lime plants would preclude accurate unit-specific estimates of actual heat input, as the facilities lack certified calibrated meters on a kiln-by-kiln basis and rely on quantifying solid fuel usage based on surveys of on-site stockpiles. The commenter added that facility-wide reporting of combustion emissions satisfies the EPA's objective of developing facility-wide emissions information, and additional unit-level information is superfluous and of limited value. Other commenters stated that individual fuel meters are not common, asserting that annual heat input for individual units is often estimated based on the maximum high heat input rating and operating hours. One commenter stated that the heat input records maintained by facilities do not necessarily correspond to the actual heat input of a unit, especially for industries that use batching with different process equipment for different products. That commenter asserted that actual heat input may vary based on age of the unit; how it is utilized in processes for steam, cooling, or other purposes; and the high heating value of fuel during certain operating periods. Another commenter questioned whether the estimation technique proposed would likely undermine the reported data or compromise the integrity of actual values that are currently reported. Commenters asserted that the requirements would have potentially very limited value and may detract from the GHG emission estimates that regulated facilities produce for the EPA or other proposed Federal rules.

Commenters also expressed that the proposed requirements would be overly burdensome and significantly increase the recordkeeping and reporting burden. One commenter specifically referred to the requirement for facilities to estimate the total annual input of each unit expressed as a decimal fraction based on the actual heat input of each unit compared to the whole; the commenter stated that this requirement would essentially negate the time efficiencies gained by reporting the aggregated group, especially for reporters using the common pipe configuration. The commenter stated that this would essentially require that heat inputs be calculated for each piece of equipment each year and could result in a ten-fold increase in burden for reporters using the common pipe method. Commenters urged that the maximum rated heat input of each unit in the aggregated group and operating hours should provide enough information for the EPA to reasonably approximate emissions for individual equipment.

Response: Upon careful consideration, the EPA has decided not to take final action on the proposed reporting requirements for each unit greater than or equal to 10 mmBtu/hour in either an aggregation of units or common pipe configuration (the unit type, maximum rated heat input capacity, and an estimate of the fraction of the total annual heat input attributable to each unit in the group) (proposed 40 CFR 98.36(c)(1)(ii) and (c)(3)(xi)) at this time. We note that the EPA disagrees that estimating the fraction of the actual total annual heat input for each unit in the group, based on company records, will be overly burdensome to reporters. ''Company records'' is defined in the existing part 98 regulations at 40 CFR 98.6 to mean, ''in reference to the amount of fuel consumed by a stationary combustion unit (or by a group of such units), a complete record of the methods used, the measurements made, and the calculations performed to quantify fuel

usage. Company records may include, but are not limited to, direct measurements of fuel consumption by gravimetric or volumetric means, tank drop measurements, and calculated values of fuel usage obtained by measuring auxiliary parameters such as steam generation or unit operating hours. Fuel billing records obtained from the fuel supplier qualify as company records.'' The broad definition of company records would afford reporters considerable flexibility when it comes to estimating the fraction of the actual total annual heat input for each unit in the group. The EPA may consider such reporting requirements in future rulemakings.

Comment: Two commenters stated that EGUs should not be reported under subpart C and are already reported under subpart D (Electricity Generation); one commenter asserted that it is unclear from the proposal how reporting these emissions under subpart C would not be duplicative. One of the two commenters additionally stated that EGUs are not specifically defined in subparts A or C of part 98, and that the EPA should provide clarification on the definition of EGUs. The commenter added that the proposed requirement would impose burden and regulatory confusion because of the conflicting definitions in, and applicability of, other EPA regulatory programs which traditionally have regulated EGUs separately from non-EGU combustion sources. The commenter stated that 40 CFR 98.36(f) already requires sources to identify if they are tied to an entity regulated by any public utility commission.

Another commenter suggested a definition for EGUs that aligns with a footnote to table A–7 to subpart A that defines EGUs for sources reporting under subpart C as ''a fuel-fired electric generator owned or operated by an entity that is subject to regulation of customer billing rates by the public utilities commission (excluding generators connected to combustion units subject to 40 CFR part 98, subpart D) and that are located at a facility for which the sum of the nameplate capacities for all such electric generators is greater than or equal to 1 megawatt electric output.''

One commenter requested clarification that waste heat generation is not included; the commenter added that requiring facilities to report emissions from the generation of electricity using waste heat recovery would be double counting. Other commenters requested clarification that emergency generators are exempt from the proposed requirements.

Two commenters supported the EPA's proposed requirement to allow operators to use an engineering estimate of the percentage of combustion emissions attributable to facility electricity generation. However, another commenter disagreed, stating that the EPA did not describe how a reporter would identify such a fraction. The commenter added that the EPA failed to take into account that emissions from a single combustion unit might provide steam to multiple consumers for multiple purposes, only a portion of which includes on-site electricity generation. The commenter expressed concerns that, if the rule is finalized as proposed, the methods to determine electricity-related emissions by fraction could become subject to numerous other requirements, such as calculations for GHG emissions, monitoring and QA/QC requirements, data reporting, and record retention obligations.

Response: The EPA is not taking final action on the proposed addition of a new indicator that would identify units as electricity generating units at this time. Furthermore, the EPA is not taking final action on the additional requirement for reporting an estimate of a group's total reported emissions attributable to electricity generation at this time. As discussed in the preamble to the 2023 Supplemental Proposal, under the current subpart C reporting requirements, the EPA cannot currently determine the quantity of EGU emissions included in the reported total emissions for the subpart. Although some facilities currently indicate whether certain stationary fuel combustion sources are connected to a fuel-fired electric generator in 40 CFR 98.36(f), this requirement only captures a subset of subpart C EGU emissions. The EPA therefore intended the proposed reporting requirements to identify other EGUs reporting under subpart C in order to improve our understanding of subpart C EGU GHG emissions and the attribution of GHG emissions to the power plant sector. However, we agree with commenters that the proposed requirements could require additional burden not contemplated by the proposed rule. Specifically, as noted by commenters, we recognize that there could be scenarios in which a single combustion unit or group of units may provide steam for multiple purposes, only a portion of which includes on-site electricity generation. In this case, although a facility may know the quantity of electricity generated and could estimate the quantity of steam required to generate the electricity, determination of the portion of GHG emissions that are attributable to the combustion unit(s) producing the steam that is used in an on-site EGU (among other processes) would additionally require the estimation of the type and quantity of fuel used by each combustion unit for the purposes of producing the steam used to generate electricity. For this reason we are not taking final action on these requirements in this rule.

D. Subpart F—Aluminum Production

We are not taking final action on any proposed amendments to subpart F of part 98 (Aluminum Production) in this action. In the 2022 Data Quality Improvements Proposal, the EPA requested comment on several issues related to determining emissions from aluminum production. Specifically, the EPA requested information on the extent to which low voltage emissions have been characterized, if data are available to develop guidance on low voltage emission measurements, and on the use of the non-linear method as an alternative to the slope coefficient and overvoltage methods currently allowed in subpart F. The EPA received comments on these issues but is not taking final action on any changes to the measurement methodology for subpart F at this time.

In the 2023 Supplemental Proposal, the EPA proposed revisions to the reporting requirements at 40 CFR 98.66(a) and (g) to require that facilities report the facility's annual production capacity and annual days of operation for each potline. We noted at that time that the capacity of the facility and capacity utilization would provide useful information for understanding variations in annual emissions and emission trends across the sector. The EPA received several comments on the proposed subpart F revisions. Following consideration of comments received, we are not taking final action on the proposed revisions at this time. However, the EPA may consider similar changes to reporting requirements in a future rulemaking. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart F.

E. Subpart G—Ammonia Manufacturing

We are finalizing amendments to subpart G of part 98 (Ammonia Manufacturing) as proposed. In some cases, we are finalizing the proposed

amendments with revisions. In other cases, we are not taking final action on the proposed amendments. This section discusses the final revisions to subpart G. The EPA received only supportive comments for the proposed revisions to subpart G. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart G. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

In the 2022 Data Quality Improvements Proposal, the EPA proposed several revisions to subpart G to require reporters to report the GHG emissions that occur directly from the ammonia manufacturing process (*i.e.,* net CO_2 process emissions) after subtracting out carbon or CO_2 captured and used in other products. The proposed revisions included combining equation G–4 and equation G–5 into a new equation G–4 and several harmonizing revisions to 40 CFR 98.72(a); revisions to the introductory paragraph of 40 CFR 98.73; the removal of § 98.73(b)(5); revisions to the introductory paragraph of 40 CFR 98.76; and revisions to the reported data elements at 40 CFR 98.76(b)(1) and (13), as described in section III.C. of the preamble to the 2022 Data Quality Improvements Proposal.

The EPA is finalizing minor edits to 40 CFR 98.72(a), the introductory paragraph of 40 CFR 98.73, the introductory paragraph to 40 CFR 98.76, and 40 CFR 98.76(b)(1) to clarify the term ''ammonia manufacturing unit,'' as well as clarifying edits to 40 CFR 98.76(b)(13) to clearly identify any CO_2 used in the production of urea and carbon bound in methanol that is intentionally produced as a desired product. Additionally, we are finalizing clarifying amendments to equation G–1, equation G–2, and equation G–3 to simplify the equations by removing the process unit ''k'' designation in the terms ''$CO_{2,G,k}$,'' ''$CO_{2,L,k}$,'' and ''$CO_{2,S,k}$.'' We are also finalizing the removal of § 98.73(b)(5) and equation G–5, consistent with our intent at proposal to require reporting of emissions by ammonia manufacturing unit.

Following consideration of comments received on similar changes proposed for subpart S (Lime Manufacturing), the EPA is not taking final action at this time on the proposed revisions to allow facilities to subtract out carbon or CO_2 captured and used in other products. We have revised new equation G–4 in the final rule to remove the proposed equation terms related to CO_2 collected and consumed on-site for urea production and the mass of methanol intentionally produced as a desired product, and removed text related to ''net'' CO_2 process emissions. The EPA is also not taking final action at this time on the addition of related monthly recordkeeping data elements that were proposed as verification software records. See section III.K.2. of this preamble for a summary of related comments and the EPA's response.

We are finalizing as proposed one amendment to subpart G from the 2023 Supplemental Proposal to include a requirement for facilities to report the annual quantity of excess hydrogen produced that is not consumed through the production of ammonia at 40 CFR 98.76(b)(16). This is a harmonizing change to ensure that the final revisions to subpart P (Hydrogen Production) to exclude reporting from any process unit for which emissions are reported under another subpart of part 98, including ammonia production units that report emissions under subpart G (see section III.I. of this preamble), will not result in the exclusion of reporting of any excess hydrogen production at facilities that are subject to subpart G.

We are also finalizing as proposed related confidentiality determinations for data elements resulting from the revisions to subpart G, as described in section VI. of this preamble.

F. Subpart H—Cement Production

We are finalizing several amendments to subpart H of part 98 (Cement Production) as proposed. In some cases, we are finalizing the proposed amendments with revisions. Section III.F.1. of this preamble discusses the final revisions to subpart H. The EPA received several comments on the proposed subpart H revisions which are discussed in section III.F.2. of this preamble. We are also finalizing confidentiality determinations for new data elements resulting from the revisions to subpart H, as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart H

This section summarizes the final amendments to subpart H. Major changes in this final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart H can be found in this section and section III.F.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal.

The EPA is finalizing several revisions to improve the quality of data collected for subpart H. First, we are finalizing the addition of several new data reporting elements to subpart H under 40 CFR 98.86(a) and (b) to enhance the quality and accuracy of the data collected. In the 2022 Data Quality Improvements Proposal, the EPA proposed to add several data reporting elements based on annual average chemical composition data for facilities using either the direct measurement (using a continuous emission monitoring system (CEMS)) methodology or the mass balance methodology, in order to assist in improving verification of reported data. The proposed data elements included (for both facilities that report CEMS data and those that report using a mass balance method) the annual arithmetic average weight fraction of: the total calcium oxide (CaO) content, non-calcined CaO content, total magnesium oxide (MgO) content, and non-calcined MgO content of clinker at the facility (proposed 40 CFR 98.86(a)(4) through (a)(7) and (b)(19) through (b)(22)); and the total CaO content of cement kiln dust (CKD) not recycled to the kiln(s), non-calcined CaO content of CKD not recycled to the kiln(s), total MgO content of CKD not recycled to the kiln(s), and non-calcined MgO content of CKD not recycled to the kiln(s) at the facility (proposed 40 CFR 98.86(a)(8) through (11) and (b)(23) through (26)). The EPA also proposed to collect other data (from both facilities using CEMS and those that report using the mass balance method), including annual facility CKD not recycled to the kiln(s) in tons (proposed 40 CFR 98.86(a)(12) and (b)(27)) and raw kiln feed consumed annually at the facility in tons (dry basis) (proposed 40 CFR 98.86(a)(13) and (b)(28)), for both verification and to improve the methodologies of the Inventory.

The EPA is finalizing the proposed requirements to report the annual arithmetic average weight fraction of the total CaO content, non-calcined CaO content, total MgO content, and non-calcined MgO content of clinker at the facility (proposed 40 CFR 98.86(a)(4) through (7) and (b)(19) through (22)), and the annual facility CKD not recycled to the kiln(s) (proposed 40 CFR 98.86(a)(12) and (b)(27), finalized as 40 CFR 98.86(a)(8) and (b)(27), respectively), for both facilities that use CEMS and those that report using the mass balance method. We are also finalizing, for facilities using the mass

balance method, the total CaO content of CKD not recycled to the kiln(s), non-calcined CaO content of CKD not recycled to the kiln(s), total MgO content of CKD not recycled to the kiln(s), and non-calcined MgO content of CKD not recycled to the kiln(s) at the facility (proposed 40 CFR 98.86(b)(23) through (26)), and the amount of raw kiln feed consumed annually (proposed 40 CFR 98.86(b)(28)). Finalizing these data elements will improve the EPA's ability to verify reported emissions (*e.g.,* the EPA will be able to create a rough estimate of process emissions at the facility and compare that to the reported total emissions, and check whether the ratio is within expected ranges). For facilities using CEMS, the finalized data elements will enable the EPA to estimate process emissions from facilities to provide a more accurate national-level cement emissions profile and the Inventory. Following consideration of public comments, we are not taking final action on certain proposed data elements for facilities that report using CEMS. Specifically, the EPA is not taking final action on the proposed requirements to report the annual arithmetic average of the total CaO content of CKD not recycled to the kiln(s), non-calcined CaO content of CKD not recycled to the kiln(s), total MgO content of CKD not recycled to the kiln(s), and non-calcined MgO content of CKD not recycled to the kiln(s) at the facility (proposed 40 CFR 98.86(a)(8) through (11)). We are also not taking final action on the reporting of the amount of raw kiln feed consumed annually (proposed 40 CFR 98.86(a)(13)). See section III.F.2. of this preamble for a summary of the related comments and the EPA's response.

The EPA is finalizing as proposed several clarifications and corrections to equations H–1, H–4, and H–5 included in the 2022 Data Quality Improvements Proposal. The final revisions to equation H–1 add brackets to clarify the summation of clinker and raw material emissions for each kiln, and update the definition of parameter ''$CO_{2\ rm}$'' to ''$CO_{2\ rm,m}$'' and clarify the raw material input is on a per-kiln basis. The final revisions to equation H–5 revise the inputs ''rm,'' ''$CO_{2\ rm}$'' (revised to ''$CO_{2\ rm,m}$''), and ''TOC_{rm},'' and add brackets to clarify that emissions are calculated as the sum of emissions from all raw materials or raw kiln feed used in the kiln. The final revisions to equation H–4 correct the defined parameters for the quarterly non-calcined CaO content and the quarterly non-calcined MgO content of CKD not recycled to ''CKD_{ncCaO}'' and ''CKD_{ncMgO},'' respectively, to align with the parameters defined in the equation.

2. Summary of Comments and Responses on Subpart H

This section summarizes the major comments and responses related to the proposed amendments to subpart H. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart H.

Comment: One commenter objected to the EPA's proposed addition of data reporting requirements for facilities reporting using the CEMS methodology. The commenter asserted that the new data requirements would add unnecessary burden without providing additional insight into cement industry GHG emissions or improving the quality or accuracy of the emissions data provided. The commenter stated that, under the new provisions, the EPA would essentially be requiring kilns that are currently using CEMS to report their emissions to verify their data by using the mass balance method, with associated reporting and recordkeeping. The commenter noted that CEMS are already required to meet extensive quality assurance and quality control requirements and have been determined as the most accurate means of measuring stack emissions. Further, the commenter reasoned that the EPA can accurately determine process emissions using already reported data, total kiln stack emissions data, and combustion emissions data, which they stated is included in the confidential monthly clinker production data and fuel use data provided using the Tier 4 methodology in subpart C. The commenter stated that it is well established by the scientific community that process emissions represent 60 percent of CO_2 emissions from the kiln based on the standard chemistry of the cement manufacturing process, and that the currently reported data should be sufficient.

The commenter also opposed the EPA's proposed data reporting elements for facilities using the mass balance (non-CEMS) methodology, likewise insisting that the EPA can readily determine both process and combustion emissions from the existing reporting requirements. The commenter explained that (1) the reporting of total and non-calcined CaO and MgO is irrelevant to calculating CO_2 process emissions as they are inherently non-carbonate; and (2) in reference to the proposed CKD reporting requirement, calculating the CKD not recycled and the quantity of raw kiln feed at all kilns within a facility would add burden without providing any additional information about industry GHG emissions. The commenter also questioned the need for the additional data, stating that the EPA did not provide an explanation of how the additional data would be used separately from potentially verifying process emissions. The commenter also expressed concern that the addition of these data elements would justify regulatory overreach from other programs.

Response: We disagree with the commenter's statement that reporting additional data from facilities using CEMS will not enhance the EPA's verification of the facility reported values. The EPA has encountered occasional instances of mistakes in reported CEMS data (*e.g.,* from data entry mistakes), resulting in significant errors in reported emissions. Fuel use data are not provided to the EPA for cement plants that report emissions using CEMS. Currently, fuel use data are entered into the IVT to calculate CH_4 and N_2O emissions from combustion for kilns with CEMS, as the process and combustion emissions are both vented through the same stack. These IVT data are not directly reported to the EPA, so the EPA cannot use them to verify the accuracy of reported emissions.

Furthermore, we are not persuaded by the commenter's assertion that process emissions represent 60 percent of kiln emissions. Cement kilns can have very different process and combustion emissions depending on the input materials, the fuel or energy source used, etc., and an average process emissions factor would not be representative of all facilities in subpart H. Furthermore, the commenter does not provide additional information about how this statistic was calculated and whether it is representative of cement manufacturing plants in the United States. The commenter did not specify where this statistic can be found in the cited source (''Getting the Numbers Right Database, Global Cement and Concrete Association'' [9]) and did not provide the underlying data to the EPA for review. Importantly, this database contains information on global cement production, and emissions profiles at facilities in the United States can differ widely from those in other countries due to differences in input

[9] Available at *https://gccassociation.org/sustainability-innovation/gnr-gcca-in-numbers/.* Accessed January 9, 2024.

materials, fuels used, and emission control systems that may be in place. The EPA has reviewed data, such as those from the UNFCCC, which suggest that implied emissions rates may vary from 49–57 percent and change by country.[10]

Upon careful review and consideration, the EPA has decided not to adopt the proposed changes to require the chemical composition data for CKD and amount of raw kiln feed consumed annually for facilities reporting with CEMS (proposed 40 CFR 98.86(a)(8) through (11) and (a)(13)). We are not taking final action on these elements after consideration of the comments and in an effort to reduce potential burden. The EPA is finalizing the remaining proposed reporting requirements as these data elements will improve verification of reported emissions. For example, the EPA will be able to create a rough estimate of process emissions at the facility and compare that to the reported total emissions, and check whether the ratio is within expected ranges. We will also be able to build evidence-based verification checks on the clinker composition data that is entered by facilities that do not use CEMS (we currently have very little information on what chemical compositions are typical in cement kilns). The final reporting elements will also enable the EPA to estimate process emissions from CEMS facilities to provide a more accurate national-level emissions profile for the cement industry and the Inventory. Reporting average chemical composition data for the clinker is expected to be less burdensome for facilities, as this data is likely collected as a part of normal business operations, while collection of CKD data may be less common. Furthermore, we do not believe these additional data elements constitute regulatory overreach as they are similar to other data already collected under subpart H and will be important for verification and our understanding of process and combustion emissions.

We also disagree that collecting additional data from facilities using the mass balance method will not enhance the EPA's verification of the facility reported values. Currently clinker composition data are entered into the IVT and are not included in the annual report that is submitted to the EPA. Reporting of these and additional data elements will improve verification of reported emissions and the mass balance calculations (*e.g.,* by allowing us to create evidence-based verification checks for clinker composition data). The final reporting elements will also provide a more accurate national-level emissions profile for the cement industry and the Inventory. With respect to the burden associated with these added reporting elements for reporters using the mass balance reporting method, these data elements are the annual arithmetic averages of either monthly or quarterly data elements that these reporters already input into e-GGRT through the IVT. These data elements are currently entered into the IVT and used for equations H–2 through H–5; but they are not reported to the EPA. Thus, the burden, if any, is expected to be minimal. There are no changes, as compared to the proposal, to the final reporting requirements for facilities using the mass balance methodology after consideration of this comment.

[10] United Nations Framework Convention on Climate Change. (2023). National inventory submissions 2023. *https://unfccc.int/ghg-inventories-annex-i-parties/2023.*

G. Subpart I—Electronics Manufacturing

We are finalizing several amendments to subpart I of part 98 (Electronics Manufacturing) as proposed. In some cases, we are finalizing the proposed amendments with revisions. In other cases, we are not taking final action on the proposed amendments. Section III.G.1. of this preamble discusses the final revisions to subpart I. The EPA received several comments on the proposed subpart I revisions which are discussed in section III.G.2. of this preamble. We are also finalizing as proposed related confidentiality determinations for data elements resulting from the revisions to subpart I as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart I

This section summarizes the final amendments to subpart I. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart I can be found in this section and section III.G.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

a. Revisions To Improve the Quality of Data Collected for Subpart I

In the 2022 Data Quality Improvements Proposal, the EPA proposed several revisions to subpart I to improve data quality, including revising the stack testing calculation method, updating the calculation methods used to estimate emission factors in the technology assessment report, updating existing default emission factors and destruction or removal efficiencies (DREs) based on new data, adding a calculation method for calculating byproducts produced in abatement systems, amending data reporting requirements, and providing clarification on reporting requirements. In the 2023 Supplemental Proposal, the EPA subsequently proposed corrections to specific revisions from the 2022 Data Quality Improvements Proposal, including DRE values in table I–16 and gamma factors in proposed new table I–18 to subpart I of part 98.

The EPA is finalizing several revisions to 40 CFR 98.93(i) to improve the calculation methodology for stack testing. These revisions include:

- Adding new equations I–24C and I–24D and a table of default weighting factors (new table I–18) to calculate the fraction of fluorinated input gases exhausted from tools with abatement systems, $a_{i,f}$, for use in equations I–19A through I–19C and I–21, and the fraction of byproducts exhausted from tools with abatement systems, $a_{k,i,f}$, for use in equations I–20 and I–22.
- Revising equations I–24A and I–24B, which calculate the weighted average DREs for individual F–GHGs across process types in each fab.
- Revising 40 CFR 98.93(i)(3) to require that all stacks be tested if the stack test method is used.
- Replacing equation I–19 with a set of equations (*i.e.,* equations I–19A, I–19B, and I–19C) that will more accurately account for emissions when pre-control emissions of an F–GHG come close to or exceed the consumption of that F–GHG during the stack testing period.
- Clarifying the definitions of the variables d_{if} and d_{kif}, the average DREs for input gases and byproduct gases respectively, in equations I–19A, I–19B, I–19C, and I–19D, in equations I–20 through I–22, in equations I–24A and B, and in equation I–28 to subpart I.

These revisions will remove the current requirements to apportion gas consumption to different process types, to manufacturing tools equipped versus not equipped with abatement systems, and to tested versus untested stacks. Equations I–24C and I–24D add the option to calculate the fraction of each input gas "i" and byproduct gas "k" exhausted from tools with abatement systems based on the number of tools that are equipped versus not equipped with abatement systems, along with weighting factors that account for the

different per-tool emission rates that apply to different process types. The weighting factors ($\gamma_{i,p}$ for input gases and $\gamma_{k,i,p}$ for byproduct gases, provided in table I–18) are based on data submitted by semiconductor manufacturers during the process of developing the 2019 Refinement (as corrected in the 2023 Supplemental Proposal). We are finalizing revisions to equations I–24A and I–24B, used to calculate the average DRE for each input gas ''i'' and byproduct gas ''k,'' based on tool counts and the same weighting factors that will be used in equations I–24C and I–24D; this accounts for operations in which a facility uses one or more abatement systems with a certified DRE value that is different from the default to calculate and report controlled emissions. We are finalizing the requirement that all stack systems be tested by removing 40 CFR 98.93(i)(1); this removes not only the need to apportion gas usage to tested versus untested stack systems, but also the requirement to perform a preliminary calculation of the emissions from each stack system. We are finalizing new equations I–19A, I–19B, and I–19C, with a clarification, which will more accurately account for emissions when emissions of an F–GHG prior to entering any abatement system (*i.e.,* pre-control emissions) would approach or exceed the consumption of that F–GHG during the stack testing period. We are clarifying that the 0.8 maximum for the 1–U value only applies to carbon-containing F–GHGs. As discussed in the proposal, the modification to the stack testing method was intended to accurately account for the source of emissions when the measured emissions exceed the consumption of the F–GHG during the stack testing period, which may occur in situations where the input gas is also generated in significant quantities as a by-product by the other input gases. However, it is not expected that NF_3 or SF_6 could be generated as a by-product by a fluorocarbon used as an input gas. Therefore, this modification is not appropriate and was not intended to apply to SF_6 or NF_3 emissions when calculating emissions using the stack test method. The revised equations improve upon the current equations because they account both for any control of the emissions and for some utilization of the input gas. Finally, we are finalizing revisions to the definitions of the variables d_{if} and d_{kif} in equations I–19A, I–19B, I–19C, and I– 19D, in equations I–20 through I–22, in equations I–24A and B, and in equation I–28 to clarify that these variables reflect the fraction of gas i (or byproduct gas k) that is destroyed once gas i (or byproduct gas k) is fed into abatement systems. See section III.E.1.a. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on these revisions and their supporting basis.

With some changes, the EPA is finalizing revisions to improve the quality of the data submitted in the technology assessment reports in 40 CFR 98.96(y) as proposed in the 2022 Data Quality Improvements Proposal. Specifically, the EPA proposed to require that reporters who submit a technology assessment report would use three methods (the ''all-input gas method,'' the ''dominant gas method,'' and the ''reference emission factor method'') to report the results of each emissions test to estimate utilization and byproduct formation emission rates. The EPA is finalizing a requirement to report the results using two of the three methods proposed, including the all-input gas method, with a clarification, and the reference emission factor method, and is allowing use of a third method of the reporter's choice, as follows:

- All-input gas method. For input gas emission rates, this method attributes all emissions of each F–GHG that is an input gas to the input gas emission factor (1–U) factor for that gas, if the input gas does not contain carbon or until that 1–U factor reaches 0.8 if the input gas does contain carbon, after which emissions of the F–GHG are attributed to the other input gases. For byproduct formation rates, this method attributes emissions of F–GHG byproducts that are not also input gases to all F–GHG input gases (kilogram (kg) of byproduct emitted/kg of all F–GHGs used).
- Reference emission factor method. This method estimates emissions using the 1–U and the byproduct formation rates that are observed in single gas recipes and then adjusts both emission factors based on the ratio between the emissions calculated based on the factors and the emissions actually observed in the multi-gas process.
- The EPA is finalizing an option for reporters to use, in addition to the utilization and byproduct formation rates calculated according to the required all-input gas method and the reference emission factor method, an alternative method of their choice to calculate and report the utilization or byproduct formation rates based on the collected data.

These revisions will ensure that the emission factors submitted in the technology assessment reports are robust (for example, not unduly affected by changing ratios of input gases) and are comparable to each other and to the emission factors already in the EPA's database. The EPA proposed, and is finalizing with a clarification, modifications to the all-input gas method to avoid an input gas emission factor greater than 0.1 when multiple gases are used. The modified method uses 0.8 as the maximum 1–U value, and as such, attributes emissions of each F–GHG used as an input gas to that input gas until the mass emitted equals 80 percent of the mass fed into the process (*i.e.,* until the 1–U factor equals 0.8). The all-input gas method assigns the remaining emissions of the F–GHG to the other input gases as a byproduct in proportion to the quantity of each input gas used in the process. We are finalizing this modified method with the clarification that the 0.8 maximum for the 1–U value only applies to carbon-containing F–GHGs. As discussed in the proposal, the modification to the all-input method was intended to avoid the situations where the historical methods would violate the conservation of mass or fail to reflect the fact that some fraction of the input gas reacts with the film it is being used to etch or clean, which may occur in situations where the input gas is also generated in significant quantities as a by-product by the other input gases. However, it is not expected that NF_3 or SF_6 could be generated as a by-product by a fluorocarbon used as an input gas. Therefore, this modification is not appropriate and was not intended to apply to SF_6 or NF_3 emissions when calculating emission factors. The EPA is requiring use of the all-input gas method to facilitate comparisons of new data to historical data; the all-input gas method was the most commonly used method in the submitted data sets included in technology assessment reports from 2013 and earlier. Following consideration of comments received and to reduce burden, the EPA is not taking final action on the proposed requirement to report emission factors using the dominant gas method. The dominant gas method calculates 1–U factors in the same way as the all-input gas method, but it calculates byproduct formation rates differently, attributing all emissions of F–GHG byproducts to the carbon-containing F–GHG input gas accounting for the largest share by mass of the input gases. Additional information on each of the three methods is available in section III.E.1.b. of the preamble to the 2022 Data Quality Improvements Proposal and in the memorandum ''Technical Support for Modifications to the Fluorinated

Greenhouse Gas Emission Estimation Method Option for Semiconductor Facilities under Subpart I,'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424. As noted in the proposed rule, the EPA intends to make available a calculation workbook for the technology assessment report that will calculate the two sets of emission factors based on each of the final methods using a single set of data entered by the reporter. The option to calculate the emission factors using an additional method provides flexibility for reporters while enabling comparison between the results of the additional method and the results of the two required methods. Where reporters choose to submit emission factors using the additional method, we will be able to evaluate the reliability and robustness of emission factors calculated using all three methods. Additional information on comments related to the calculation methods and the EPA's response can be found in section III.G.2.a. of this preamble.

The EPA is also finalizing two additional requirements for the submitted technology assessment reports including requiring reporters to specify (1) the method used to calculate the reported utilization and byproduct formation rates and assign and provide an identifying record number for each data set; and (2) for any DRE data submitted, whether the abatement system used for the measurement is specifically designed to abate the gas measured under the operating condition used for the measurement. For reporters who opt to additionally provide utilization and byproduct formation rates using an alternative method of their choice, reporters must provide this information and a description of the alternative method used.

The EPA is finalizing revisions to update the default emission factors and DREs in subpart I based on new data submitted as part of the 2017 and 2020 technology assessment reports and the 2019 Refinement, as proposed in the 2022 Data Quality Improvements Proposal and corrected in the 2023 Supplemental Proposal. These revisions include:

- Updates to the utilization rates and byproduct emission factors (BEFs) for F–GHGs used in semiconductor manufacturing in tables I–3, I–4, I–11 and I–12;
- Removal of byproduct emission factors from tables I–3 and I–4 where there is a combination of both a low BEF and a low GWP resulting in very low reported emissions per metric ton of input gas used (removes the BEF for C_4F_6 and C_5F_8 for all input gases used in wafer cleaning or plasma etching processes, and results in not adding BEFs for COF_2 and C_2F_4 for any input gas/process combination from the new data submitted as part of the 2017 and 2020 technology assessment reports).
- In cases where neither the input gas nor the films being processed in the tool contain carbon, setting the BEF for the carbon-containing byproducts to zero. These provisions apply at the process subtype level. For example, a BEF of zero will only be used for a combination of input gas and chamber cleaning process subtype (*e.g.,* NF_3 in remote plasma cleaning (RPC)) if no carbon-containing materials were removed using that combination of input gas and chamber cleaning process subtype during the year and no carbon-containing input gases were used on those tools. Otherwise, the default BEF will be used for that combination of input gas and chamber cleaning process subtype for all of that gas consumed for that subtype in the fab for the year. The EPA is making one modification to the proposed equation to clarify that the carbon-containing byproduct emission factors are zero when the combination of input gas and etching and wafer cleaning process type uses only non-carbon containing input gases (SF_6, NF_3, F_2 or other non-carbon input gases) and etches or cleans only films that do not contain carbon.
- Updates to the default emission factors for N_2O used in all electronics manufacturing in table I–8, including distinct utilization rates for semiconductor manufacturing and LCD manufacturing and, for semiconductor manufacturing, utilization rates by wafer size;
- Revisions to the calculation methodology for MEMS and PV manufacturing to allow use of 40 CFR 98.93(a)(1), the current methodology for semiconductor manufacturing, for manufacture of MEMS and PV using semiconductor tools and processes, which applies the default emission factors in tables I–3 and I–4 to these processes;
- Revisions to 40 CFR 98.93(a)(6) to revise the utilization rate and byproduct emission factor values assigned to gas/process combinations where no default utilization rate is available; these revisions account for the likely partial conversion of the input gas into CF_4 and C_2F_6. The final rule requires, for a gas/process combination where no default input gas emission factor is available in tables I–3, I–4, I–5, I–6, and I–7, reporters will use an input gas emission factor (1–U) equal to 0.8 (*i.e.,* a default utilization rate or U equal to 0.2) with BEFs of 0.15 for CF_4 and 0.05 for C_2F_6.
- Revisions to the default DREs in table I–16 to subpart I to reflect new data and strengthening of abatement system certification requirements. The final revisions assign chemical-specific DREs to all commonly used F–GHGs for the semiconductor manufacturing sub-sector without distinguishing between process types.

Additional information on the EPA's derivation of the final emission factors and DREs is available in section III.E.1.c. of the preamble to the 2022 Data Quality Improvements Proposal and in the revised technical support document, ''Revised Technical Support for Revisions to Subpart I: Electronics Manufacturing,'' available in the docket for this rulemaking (Docket ID. No. EPA–HQ–OAR–2019–0424).

The EPA is also finalizing revisions to the conditions under which the default DRE may be claimed, with some revisions from the proposal so that the new documentation requirements apply only to abatement systems purchased and installed on or after January 1, 2025. For all abatement systems for which a DRE is being claimed, including abatement systems purchased and installed during or after 2025 and older abatement systems, the EPA is maintaining the current certification and documentation requirements and is finalizing the proposed additional requirement that the certification must contain a manufacturer-verified DRE value. If the abatement system is certified to abate the F–GHG or N_2O at a value equal to or higher than the default DRE, the facility may claim the default DRE. If the abatement system is certified to abate the F–GHG or N_2O but at a value lower than the default DRE, the facility may not claim the default; however, the facility may claim the lower manufacturer-verified value. (Site-specific measurements by the electronics manufacturer are still required to claim a DRE higher than the default.) Based on annual reports submitted through RY2022, facilities have historically been able to provide manufacturer-verified DRE values for all abatement systems for which emission reductions have been claimed.

Additional requirements apply to abatement systems purchased and installed on or after January 1, 2025. Specifically, the EPA is finalizing revisions to the definition of operational mode in 40 CFR 98.98 to specify that for abatement systems purchased and installed during or after January 1, 2025, operational mode means that the system is operated within the range of parameters as specified in the DRE certification documentation. The specified parameters must include the

highest total F–GHG or N_2O flows and highest total gas flows (with N_2 dilution accounted for) through the emissions control systems. Systems operated outside the range of parameters specified in the documentation supporting the DRE certification may rely on a measured site-specific DRE according to 40 CFR 98.94(f)(4) to be considered operational within the range of parameters used to develop a site-specific DRE.

The EPA is also finalizing revisions to 40 CFR 98.94(f)(3) to modify the conditions under which the default or lower DRE may be claimed for abatement systems purchased and installed on or after January 1, 2025. For systems purchased and installed on or after January 1, 2025, reporters are required to: (1) certify that the abatement device is able to achieve, under the worst-case flow conditions during which the facility is claiming that the system is in operational mode, a DRE equal to or greater than either the default DRE value, or if the DRE claimed is lower than the default DRE value, a manufacturer-verified DRE equal to or greater than the DRE claimed; and (2) provide supporting documentation. Specifically, for POU abatement devices purchased and installed on or after January 1, 2025, reporters must certify and document under 40 CFR 98.94(f)(3)(i) and (ii) that the abatement system has been tested by the abatement system manufacturer using a scientifically sound, industry-accepted measurement methodology that accounts for dilution through the abatement system, such as EPA 430–R–10–003,[11] and that the system has been verified to meet (or exceed) the destruction or removal efficiency used for that fluorinated GHG or N_2O under worst-case flow conditions (the highest total F–GHG or N_2O flows and highest total gas flows, with N_2 dilution accounted for). Because manufacturers routinely conduct DRE testing and are familiar with the protocols of EPA 430–R–10–003, we anticipate this information will be readily available for abatement systems purchased in calendar year 2025 or later. The EPA is finalizing that the new DRE requirements will be implemented for reports prepared for RY2025 and submitted March 31, 2026, which provides over a year for reporters to acquire the necessary documentation. Reporters are not required to maintain documentation of the DRE on abatement systems for which a DRE is not being claimed.

We are also clarifying that the list of abatement system manufacturer specifications within which the abatement system must be operated at 40 CFR 98.96(q)(2) is intended to be exemplary, adding ''which may include, for example,'' before the list. This clarifies that some of the listed specifications or parameters may not be specified by all abatement system manufacturers for all abatement systems, and leaves open the possibility that some abatement system manufacturers may include other specifications within which the abatement system must be operated.

Additionally, following consideration of comments received, we are clarifying how reporters account for uptime of the abatement device if suitable backup emissions control equipment or interlocking with the process tool is implemented for each emissions control system. The EPA is revising the definition of the term ''UT_{ij}'' in equation I–15 and the definition of ''UT_f'' in equation I–23 to clarify that if all the abatement systems for the relevant input gas and process type are interlocked with all the tools feeding them, the uptime may be set to one (1). We are also clarifying equations I–15 and I–23 to reference the provisions in 40 CFR 98.94(f)(4)(vi) when accounting for uptime when redundant abatement systems are used. See section III.G.2.a. of this preamble for additional information on related comments and the EPA's response.

The EPA is finalizing the addition of a calculation methodology that estimates the emissions of CF_4 produced in hydrocarbon-fuel based combustion emissions control systems (''HC fuel CECs'') that are not certified not to generate CF_4. Following consideration of public comments, the calculation will be required only for HC fuel CECs purchased and installed on or after January 1, 2025. To implement the new calculation methodology, we are adding a new equation I–9 and renumbering the previous equation I–9 as equation I–8B. Equation I–9 only applies to processes that use F_2 as an input gas or to remote plasma cleaning processes that use NF_3 as an input gas. Equation I–9 estimates the emissions of CF_4 from generation in emissions control systems by calculating the mass of the fluorine entering uncertified HC fuel CECs (the product of the consumption of the input gas, the emission factor for fluorine, and a_i, where a_i is the ratio of the number of tools with uncertified abatement devices for the gas-process combination to the total number of process tools for the gas-process combination) and multiplying that mass by a CF_4 emission factor, $AB_{CF4,F2}$, which has a value of 0.116. In related changes, the EPA is finalizing a BEF for F_2 from NF_3 used in remote plasma clean processes of 0.5. For other gas and process combinations where no data are available (listed as ''NA'' in tables I–3 and I–4), the EPA is finalizing a BEF of 0.8 be used for F_2 in equation I–9 for all process types.

The EPA is requiring that reporters estimate CF_4 emissions from all HC fuel CECs that are purchased and installed on or after January 1, 2025 and that are not certified not to produce CF_4, even if reporters are not claiming DREs for those systems. However, as noted above, the requirements apply only to HC fuel CECs used on processes that use F_2 as an input gas or to remote plasma cleaning processes that use NF_3 as an input gas. We are also finalizing a related definition of ''hydrocarbon-fuel-based combustion emissions control system (HC fuel CECS),'' which we have revised from the proposed ''hydrocarbon-fuel-based emissions control system,'' to align with the 2019 Refinement and to clarify that the term includes systems used on processes that have the potential to emit F_2 or fluorinated GHGs, as recommended by commenters. As noted above, we have also revised the final rule from proposal to require these estimates from HC fuel CECS purchased and installed on or after January 1, 2025. We are also finalizing corresponding monitoring, reporting, and recordkeeping requirements (see 40 CFR 98.94(e), 40 CFR 98.96(o), and 40 CFR 98.97(b), respectively) for facilities that use HC fuel CECS purchased and installed during or after 2025 to control emissions from tools that use either NF_3 as an input gas in RPC processes or F_2 as an input gas in any process and assume in equation I–9 that one or more of those systems do not form CF_4 from F_2. Under these requirements facilities must certify and document that the model for each of the systems that the facility assumes does not form CF_4 from F_2 has been tested and verified to produce less than 0.1 percent CF_4 from F_2, and that each of these systems is installed, operated, and maintained in accordance with the directions of the HC fuel CECS manufacturer. The facility may perform the testing itself, or it may supply documentation from the HC fuel CECS manufacturer that supports the certification. Because the requirement to quantify emissions of CF_4 from F_2 is being applied only to HC fuel CECS purchased and installed on or after

[11] Protocol for Measuring Destruction or Removal Efficiency of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing, Version 1, March 2010 (''EPA DRE Protocol''), as incorporated at 40 CFR 98.7.

January 1, 2025, we anticipate that most HC fuel CECS will be tested by the HC fuel CECS manufacturer. If the facility performs the testing, it is required to measure the rate of conversion from F_2 to CF_4 using a scientifically sound, industry-accepted method that accounts for dilution through the abatement device, such as the EPA DRE Protocol, adjusted to calculate the rate of conversion from F_2 to CF_4 rather than the DRE.

The EPA is also finalizing related amendments to 40 CFR 98.94(j)(1)(i) to require that the uptime (*i.e.,* the fraction of time that abatement system is operational and maintained according to the site maintenance plan for abatement systems) during the stack testing period average at least 90 percent for uncertified HC fuel CECS. Following consideration of comments received, we are clarifying in the final rule that these provisions are limited to only those HC fuel CECS that were purchased and installed on or after January 1, 2025, that are used to control emissions from tools that use either NF_3 in remote plasma cleaning processes or F_2 as an input gas in any process type or sub-type, and that are not certified not to form CF_4. See section III.G.2.a. of this preamble for additional information on related comments on HC fuel CECS and the EPA's response.

Finally, the EPA is not taking final action on proposed revisions to the calibration requirements for abatement systems. In the 2022 Data Quality Improvements Proposal, the EPA proposed that a vacuum pump's purge flow indicators are calibrated every time a vacuum pump is serviced or exchanged, with the expectation that this requirement would require calibrations every one to six months, depending on the process. Following review of input provided by commenters, we are not taking final action on the proposed revisions. Removal of the proposed requirements is anticipated to reduce the potential burden on reporters without any large effects on data quality. Section III.G.2.a. of this preamble provides additional information on the comments received related to vacuum pump purge flow calibration and the EPA's response.

b. Revisions To Streamline and Improve Implementation for Subpart I

In the 2022 Data Quality Improvements Proposal, the EPA proposed several revisions intended to streamline the calculation, monitoring, or reporting in specific provisions in subpart I to provide flexibility or increase the efficiency of data collection. The EPA is finalizing these changes as proposed. First, the final rule revises the applicability of subpart I as follows:

- Adds a second option in 40 CFR 98.91(a)(1) and (2) for estimating GHG emissions for semiconductor, MEMS, and LCD manufacturers, for comparison to the 25,000 $mtCO_2e$ per year emissions threshold in 40 CFR 98.2(a)(2), that is based on gas consumption in lieu of production capacity. The revisions include new equations I–1B and I–2B to multiply gas consumption by a simple set of emission factors, the gas GWPs, and a factor to account for heat transfer fluid to estimate emissions. The emission factors are included in new table I–2 to subpart I of part 98 and are the same as the emission factors for gas and process combinations for which there is no default in tables I–3, I–4, or I–5 to subpart I. Facilities that choose to use this option for their calculation method will be required to track annual gas consumption by GHG but are not required to apportion consumption by process type for the purposes of assessing rule applicability.
- Revises the current applicability calculation for PV manufacturers to revise equation I–3 and refer to new table I–2, and delete the phrase ''that have listed GWP values in table A–1,'' to increase the accuracy of the estimated emissions for determining applicability; and
- Updates the emission factors in table I–1 to subpart I of part 98 used in the current applicability calculations for MEMS and LCD manufacturers based on new Tier 1 emission factors in the 2019 Refinement.

Additional information on the EPA's revisions to applicability and the final emission factors is available in section III.E.2.a. of the preamble to the 2022 Data Quality Improvements Proposal.

The EPA additionally proposed, and is finalizing, to revise the frequency and applicability of the technology assessment report requirements in 40 CFR 98.96(y), which applies to semiconductor manufacturing facilities with GHG emissions from subpart I processes greater than 40,000 $mtCO_2e$ per year. First, we are finalizing amendments to 40 CFR 98.96(y) to decrease the frequency of submission of the reports from every three years to every five years. As we noted in the preamble to the 2022 Data Quality Improvements Proposal, revising the frequency of submission to every five years will increase the likelihood that reports will include updates in technology rather than conclusions that technology has not changed. At the time of proposal, this would have moved the due date for the next technology assessment, from March 31, 2023, to March 31, 2025. Because the EPA is not implementing the revisions in this final rule until January 1, 2025, we have revised the provision in the final rule to clarify that the first technology assessment report due after January 1, 2025 is due on March 31, 2028. Section III.G.2.b. of this preamble provides additional information on the comments received related to the frequency of submittal of the technology assessment report and the EPA's response.

We are also finalizing revisions to restrict the reporting requirement in 40 CFR 98.96(y) to facilities that emitted greater than 40,000 $mtCO_2e$ and produced wafer sizes greater than 150 mm (*i.e.,* 200 mm or larger) during the period covered by the technology assessment report, as well as explicitly state that semiconductor manufacturing facilities that manufacture only 150 mm or smaller wafers are not required to prepare and submit a technology assessment report. The final provisions also clarify that a technology assessment report need not be submitted by a facility that has ceased (and has not resumed) semiconductor manufacturing before the last reporting year covered by the technology assessment report (*i.e.,* no manufacturing at the facility for the entirety of the year immediately before the year during which the technology assessment report is due).

2. Summary of Comments and Responses on Subpart I

This section summarizes the major comments and responses related to the proposed amendments to subpart I. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart I.

a. Comments on Revisions To Improve the Quality of Data Collected for Subpart I

Comment: The EPA received several comments related to the proposed revisions to the stack testing calculation methodology in subpart I. Largely, commenters objected to the EPA's proposal that ''all stacks'' be tested. The commenters questioned the use of the terminology ''all stacks'' within the proposed preamble and disagreed with the EPA's assumption that the number of stacks at each fab is expected to be small (*e.g.,* one to two). The commenters provided input from an industry survey of 33 fabs, suggesting that over 250

stacks would require testing, as well as an additional 170 process stacks that do not contain F–GHGs (*e.g.,* general fab exhausts). The commenters urged that adding stacks that do not have the potential to emit F–GHGs to the stack testing scope would add an additional $60,000 to $200,000 per testing event and as much as $400,000 for large sites. The commenters requested the EPA clarify that the testing is required for all operating stacks or stack systems that have the potential to emit F–GHGs, and that the rule retain the current terminology of ''stack system.''

Response: Even though the EPA referred to ''all stacks'' in the proposal preamble, we agree that the testing is required only for all operating stack systems. The proposed and final regulatory text continue to use the term ''stack system,'' which is defined as ''one or more stacks that are connected by a common header or manifold, through which a fluorinated GHG-containing gas stream originating from one or more fab processes is, or has the potential to be, released to the atmosphere. For purposes of this subpart, stack systems do not include emergency vents or bypass stacks through which emissions are not usually vented under typical operating conditions.'' We are finalizing the proposed requirement that all stack systems must be tested in accordance with 40 CFR 98.93(i)(3)(ii).

Comment: The EPA received comments objecting to proposed revisions to the technology assessment report to require use of three proposed calculation methods (*i.e.,* the dominant input gas method, all-input gas method, and reference emission factor method) to develop utilization and byproduct emission factors. The commenters expressed that each of EPA's proposed methods fails to meet the agency's goals for consistent implementation of emission factors across facilities and to allow for comparability across the industry and in industry emission rates. Specifically, the commenters asserted that the dominant input gas method and all-input gas method violate the physical reality of conservation of mass for plasma etch/wafer cleaning processes when using multiple gases and may lead to byproduct emission factors greater than 1. The commenters continued that the dominant input gas method does not clearly define what gas would be dominant in situations where gases of equal or near-equal mass are used. For both of the all-input gas method and the dominant input gas method, the commenters criticized the use of a ''cap'' value of 0.8 as inconsistent with the agency's goal to calculate emission factors consistently with those already in the EPA's data set. For the all-input gas method, commenters added that the cap of 0.8 for individual testing does not align with the maximum seen within historical test data submitted by industry, but is instead aligned with the maximum average emission factor across all gases. Commenters stated that the modification to both methods may amplify or obfuscate technology changes by setting an artificial maximum emissions value.

The commenters also stated that it is unclear how the reference emission factor method would be implemented. Specifically, commenters questioned whether 1–U or the byproduct emission factors would be held constant, maintaining that the method increases the difficulty in comparing individual tests depending on what is held constant, and adding that if new gases or byproducts are used or measured, the methodology will not have a reference emission basis to apply. Commenters expressed that the additional burden and complexity of calculating technology emission factors three different ways could be a disincentive to facility testing and would not improve overall emissions accuracy.

The commenters requested that in lieu of the three calculation methods, the EPA consider use of the ''multi-gas method,'' which attributes all non-carbon-containing GHGs, such as SF_6 and NF_3, to the input of these non-carbon-containing GHGs and attributes all carbon-containing F–GHG emissions across all carbon-based input F–GHGs. The commenters believe that the multi-gas method would appropriately assign emissions (especially for recipes running more than two gases at once), would eliminate concerns regarding emission factors that do not meet conservation of mass principles, and is not reliant on past or assumed data to calculate emission factors or byproduct emission factors. Commenters explained that high variability in single-gas emission factors is due to a variety of factors, including the amount or concentration of input gases, as well as plasma and manufacturing tool variables, and suggested that use of the multi-gas method would generate emission factors consistent and within the range of the existing emission factor data, while also being able to accommodate new gases and changes in technology.

Response: The EPA disagrees with the commenter's assessment of the three proposed emission factor methods. We also disagree that the proposed requirements are overly burdensome. However, following consideration of the comments raised, we are revising the final rule to require reporters to estimate emission factors using two of the three proposed methods (the all-input gas method and the reference emission factor method) and to allow reporters to submit results using an additional method of their choice. As noted in the preamble to the proposed rule, we plan to provide a spreadsheet that will automatically perform the calculations for the two required methods using a single data set entered by the reporters, minimizing burden. As explained in both section III.E.1.b. to the preamble to the 2022 Data Quality Improvements proposal and the subpart I technical support document,[12] the all-input gas method is quite consistent with the historically used methods, differing from the historically used methods only under circumstances where the historically used methods are likely to yield unrealistic results (*e.g.,* where CF_4 is used as an input gas and accounts for a small fraction of the mass of all input gases, yielding CF_4 input gas emission factors over 0.8). Of the three methods proposed, the reference emission factor method is somewhat less consistent with the historically used methods, but is expected to be more robust in that its results are less affected by changing ratios of input gases. As discussed further below, both of these methods are more consistent with the historical methods and less affected by changing input gas ratios than the method favored by the commenter, the multi-gas method.

After consideration of comments, the EPA is not taking final action on the proposed requirement to report emission factors calculated using the dominant gas method for several reasons. First, the dominant gas method estimates the input gas emission rate in the same way as the all-input gas method, making it redundant with the all-input gas method for calculation of input gas emission rates. Second, the dominant gas method estimates the byproduct emission rate by assigning all emissions of F–GHG byproducts to the carbon-containing F–GHG input gas accounting for the largest share by mass of the input gases, which is anticipated, as noted by commenters, to be less accurate in cases where input gases of equal or near-equal mass are used. Third, in the historical data sets submitted to the EPA, the all-input gas method was the most commonly used

[12] See document ''Technical Support for Proposed Revisions to Subpart I (2022),'' available in the docket for this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424.

method; therefore, retaining this approach rather than the dominant gas method will allow the EPA to more reliably compare the new data submitted to the historical data set. Finally, not requiring use of the dominant gas method will reduce burden on facilities that are required to submit technology assessment reports.

As noted in the preamble to the 2022 Data Quality Improvements proposal, receiving results based on multiple methods will enable the EPA: (1) to directly compare the new emission factor data to the emission factor data that are already in the EPA's database and that were calculated using the historical method; and (2) to compare the results across the available emission factor calculation methods and to identify any systematic differences in the results of the different methods for each gas and process type. By identifying and quantifying systematic differences in the results of the different methods, we will be better able to distinguish these differences from differences attributable to technology changes. Knowledge of these systematic differences will also be useful in the event that we ultimately require facilities to submit emission factors using one method only, particularly if that method is not closely related to one of the methods used historically. We will also be able to evaluate how much the results of each method vary for each gas and process type; high variability may indicate that the results of a method are being affected by varying input gas proportions rather than differences in gas behavior. On the other hand, extremely low variability may also indicate that a method is affected by input gas proportions. For example, if the all-input-gas method yields a large number of input gas emission factors equal to 0.8, the maximum allowed value for input gas emission factors under this method, this implies that some of the emissions being attributed to the input gas are actually being generated as byproducts from other input gases that are collectively more voluminous, conditions under which the reference emission factor method may yield the most reliable results. Ultimately, these analyses will enable us to more accurately characterize emissions from semiconductor manufacturing by selecting the most robust emission factor data for updating the default emission factors in tables I–3 and I–4. Note that the EPA would update the default emission factors using the rulemaking process, providing an opportunity for industry to comment on the data and methodology used to develop any proposed factors.

Regarding the comment that the proposed rule did not clarify how the reference emission factor would be implemented, including whether the 1–U or by-product emission factors would be adjusted, the proposed rule made it clear that both the 1–U and byproduct emission factors would be adjusted where the emitted gas was also an input gas. The preamble to the proposed rule stated, ''the reference emission factor method calculates emissions using the 1–U and the BEFs [by-product emission factors] that are observed in single gas recipes and then adjusts both factors based on the ratio between the emissions calculated based on the factors and the emissions actually observed in the multi-gas process. This approach uses all the information available on utilization and by-product generation rates from single-gas recipes while avoiding assumptions about which of these are changing in the multi-gas recipe'' (87 FR 36947). The proposed equations I–31A (for 1–U factors, finalized as equation I–30A) and I–31B (for by-product factors, finalized as equation I–30B) showed this in mathematical terms and also showed how the method would apply where more than two input gases were used. The proposed rule also clearly indicated that where a by-product gas was not also an input gas, proposed equation I–30B (finalized as equation I–29B) was to be used. Equation I–29B is the equation used in the all-input-gas method as well as the reference emission factor method for by-products that are not also input gases. Equation I–29B would apply to newly observed as well as previously observed by-product gases that were not also input gases.

This leaves only the situation where an input gas is used in a process type for the first time along with other input gases. While we expect that this situation will be rare, we agree that it should be addressed. We are clarifying in the final rule that where an input gas is used in a process type with other input gases and there is no 1–U factor for that input gas in table I–19 or I–20, as applicable, the Reference Emission Factor Method will not be used to estimate the emission factors for that process.

We are not specifying the multi-gas method as the sole method for calculating emission factors submitted in the technology assessment report. As noted in the proposed rule, one of the EPA's goals in collecting emission factor data through the technology assessment report is to better understand how emission factors may be changing as a result of technological changes in the semiconductor industry, and whether the changes to the emission factors may justify further data collection to comprehensively update the default emission factors in tables I–3 and I–4. To meet this goal, the emission factors submitted in the technology assessment reports should be calculated using methods that are similar to the methods used to calculate the emission factors already in the EPA's database; otherwise, differences attributable to differences in calculation methods may amplify or obscure differences attributable to technology changes. The multi-gas method assigns emissions of all carbon-containing F–GHGs to all carbon-containing F–GHG input gases, regardless of species, yielding input gas emission factors that are equal to byproduct gas formation factors for each emitted F–GHG. These input gas and byproduct gas emission factors are significantly different from the input gas and byproduct gas emission factors yielded by the historically used methods, making it difficult to discern the impact of technology changes as opposed to calculation method changes on the emission factors. In addition, our analysis indicated that the multi-gas method results are highly sensitive to the ratios of the masses of input gases fed into the process, which appears likely to affect the robustness and reliability of emission factors calculated using that method.[13] For these reasons, we have concluded that it would not be appropriate to require submission of emission factors using only the multi-gas method.

However, we are providing an option in the final rule for reporters to use, in addition to the required all-input gas method and the reference emission factor method, an alternative method of their choice to calculate and report updated utilization or byproduct formation rates based on the collected data. Reporters will therefore have the opportunity to provide emission factor data that are calculated using the multi-gas method or other methodologies, provided the reporter provides a complete, mathematical description of the alternative calculation method and labels the data calculated using that method consistent with the requirements for the all-input gas method and the reference emission factor method. Submitting emission factors calculated using the multi-gas

[13] *Id.* The EPA has included in the docket a memo and spreadsheet showing the results of the different emission factor calculation methods using the same data (see Docket ID. No. EPA–HQ–OAR–2019–0424–0142, memorandum and attachment 3 Excel spreadsheet).

method along with the other two methods would allow us to compare the results of the multi-gas method to the results of the other two (one of which is very similar to the primary historically used method) and to identify any systematic differences. As noted above, by identifying and quantifying systematic differences in the results of the different methods, we will be better able to distinguish these differences from differences attributable to technology changes. We may also be able to relate the results of the historical methods to the results of methods that differ from those used historically. Receiving emission factors calculated using three methods would also allow us to better assess the robustness and reliability of the emission factors calculated using all three methods, *e.g.,* by seeing which methods yield highly variable emission factors within each input gas-process type combination. Because the final rule does not require reporters to submit emission factors calculated using an alternative methodology, the requirement to provide a complete, mathematical description of the alternative calculation method used is not anticipated to add significant burden.

Comment: Commenters supported the proposal to remove BEFs for C_4F_6 and C_5F_8 and the decision to not add COF_2 and C_2F_4, as byproduct emissions of them account for <<0.001% of overall GHG emissions from semiconductor manufacturing operations. One commenter also requested the EPA clarify that carbon-containing byproduct emission factors are zero when calculating emissions from non-carbon containing input gases (SF_6, NF_3, F_2, or other non-carbon input gases) and when the film being etched or cleaned does not contain carbon, as this would align the EPA final rule with the 2019 Refinement.

Response: The EPA is finalizing the rule as proposed to remove the BEFs for C_4F_6 and C_5F_8. The EPA is also not adding BEFs for COF_2 or C_2F_4. For non-carbon containing input gases used in cleaning processes, we proposed to set carbon-containing byproduct emission factors to zero when the combination of input gas and chamber cleaning process sub-type is never used to clean chamber walls on manufacturing tools that process carbon-containing films during the year (*e.g.,* when NF_3 is used in remote plasma cleaning processes to only clean chambers that never process carbon-containing films during the year). We agree with the commenter that non-carbon-containing input gases used in etching processes are similarly not expected to give rise to carbon-containing byproducts if neither the input gases nor the films being etched contain carbon. We are therefore finalizing an expanded version of the proposed provision, setting carbon-containing byproduct emission factors to zero for etching and wafer cleaning processes as well as chamber-cleaning processes when these conditions are met. The revisions align the rule requirements with the 2019 Refinement.

Comment: Commenters expressed several concerns regarding the EPA's proposed revisions to the conditions under which the default DRE may be claimed. One commenter requested the EPA remove the requirement to provide supporting documentation for all abatement units using certified default or lower than default DREs. The commenter also requested the EPA clarify that reporters are not required to maintain supporting documentation on abatement units for which a DRE is not being claimed.

Commenters also contended that the existing language in subpart I is sufficient to ensure proper point-of-use (POU) device performance while being consistent with the 2019 Refinement, and the requirement to provide supporting documentation of manufacturer certified POU DREs, including testing method, is burdensome and may be unachievable, especially for older abatement units. One commenter expressed concern that the proposed increase in certification and documentation requirements beyond existing POU operational requirements will dissuade semiconductor companies from accounting for DREs from installed POU, resulting in an over-estimate of emissions from the semiconductor industry. The commenter also stated that adding operational elements of fuel and oxidizer settings, fuel gas flows and pressures, fuel calorific values, and water quality, flow, and pressures to the POU DRE requirements are outside the manufacturer-specified requirements for emissions control and are not necessary to ensure accurate POU DREs. Commenters stated that abatement equipment installed across the industry does not have manufacturer specifications for all listed parameters, or the capability to track all listed parameters. Commenters concluded that these and other POU default DRE certification and documentation requirements go above and beyond the 2019 Refinement and will make it more difficult for U.S. reporters to take credit for installed and future emissions control devices, resulting in a less accurate, overestimated GHG emissions inventory. One commenter supported applying the requirements only to equipment purchased after the reporting rule becomes effective. The commenter stated that verification testing would be especially burdensome; the commenter estimated testing to take approximately 20 weeks per chemistry and stated it could take up to 2+ years for individual vendors to have required documentation. The commenter also expressed concern that the proposed requirements could have cascading impacts to facility manufacturing and operating permits based on state implementation of the Tailoring Rule, which typically rely on GHGRP protocols. Commenters supported aligning the emission control device operational requirements for default POU DREs with the following 2019 Refinement language: ''. . . obtain a certification by the emissions control system manufacturers that their emissions control systems are capable of removing a particular gas to at least the default DRE in the worst-case flow conditions, as defined by each reporting site.''

The commenter also requested the EPA include language supporting full uptime for emission control devices interlocked with manufacturing tools or with abatement redundancy. The commenter supported 2019 Refinement language that: ''Inventory compilers should also note that UT [uptime] may be set to one (1) if suitable backup emissions control equipment or interlocking with the process tool is implemented for each emissions control system. Thus, using interlocked process tools or backup emissions control systems reduces uncertainty by eliminating the need to estimate UT for the reporting facility.'' The commenter contended that such language will drive further use of manufacturing tool interlocks or emission control system redundancy while having the added benefit of simplifying uptime tracking of individual POU.

Response: The EPA is clarifying in this response that reporters are not required to maintain documentation of the DRE on abatement units for which a DRE is not being claimed. However, no regulatory changes are needed to reflect this clarification. For abatement units for which a DRE is being claimed, reporters are still required to provide certification that the abatement systems for which emissions are being reported were specifically designed for fluorinated GHG or N_2O abatement, as applicable, and support the certification by providing abatement system supplier documentation stating that the system was designed for fluorinated GHG or N_2O abatement. The facility must certify

that the DRE provided by the abatement system manufacturer is greater than or equal to the DRE claimed (either the default, if the certified DRE is greater than or equal to the default, or the manufacturer-verified DRE itself, if the certified DRE is lower than the default DRE). To use the default or lower manufacturer-verified destruction or removal efficiency values, operation of the abatement system must be within the manufacturer's specifications. It was not the EPA's intent to require that certified abatement systems that operate within the manufacturer's specifications must meet all the operational parameters listed, and we are revising the final rule at 40 CFR 98.96(q)(2) to add ''which may include, for example,'' to clarify that, in order to use the default or lower manufacturer-verified destruction or removal efficiency values, operation of the abatement system must be within those manufacturer's specifications that apply for the certification.

In the final rule, the EPA is maintaining the current certification and documentation requirements for older POU abatement devices, although the certification must contain a manufacturer-verified DRE value that is equal to or higher than the default in order to claim the default DRE; facilities are allowed to claim a lower manufacturer-verified value if the provided certified DRE is lower than the default. The EPA concurs that some older POU abatement systems may not have full documentation from the manufacturer of the test methods used and whether testing was conducted under worst-case flow conditions; however, we believe this documentation should be available for most newer abatement systems. As a result, reporters with the older POU abatement devices will not have any additional documentation requirements beyond those currently in place, except to provide the certified DRE. Following a review of annual reports submitted under subpart I, we determined that facilities have historically provided manufacturer-verified DRE values for all abatement systems for which emission reductions have been claimed. Therefore, we have determined that these final requirements are reasonable. The EPA is finalizing the new documentation requirements for POU abatement devices purchased on or after January 1, 2025 under 40 CFR 98.94(f)(3)(i) and (ii), these additional requirements include that the manufacturer-verified DREs reflect that the abatement system has been tested by the manufacturer using a scientifically sound, industry-accepted measurement methodology that accounts for dilution through the abatement system, such as the EPA DRE Protocol (EPA 430–R–10–003), and verified to meet (or exceed) the default destruction or removal efficiency for the fluorinated GHG or N_2O under worst-case flow conditions. Since manufacturers routinely conduct DRE testing and are familiar with the protocols of EPA 430–R–10–003, this information would be readily available for abatement systems purchased in calendar year 2025 or later. Further, these final rule requirements will be implemented for reports prepared for RY2025 and submitted March 31, 2026, providing adequate time for reporters to acquire documentation.

The EPA agrees with the recommendation to align the rule with the 2019 Refinement with respect to the uptime factor for interlocked tools and abatement systems and is making this change in the final rule. The use of interlocked tools is already accounted for in the current rule in the definition of terms ''UT_{ijp}'' and ''UT_{pf}'' in equations I–15 and I–23 (the total time in minutes per year in which the abatement system has at least one associated tool in operation), which state that ''[i]f you have tools that are idle with no gas flow through the tool for part of the year, you may calculate total tool time using the actual time that gas is flowing through the tool.'' However, to clarify and simplify the calculation of uptime where interlocked tools are used, the EPA is revising the definition of the term ''UT_{ij}'' in equation I–15 to say that if all the abatement systems for the relevant input gas and process type are interlocked with all the tools feeding them, the uptime may be set to one (1). The revised text specifies that ''all'' tools and abatement systems for the relevant input gas and process sub-type or type are interlocked because the numerator and denominator of the uptime calculation in equations I–15 and I–23 are separately summed across abatement systems for input gas ''i'' and process sub-type or type ''j.'' Similar changes are made for the same reasons in the definition of ''UT_f'' in equation I–23. With the use of an interlock between the process tool and abatement device, the process tool should never be operating when the abatement device is not operating.

The current rule also accounts for the use of redundant abatement systems. Section 98.94(f)(4)(vi) currently states, ''If your fab uses redundant abatement systems, you may account for the total abatement system uptime (that is, the time that at least one abatement system is in operational mode) calculated for a specific exhaust stream during the reporting year.'' This provision achieves nearly the same objective as suggested by the commenters. To clarify this point, the EPA is revising the definition of the terms ''Td_{ijp}'' in equation I–15 and ''Td_{pf}'' in equation I–23 to reference the provision in 40 CFR 98.94(f)(4)(vi) when accounting for uptime when redundant abatement systems are used.

Comment: Commenters objected to the EPA's proposed requirements to include a calculation methodology to estimate emissions of CF_4 produced in hydrocarbon-fuel based combustion emissions control systems (HC fuel CECS) that are not certified not to generate CF_4. The commenters claimed that the CF_4 byproduct emissions from HC fuel CEC abatement of F_2 gas (from etch or remote plasma chamber cleaning processes) are based on limited and unverified data. Specifically, the commenters expressed concern that the values documented within the 2019 Refinement and referenced within the proposal are based on a single, confidential data set from one abatement supplier. One commenter stated that developing regulatory language around this single, unverified data set does not accurately represent the CF_4 byproduct emissions from the uses or generation of F_2 and may deliver an advantage to the single emissions control system supplier that provided the data.

The commenters also listed the following concerns with the information provided within the 2019 Refinement and the proposed rule supporting documentation upon which the CF_4 byproduct ($AB_{CF4,F2}$ and $B_{F2,NF3}$) is based:

- The F_2 emission values presented in ''Influence of CH_4-F_2 mixing on CF_4 byproduct formation in the combustive abatement of F_2'' by Gray & Banu (2018) are based on testing conducted in a lab under conditions that are not found in actual semiconductor abatement installations. Test methods do not appear to adhere to those specified in industry standard test methods or the EPA DRE Protocol. F_2 results are measured from a device, the MST Satellite XT, designed to provide ''nominal'' F_2 concentrations meant for health and safety risk management and not for environmental emissions measurement.
- ''FTIR spectrometers measure scrubber abatement efficiencies'' by Li, et al. (2002) and ''Thermochemical and Chemical Kinetic Data for Fluorinated Hydrocarbons'' by Burgess, et al. (1996) provide anecdotal and hypothetical emission pathways for the combustion of fluorinated gases, but do not confirm

reliable and peer reviewed CF_4 emission results from current semiconductor manufacturing use or generation of F_2.

- EPA references a single, confidential data set from Edwards, Ltd. (2018) upon which numerical $AB_{CF4,F2}$ and $B_{F2,NF3}$ values are based. This single data set of 15 measurements refers to an RPC NF_3 to F_2 emission value based on mass balance. The commenter opposed using the data provided by Edwards confidentially without the ability to review the underlying data and experimental procedure of the 15 measurements upon which the RPC NF_3 to F_2 emission factor was based. Mass balance has shown to be a highly conservative method in estimating emission factors and this confidential data set lacks visibility into repeatability, experimental design, and semiconductor process applicability.

The commenters further contended that the requirement to calculate CF_4 emissions from HC fuel CECS abatement of F_2, based on equation I–9 if the HC fuel CECS is not certified to not convert F_2 at less than 0.1%, adds complexity to apportioning RPC NF_3 and F_2 to both <0.1% certified and uncertified HC fuel CECS and will require time and cost investments which are not justified by data. One commenter added that this could disincentivize the use of low emission NF_3 cleans or potentially slow implementation of F_2 processes with zero-GWP potential due to the requirement to report CF_4 BEF generation with tools with POU abatement. Another commenter added that this requirement appears to apply to all relevant HC fuel CECS regardless of whether a default or measured DRE is claimed for the abatement device. The commenter stated that if HC fuel CECS abatement suppliers and device manufacturers are not able to provide the required certification to exempt systems from this added emission, for every kilogram of RPC NF_3 used, CO_2e emissions out of the HC fuel CECS will increase more than 600% for 200 mm and more than 400% for 300 mm processes. Commenters added that this jump in CF_4 emissions will result in a time series inconsistency for semiconductor industry greenhouse gas reporting.

One commenter also stated that, if EPA maintains this requirement, it is unclear if equation I–9 applies in addition to or in place of existing CF_4 byproduct emission factors. The commenter requested that CF_4 emissions from the HC fuel CECS abatement of F_2, as calculated by equation I–9, are applied instead of, not in addition to, default CF_4 BEFs for RPC NF_3. Commenters requested the removal of equation I–9 and associated $AB_{CF4,F2}$ and $B_{F2,NF3}$ data elements; one commenter added that an alternative would be to make changes to HC fuel CECS requirements to remove confusion and double counting of emissions.

Response: The EPA disagrees with the commenter after a thorough review of the issue, as documented in detail in a memorandum in the docket for the final rulemaking.[14] The analysis conducted for the EPA demonstrated that: (1) the formation of CF_4 by reaction of CH_4 and F_2 in POU combustion systems is thermodynamically favored and that there is no question that CF_4 emissions can be observed if mixing of CH_4 and F_2 is allowed to occur; (2) that a revised $B_{F2,NF3}$ default emission factor of 0.5 is well supported by scientific peer-reviewed evidence to describe the formation of F_2 from NF_3-based RPC processes; (3) that the proposed default value for $AB_{CF4,F2}$ of 0.116, describing the rate of formation of CF_4 from F_2, is well supported by experimental evidence under conditions that are representative of the designs and use of commercially available POU emissions control systems in production conditions; (4) that there is strong *prima facie* evidence of the formation of CF_4 from within POU emissions control systems during the production of semiconductor devices; and (5) that not reporting such CF_4 emissions could lead to a significant underestimation of GHG emissions from semiconductor manufacturing facilities.

Based on the evidence documented in the memorandum, the EPA is finalizing as proposed the requirement that the electronic manufacturers estimate and report CF_4 byproduct emissions from hydrocarbon-fuel-based POU emissions control systems that abate F_2 processes or NF_3-based RPC processes.

The EPA is also requiring that reporters estimate CF_4 emissions from all POU abatement devices that are not certified not to produce CF_4, even if they are not claiming a DRE from those devices, because the CF_4 emissions from HC fuel combustion in the abatement of F_2 or F–GHG is a separate issue from whether or not a DRE is claimed for the same devices. The EPA disagrees that the rule is adding unnecessary complexity to apportion RPC NF_3 and F_2 between POU abatement systems that are certified not to convert F_2 to CF_4 and those that are not certified. Reporters will use tool counts in this case rather than the usual gas apportioning model. This should be straightforward because it requires the reporters to: (1) count the total number of tools running the process type of interest (either RPC NF_3 or F_2 in any process type); (2) count the number of tools running that process type that are equipped with HC fuel CECs that are not certified not to form CF_4; and (3) divide (2) by (1).

The EPA is revising the final rule to require that reporters must only provide estimates of CF_4 emissions from HC fuel CECS purchased and installed on or after January 1, 2025. We recognize that applying the testing, certification, and emissions estimation requirements to older equipment would have expanded the set of equipment for which testing would need to be performed and/or emissions would need to be estimated, which may have posed logistical challenges, particularly for older equipment that may no longer be manufactured. Making the requirements applicable only to HC fuel CECs purchased and installed on or after January 1, 2025 ensures that abatement system manufacturers and/or electronics manufacturers can test the equipment and measure its CF_4 generation rate from F_2 by March 31, 2026, by which time facilities must either certify that the HC fuel CECS do not generate CF_4 or quantify CF_4 emissions from the HC fuel CECS.

The EPA recognizes that the new requirement to report CF_4 emissions from HC fuel CECS could lead to a time series inconsistency in reported emissions. However, such an inconsistency is not in conflict with the overall purpose of the GHGRP to accurately estimate GHG emissions. Nor would it be unique to the electronics industry, because other GHGRP subparts have been revised in ways that altered the time series of the emissions as new source types were added or more accurate methods were adopted. For example, in 2015, subpart W was updated to include a new source, completions and workovers of oil wells with hydraulic fracturing, in the existing Onshore Petroleum and Natural Gas Production segment and also added two entirely new segments, the Onshore Petroleum and Natural Gas Gathering and Boosting and Onshore Natural Gas Transmission Pipelines segments. Such changes in reported emissions are often documented in the public data, including in the EPA's sector profiles.

The EPA is clarifying in this response to comment that equation I–9 is in addition to, rather than in place of, CF_4 byproduct factors for RPC NF_3, because the CF_4 byproduct factors for RPC NF_3

[14] Memorandum from Sebastien Raoux to U.S. EPA. "CF_4 byproduct formation from the combustion of CH_4 and F_2 in Point of Use emissions control systems in the electronics industry." Prepared for the U.S. EPA. May 2023, available in the docket for this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424.

represent emissions from the process before abatement, and these emissions were measured without abatement equipment running.

Comment: One commenter supported using the term ''hydrocarbon-fuel-based combustion emissions control systems'' (HC fuel CECS) because it aligns with the nomenclature within 2019 Refinement rather than the less used ''hydrocarbon-fueled abatement systems'' or other terms. The commenter explained that semiconductor facilities widely implement large, facility-level volatile organic compound abatement devices to eliminate and control criteria volatile and non-volatile organic compounds, with no expectation of fluorinated greenhouse gas emissions. The commenter expressed concern that the broad definition of HC fuel CECS may be interpreted to include all hydrocarbon-based fuel control systems, not just tool-level POU abatement. The commenter added that, although not currently implemented, future facility-level F–GHG abatement systems could be incorrectly included in the scope of equation I–9 as it is written. The commenter requested that all emissions control systems language is updated to be consistent. The commenter also specifically requested the definition of ''hydrocarbon-fuel-based combustion emission control systems'' be tailored to specify HC fuel CECS connected to manufacturing tools, and include the following language: ''and have the potential to emit fluorinated greenhouse gases.''

Response: The EPA agrees with the commenter and has revised the proposed language to include the term, ''hydrocarbon-fuel-based combustion emissions control systems'' (HC fuel CECS) to align with the nomenclature within 2019 Refinement. The EPA is also clarifying in the final rule that these requirements apply only to equipment that is connected to manufacturing tools that have the potential to emit F_2 or F–GHGs. It is important to include emissions of F_2 as well as F–GHGs since it is F_2 that may combine with hydrocarbon fuels to generate CF_4 emissions. These changes include revising ''hydrocarbon fuel-based emissions control systems'' to ''HC fuel CECS'' in the terms ''EAB_{CF4},'' $a_{F2,j}$,'' ''$UT_{F2,j}$,'' ''$AB_{CF4,F2}$,'' ''$a_{NF3,RPC}$,'' ''and ''$UT_{NF3,RPC,F2}$'' defined in equation I–9.

Comment: One commenter requested the EPA specify that HC fuel CECS uptime during stack testing is ''representative of the emissions stream'' and the EPA specify that HC fuel CECS uptime during stack testing applies to RPC NF_3 or input F_2 processes only. The commenter questioned the EPA's proposed requirement that the uptime during the stack testing period must average at least 90 percent for uncertified hydrocarbon-fueled emissions control systems. The commenters asserted that uptime tracking for uncertified abatement devices is excessive, goes beyond the 2019 Refinement requirements, and does not improve the accuracy of emissions estimates. The commenter requested language to limit this requirement to ''at least 90% uptime of NF_3 remote plasma clean HC fuel CECS devices that are not certified to not form CF_4 during the test.'' The commenter also requested EPA clarify that equation I–9 does not apply in addition to stack testing requirements. The commenter requested that CF_4 emissions from the HC fuel CECS abatement of F_2, as calculated by equation I–9, be specifically exempted from the stack testing method as it would double count CF_4 emissions.

Response: The EPA agrees with the commenter that it would be helpful to clarify of the applicability of the 90-percent uptime requirement for HC fuel CECS. The EPA is revising the rule language at 40 CFR 98.94(j)(1) to further limit the HC fuel CECS 90-percent uptime requirement to systems that were purchased and installed on or after January 1, 2025 and that are used to control emissions from tools that use either NF_3 in remote plasma cleaning processes or F_2 as an input gas in any process type or sub-type. Either of these input gas-process type combinations may exhaust F_2 into HC fuel CECS, potentially leading to the formation of CF_4. The qualification ''that are not certified not to form CF_4'' is being finalized as proposed.

Regarding the commenters' concerns related to the uptime tracking requirements for uncertified abatement devices during stack testing, we reiterate that the uptime tracking requirement during stack testing is for hydrocarbon-fueled abatement devices that are not certified to not form CF_4, because these reporters still need to account for CF_4 emissions even if not accounting the abatement device's F–GHG DRE.

The EPA is also clarifying in this response that equation I–9 is *not* in addition to stack test calculations. The emissions from HC fuel CECS, should they occur, will be captured by the stack testing measurements. Because equation I–9 is not included in or referenced by the stack testing section, the regulatory text in 40 CFR 98.93(i) as currently drafted does not need any additional revision. However, the header paragraph 40 CFR 98.93(a) has been revised to clarify that paragraph (a)(7), which includes equation I–9, is one of the paragraphs used to calculate emissions based on default gas utilization rates and byproduct formations rates.

Comment: One commenter objected to the EPA's proposed calibration requirements for abatement systems, specifically for vacuum pump purge systems. The commenter urged that this would have significant impacts on the semiconductor industry and would drive a major increase in pump replacement and tool downtime. The commenter explained that POU abatement devices and their connected vacuum pumps are separate systems, and while physically connected, POU maintenance and pump replacement schedules are independent of one another. Further, the commenter asserted that pump purge flow calibration is technically and operationally infeasible for device manufacturers to perform. The commenter explained that purge flow indicators are factory calibrated and are part of the pump installation and commissioning; if there is a flow indicator failure, the vacuum pump is replaced with a factory-calibrated pump. The commenter stated that pump maintenance and repair is not typically performed at the manufacturing tool and requires pump disconnection and physical removal, and thus pumps are often repaired off-site. The commenter stressed that pump manufacturers do not provide recommendations or specifications for re-calibration of these pumps. The commenter added that there is no pump redundancy installed on a tool, and to check the calibration and potentially replace the flow transducer, the vacuum pump must be shutdown to safely work on it. The commenter noted that any replacement of the pump would require a tool shutdown and therefore 12 to 48 hours of downtime for manufacturing requalification.

The commenter stated that pumps remain continually in service on the order of years and asserted that pump vendors indicate that pumps can remain in service for many years without requiring calibration of the pump purge. The commenter provided that pump changes and refurbishment costs can be over $5,000 per occurrence and noted that pump repair or calibration activities can require significant coordination with factory and site operations due to the highly specialized equipment and resources needed. The commenter estimated that semiconductor manufacturing sites can have 2,000+ POU abatement devices as well as 4,000+ vacuum pumps in a high-volume-manufacturing site. The

commenter subsequently estimated that the EPA's proposed revisions could result in pump downtime, process equipment tool downtime, and maintenance costs to the U.S. semiconductor industry of about $40 million annually.

The commenter also stated that they believe the existing performance certification of POU emissions control devices based on high flow conditions are highly protective of POU system reliability. The commenter reiterated that high flow POU certification is based on maximum device flows, which, for multi-chamber tools, includes all chambers running at once. The commenter urged that significant variations in pump purge flows are unlikely and the magnitude of these variations would be a small component of overall POU flow volumes. As such, the commenter urged that pump purge flows are not necessary to calibrate after initial pump commissioning.

Response: The EPA agrees with the commenter that calibration of N_2 purge flows is normally done during pump service or maintenance, when the pumps are typically: (1) disconnected from the process tool; (2) replaced by a new or refurbished pump; and (3) brought to a ''service center'' for refurbishment (sometimes on-site, sometimes off-site). The EPA also concurs with commenters that requiring N_2 pump purge calibration could be disruptive if done outside of ''normal'' service periods. Consequently, the EPA proposed to require that pump purge flow indicators be calibrated ''each time a vacuum pump is serviced or exchanged'' rather than more frequently. The anticipated frequency of calibration mentioned in the preamble, every six months, was intended to be descriptive rather than prescriptive. Thus, the EPA does not believe that the proposed requirement would have the large economic impacts cited by the commenter. Nevertheless, because it appears that pumps are typically factory calibrated when commissioned and are replaced with factory-calibrated pumps when the flow indicator fails, a calibration requirement is not required. Therefore, the EPA is not taking final action on the proposed calibration requirement.

b. Comments on Revisions To Streamline and Improve Implementation for Subpart I

Comment: One commenter supported finalizing the amendment to 40 CFR 98.96(y) decreasing the frequency of submission of technology assessment reports, before the due date for the next technology assessment report.

Response: The EPA acknowledges the commenter's support and is finalizing revisions to 40 CFR 98.96(y) to decrease the frequency of submission of technology assessment reporters to every 5 years, as proposed. However, because the EPA is not implementing the final revisions until January 1, 2025 (see section V. of this preamble), we have revised the provision to clarify that the first technology assessment report due after January 1, 2025 is due on March 31, 2028. Subsequent reports must be submitted every 5 years no later than March 31 of the year in which it is due.

H. Subpart N—Glass Production

We are finalizing several amendments to subpart N of part 98 (Glass Production) as proposed. The EPA received only supportive comments for the proposed revisions to subpart N. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart N. We are also finalizing as proposed related confidentiality determinations for data elements resulting from the revisions to subpart N, as described in section VI. of this preamble.

The EPA is finalizing two revisions to the recordkeeping and reporting requirements of subpart N of part 98 (Glass Production) as proposed in the 2022 Data Quality Improvement Proposal. The revisions apply to both CEMS and non-CEMS reporters and require that facilities report and maintain records of annual glass production by glass type (*e.g.,* container, flat glass, fiber glass, specialty glass). Specifically, the final amendments revise (1) 40 CFR 98.146(a)(2) and (b)(3) to require the annual quantity of glass produced in tons, by glass type, from each continuous glass melting furnace and from all furnaces combined; and (2) 40 CFR 98.147(a)(1) and (b)(1), to add that records must also be kept on the basis of glass type. Differences in the composition profile of raw materials, use of recycled material, and other factors lead to differences in emissions from the production of different glass types. Collecting data on the annual quantities of glass produced by type will improve the EPA's understanding of emissions variations and industry trends, and improve verification for the GHGRP, as well as provide useful information to improve analysis of this sector in the Inventory. The EPA is also finalizing revisions to the recordkeeping and reporting requirements of subpart N as proposed in the 2023 Supplemental Proposal. The final revisions add reporting provisions at 40 CFR 98.146(a)(3) and (b)(4) to require the annual quantity (in tons), by glass type (*e.g.,* container, flat glass, fiber glass, or specialty glass), of cullet charged to each continuous glass melting furnace and in all furnaces combined, and revises 40 CFR 98.146(b)(9) to require the number of times in the reporting year that missing data procedures were used to measure monthly quantities of cullet used. The final revisions also add recordkeeping provisions to 40 CFR 98.147(a)(3) and (b)(3) to require the monthly quantity of cullet (in tons) charged to each continuous glass melting furnace by product type (*e.g.,* container, flat glass, fiber glass, or specialty glass). Differences in the quantities of cullet used in the production of different glass types can lead to variations in emissions, and, due to lower melting temperatures, can reduce the amount of energy and combustion required to produce glass. As such, the annual quantities of cullet used will further improve the EPA's understanding of variations and differences in emissions estimates, industry trends, and verification, as well as improve analysis for the Inventory. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

I. Subpart P—Hydrogen Production

We are finalizing several amendments to subpart P of part 98 (Hydrogen Production) as proposed. In some cases, we are finalizing the proposed amendments with revisions. In other cases, we are not taking final action on the proposed amendments. Section III.I.1. of this preamble discusses the final revisions to subpart P. The EPA received several comments on the proposed subpart P revisions which are discussed in section III.I.2. of this preamble. We are also finalizing related confidentiality determinations for data elements resulting from the revisions to subpart P, as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart P

This section summarizes the final amendments to subpart P. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other final revisions to 40 CFR part 98, subpart P can be found in this

section and section III.I.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

a. Revisions To Improve the Quality of Data Collected for Subpart P

In the 2023 Supplemental Proposal, the EPA proposed several amendments to subpart P of part 98 to expand and clarify the source category definition. First, to increase the GHGRP's coverage of facilities in the hydrogen production sector, we are amending, as proposed, the source category definition in 40 CFR 98.160 to include all facilities that produce hydrogen gas regardless of whether the hydrogen gas is sold. The final revisions will address potential gaps in applicability and reporting, allowing the EPA to better understand and track emissions from facilities that do not sell hydrogen gas to other entities. As proposed, these amendments categorically exempt any process unit for which emissions are currently reported under another subpart of part 98, including, but not necessarily limited to, ammonia production units that report emissions under subpart G of part 98 (Ammonia Manufacturing), catalytic reforming units located at petroleum refineries that produce hydrogen as a byproduct for which emissions are reported under subpart Y of part 98 (Petroleum Refineries), and petrochemical production units that report emissions under subpart X of part 98 (Petrochemical Production). As proposed, we are also exempting process units that only separate out diatomic hydrogen from a gaseous mixture and are not associated with a unit that produces diatomic hydrogen created by transformation of feedstocks.

The EPA is also amending the source category definition at 40 CFR 98.160 as proposed to clarify that stationary combustion sources that are part of the hydrogen production unit (*e.g.,* reforming furnaces and hydrogen production process unit heaters) are part of the hydrogen production source category and that their emissions are to be reported under subpart P. These amendments, which include a harmonizing change at 40 CFR 98.162(a), clarify that these furnaces or process heaters are part of the hydrogen production process unit regardless of where the emissions are exhausted (through the same stack or through separate stacks). Similarly, we are finalizing a clarification for hydrogen production units with separate stacks for ''process'' emissions and ''combustion'' emission that use a CEMS to quantify emissions from the process emissions stack. The final amendments at 40 CFR 98.163(c) require reporters to calculate and report the CO_2 emissions from the hydrogen production unit's fuel combustion using the mass balance equations (equations P–1 through P–3) in addition to calculating and reporting the process CO_2 emissions measured by the CEMS. Additional information on these revisions and their supporting basis may be found in section III.G. of the preamble to the 2023 Supplemental Proposal. We are adding one additional revision to address the monitoring of stationary combustion units directly associated with hydrogen production (*e.g.,* reforming furnaces and hydrogen production process unit heaters), following a review of comments received. Based on the EPA's analysis of reported data, there may be a small number of reporters that may not currently measure the fuel use to these combustion units separately. We have decided to add new § 98.164(c) to provide the use of best available monitoring methods (BAMM) for those facilities that may still need to install monitoring equipment to measure the fuel used by each stationary combustion unit directly associated with the hydrogen production process unit. To be eligible to use BAMM, the stationary combustion unit must be directly associated with hydrogen production; the unit must not have a measurement device installed as of January 1, 2025; the hydrogen production unit and the stationary combustion unit are operated continuously; and the installation of a measurement device must require a planned process equipment or unit shutdown or only be able to be done through a hot tap. BAMM can be the use of supplier data, engineering calculation methods, or other company records. We are not requiring facilities to provide an application to use BAMM that would require EPA review and approval to measure the fuel used in the hydrogen production process combustion unit. However, we are adding a new requirement at 40 CFR 98.166(d)(10) to require each facility to indicate in their annual report, for each stationary combustion unit directly associated with hydrogen production, whether they are using BAMM, the date they began using BAMM, and the anticipated or actual end date of BAMM use. Providing the use of BAMM is intended to reduce the burden associated with installation of new equipment, and we do not anticipate that the requirement to report the required indicators of BAMM will add significant burden. See section III.I.2. of this preamble for additional information on related comments and the EPA's response.

In the 2022 Data Quality Improvements Proposal, the EPA proposed several amendments to subpart P to allow the subtraction of the mass of carbon contained in products (other than CO_2 or methanol) and the carbon contained in intentionally produced methanol from the carbon mass balance used to estimate CO_2 emissions. The proposed revisions included new equation P–4 to allow facilities to adjust the calculated emissions from fuel and feedstock consumption in order to calculate net CO_2 process emissions, as well as harmonizing revisions to the introductory paragraph of 40 CFR 98.163 and 98.163(b) and the reporting requirements at 40 CFR 98.167(b)(7). Following review of comments received on similar changes proposed for subpart S (Lime Manufacturing), the EPA is not taking final action at this time on the proposed revisions to allow facilities to subtract out carbon contained in products other than CO_2 or methanol and the carbon contained in methanol. See sections III.E., III.I.2., and III.K.2. of this preamble for additional information on the comments related to subparts G, P and S and the EPA's response. However, the EPA is finalizing the proposed reporting requirement at 40 CFR 98.166(b)(7) (now 40 CFR 98.166(d)(7)), with minor revisions as a result of comments received. See the discussion in this section regarding subpart P reporting requirements for additional information as to why EPA is making revisions as a result of comments received.

The EPA is finalizing several additional revisions to the subpart P reporting requirements to improve the quality of the data collected based on the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal. The final reporting requirements are reorganized to accommodate the final amendments at 40 CFR 98.163(c), which require reporters using CEMS that do not include combustion emissions from the hydrogen production unit to calculate and report the CO_2 emissions from fuel combustion using the material balance equations (equations P–1 through P–3) in addition to the process CO_2 emissions measured by the CEMS. The revisions to 40 CFR 98.166 clarify the reporting elements that must be provided for each hydrogen production process unit based on the calculation methodologies used. Reporters using CEMS to measure combined CO_2 process and fuel combustion emissions will be required

to meet the requirements at 40 CFR 98.166(b); reporters using only the material balance method will be required to meet the requirements at 40 CFR 98.166(c); and reporters using CEMS to measure CO_2 process emissions and the material balance method to calculate emissions from fuel combustion emissions using equations P–1 through P–3 will be required to meet the requirements of 40 CFR 98.166(b) and (c). If a common stack CEMS is used to measure emissions from either a common stack for multiple hydrogen production units or a common stack for hydrogen production unit(s) and other source(s), reporters must also report the estimated fraction of CO_2 emissions attributable to each hydrogen production process unit. All other reporting requirements for each hydrogen production process unit (regardless of the calculation method) are consolidated under 40 CFR 98.166(d).

As proposed, we are finalizing the addition of requirements for facilities to report the process type for each hydrogen production unit (*i.e.,* steam methane reforming (SMR), SMR followed by water gas shift reaction (SMR–WGS), partial oxidation (POX), partial oxidation followed by WGS (POX–WGS), Water Electrolysis, Brine Electrolysis, or Other (specify)), and the purification type for each hydrogen production unit (*i.e.,* pressure swing adsorption (PSA), Amine Adsorption, Membrane Separation, Other (specify), or none); the final requirements have been moved to 40 CFR 98.166(d)(1) and (2) and paragraph (d)(1) has been revised to include ''autothermal reforming only'' and ''autothermal reforming followed by WGS'' as additional unit types.

We are amending, as proposed, requirements to clarify that the annual quantity of hydrogen produced is the quantity of hydrogen that is produced ''. . . by reforming, gasification, oxidation, reaction, or other transformations of feedstocks,'' and to add reporting for the annual quantity of hydrogen that is only purified by each hydrogen production unit; the final requirements have been moved to 40 CFR 98.166(d)(3) and (4).

We are finalizing a requirement at 40 CFR 98.166(c) (proposed 40 CFR 98.166(b)(5)), to report the name and annual quantity (metric tons (mt)) of each carbon-containing fuel and feedstock (formerly 40 CFR 98.166(b)(7)). For clarity, we have revised the text of the requirement at 40 CFR 98.166(c) from proposal to specify that the information is required whenever equations P–1 through P–3 are used to calculate CO_2 emissions. We are finalizing revisions that renumber 40 CFR 98.166(c) and (d) (now 40 CFR 98.166(d)(6) and (7)), and are finalizing paragraph (d)(7) with revisions from those proposed to require reporting, on a unit-level: (1) the quantity of CO_2 that is collected and transferred off-site; and (2) the quantity of carbon other than CO_2 or methanol collected and transferred off-site, or transferred to a separate process unit within the facility for which GHG emissions associated with the carbon is being reported under other provisions of part 98. The final rule also requires at 40 CFR 98.166(d)(9) the reporting of the annual net quantity of steam consumed by the unit (proposed as 40 CFR 98.166(c)(9)). This value will be a positive quantity if the hydrogen production unit is a net steam user (*i.e.,* uses more steam than it produces) and a negative quantity if the hydrogen production unit is a net steam producer (*i.e.,* produces more steam than it uses).

Finally, for consistency with the final revisions to the reporting requirements for facilities subject to revised 40 CFR 98.163(c), we are making a harmonizing change to the recordkeeping requirements at 40 CFR 98.167(a) to specify that, if the facility CEMS measures emissions from a common stack for multiple hydrogen production units or emissions from a common stack for hydrogen production unit(s) and other source(s), reporters must maintain records used to estimate the decimal fraction of the total annual CO_2 emissions from the CEMS monitoring location attributable to each hydrogen production unit. We are also finalizing as proposed clarifying edits in 40 CFR 98.167(e) that retention of the file required under that provision satisfies the recordkeeping requirements for each hydrogen production unit. See section III.G.1. of the preamble to the 2022 Data Quality Improvements Proposal and section III.G. of the preamble to the 2023 Supplemental Proposal for additional information on these revisions and their supporting basis.

In the 2023 Supplemental Proposal, the EPA also requested comment on, but did not propose, other potential revisions to subpart P, including revisions that would remove the 25,000 $mtCO_2e$ threshold under 40 CFR 98.2(a)(2), which would result in a requirement that any facility meeting the definition of the hydrogen production category in 40 CFR 98.160 report annual emissions to the GHGRP. The EPA considered these changes in order to collect information on facilities that use electrolysis or other production methods that may have small direct emissions, but that may use relatively large amounts of off-site energy to power the process (*i.e.,* the emissions occurring on-site at these hydrogen production facilities may fall below the existing applicability threshold, while the combined direct emissions (*i.e.,* ''scope 1'' emissions) and emissions attributable to energy consumption (*i.e.,* ''scope 2'' emissions) could be relatively large), as collecting information from these kinds of facilities as well is especially important in understanding hydrogen as a fuel source. To reduce the burden on small producers, the EPA requested comment on applying a minimum annual production quantity within the source category definition to limit the applicability of the source category to larger hydrogen production facilities, such as defining the source category to only include those hydrogen production processes that exceed a 2,500 metric ton (mt) hydrogen production threshold. The EPA also requested comment on potential options to require continued reporting from hydrogen production facilities that use electrolysis or other production methods that may have small direct emissions (*i.e.,* scope 1 emissions) that would likely qualify to cease reporting after three to five years under the part 98 ''off-ramp'' provisions of 40 CFR 98.2(i) (*i.e.,* facilities may stop reporting after three years if their emissions are under 15,000 $mtCO_2e$ or after five years if their emissions are between 15,000 and 25,000 $mtCO_2e$), to enable collection of a more comprehensive data set over time. Following consideration of comments received, the EPA is not taking final action on these potential revisions in this rule. See section III.I.2. of this preamble for additional information on related comments and the EPA's responses. The EPA also considered, but did not propose, further expanding the reporting requirements to include the quantity of hydrogen provided to each end-user (including both on-site use and delivered hydrogen) and, if the end-user reports to GHGRP, the e-GGRT identifier for that customer. The EPA requested comment on the approach to collecting this sales information and the burden such a requirement may impose in the 2023 Supplemental Proposal. Following review of comments received, the EPA is not taking final action on these potential revisions in this rule.

b. Revisions To Streamline and Improve Implementation for Subpart P

The EPA is finalizing several revisions to subpart P to streamline the requirements of this subpart and improve flexibility for reporters. To

address the recent use of low carbon content feedstocks, the EPA is finalizing, with revisions from those proposed, revisions to 40 CFR 98.164(b)(2) and (3) to allow the use of product specification information annually as specified in the final provisions for (1) gaseous fuels and feedstocks that have carbon content less than or equal to 20 parts per million by weight (*i.e.,* 0.00002 kg carbon per kg of gaseous fuel or feedstock) (rather than at least weekly sampling and analysis), and (2) for liquid fuels and feedstocks that have a carbon content of less than or equal to 0.00006 kg carbon per gallon of liquid fuel or feedstock (rather than monthly sampling and analysis). As explained in the 2022 Data Quality Improvements Proposal, the fuels and feedstocks below these concentrations have very limited GHG emission potential and are currently an insignificant contribution to the GHG emissions from hydrogen production. The revisions from those proposed were included to remove the term ''non-hydrocarbon'' because it is not necessary since the maximum hydrocarbon concentrations that qualify for the revised monitoring requirements are included in 40 CFR 98.164(b)(2) and (3).

The EPA is finalizing, with revisions from those proposed, the addition of new 40 CFR 98.164(b)(5)(xix) to allow the use of modifications of the methods listed in 40 CFR 98.164(b)(5)(i) through (xviii) or use of other methods that are applicable to the fuel or feedstock if the methods currently in 40 CFR 98.164(b)(5) are not appropriate because the relevant compounds cannot be detected, the quality control requirements are not technically feasible, or use of the method would be unsafe. The revisions from those proposed were harmonizing changes to remove the term ''non-hydrocarbon'' and tie the proposed revisions back more clearly to the specifications in paragraphs (b)(2) and (3).

The final rule also finalizes as proposed, revisions to § 98.164(b)(2) through (4) to specifically state that the carbon content must be determined ''. . . using the applicable methods in paragraph (b)(5) of this section'' to clarify the linkage between the requirements in § 98.164(b)(2) through (4) and § 98.164(b)(5).

Finally, the EPA is finalizing revisions to the recordkeeping requirements at 40 CFR 98.167(b) to refer to paragraph (b) of 40 CFR 98.166. For facilities using the alternatives at 40 CFR 98.164(b)(2), (3) or (5)(xix), these requirements include retention of product specification sheets, records of modifications to the methods listed in 40 CFR 98.164(b)(5)(i) through (xviii) that are used, and records of the alternative methods used, as applicable. We are also finalizing a revision to remove and reserve redundant recordkeeping requirements in 40 CFR 98.167(c). See section III.G.2. of the preamble to the 2022 Data Quality Improvements Proposal and section III.G. of the preamble to the 2023 Supplemental Proposal for additional information on these revisions and their supporting basis.

2. Summary of Comments and Responses on Subpart P

This section summarizes the major comments and responses related to the proposed amendments to subpart P. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart P.

Comment: Two commenters recommended expanding the source category to include all hydrogen production facilities; this would include non-merchant producers, facilities that use electrolysis or renewable energy, and include process units that do not report to other subparts. Other commenters did not oppose expanding the source category to non-merchant facilities. One commenter on the 2022 Data Quality Improvements Proposal stated that the existing definition may cause confusion in situations where the hydrogen produced is used on-site or otherwise not ''sold as a product to other entities'' and suggested specific revisions to expand the source category to include other types of hydrogen production plants, including those using electrolysis. One commenter stated that reporting energy consumption by hydrogen production sources is necessary to inform decarbonization strategies, *e.g.,* whether producing excessive amounts of green hydrogen may risk delaying fossil fuel retirement by diverting renewable energy from other uses. The commenter recommended a threshold for these facilities based on energy input. The commenter added that any hydrogen production facilities using carbon capture and sequestration technology should be required to report in all instances, as emissions data and energy consumption data from these facilities will be highly relevant to future regulatory action.

Multiple commenters commented on the EPA's request for comment regarding removing the threshold for the hydrogen production source category. One commenter strongly urged the EPA to make subpart P an ''all-in'' subpart to ensure all hydrogen production facilities are covered by reporting requirements, including the requirements proposed to report purchased energy consumption under proposed subpart B to part 98. The commenter pointed to hydrogen electrolysis facilities that may consume very large amounts of grid electricity that could have significant upstream emissions impacts; the commenter stated that many or most of these facilities will already be tracking the attributes of the energy they consume to qualify for Federal incentives and investment, and will therefore have this information readily available. The commenter stressed that understanding this information and the lifecycle emissions of hydrogen production will be critical to informing future actions under the CAA. The commenter also supported a production-based reporting threshold to ensure reporting for high production facilities with lower direct emissions and suggested the production threshold should at least include at least the top 75 percent of production facilities. One commenter suggested a hydrogen production threshold of 5,000 mt/year. Another commenter recommended that the EPA should implement a threshold to limit the applicability of the subpart to larger hydrogen production facilities. One commenter opposed a hydrogen production threshold, and recommended that the EPA retain the existing emissions-based threshold of 25,000 $mtCO_2e$; the commenter suggested this would further incentivize the implementation of low GHG hydrogen manufacturing processes over higher emitting processes such as steam methane reformers.

Several commenters also opposed revisions that would remove the ability of sources to off-ramp. One commenter offered the following recommendations: (1) hydrogen production process units which produce hydrogen but emit no direct GHG emissions should become eligible to cease reporting starting January 1 of the following year after the cessation of direct GHG emitting activities associated with the process; (2) if the direct GHG emissions remain below 15,000 $mtCO_2e$ or between 15,000 and 25,000 $mtCO_2e$, reporting would be required for 3 or 5 years respectively, consistent with the existing off-ramp provisions; or (3) if the EPA establishes

a hydrogen production threshold for reporting, then falling below the production threshold should be the trigger for cessation of reporting, either starting January 1 of the following year or on a parallel structure to the three and five year off-ramp emission thresholds. Two other commenters stated that the EPA ignores that the ''off-ramp'' is intended for entities that should no longer be subject to reporting requirements by virtue of the fact that their emissions fall below a reasonable threshold. One commenter stated that it is unclear how the EPA would have authority to continue to require reporting for these entities, and the commenters said that the EPA should justify excluding hydrogen production facilities from the off-ramp. The commenters added that the EPA could use other methods to collect this data, including proposing a separate standard addressing emissions from hydrogen production under CAA section 111.

Response: We agreed with commenters that the language regarding ''hydrogen gas sold as a product to other entities'' could cause confusion, as we intended to require non-merchant hydrogen production units to now report under subpart P. As such, we are finalizing, as proposed in the 2023 Supplemental Proposal, the language in 40 CFR 98.160(a) to focus on hydrogen gas production without referring to the disposition of the hydrogen produced. In the 2023 Supplemental Proposal, we also proposed to significantly revise § 98.160(b) and (c). The supplemental proposal revisions appear to address most of the commenter's suggested revisions, except that we are not including ''electrolysis'' in the list of types of transformations in 40 CFR 98.160(b) because we consider electrolysis as already included under ''. . . reaction, or other transformations of feedstocks.'' This is also supported by the inclusion of water electrolysis and brine electrolysis in the list of hydrogen production unit types in the proposed 40 CFR 98.166(b)(1)(i) (now 40 CFR 98.166(d)(1)). We agree with commenters that subpart P should be applicable to non-merchant facilities and are finalizing the proposed revisions.

The EPA has considered comments both supporting and not supporting changes related to the EPA's request for information regarding removing the emissions-based threshold or introducing an alternative production-based threshold for the hydrogen production source category, including options to require continued reporting from hydrogen production facilities by amending the emissions-based off-ramp provisions at 40 CFR 98.2(i)(1) and (2). The EPA did not propose or provide for review specific revisions to part 98 to expand the source category, beyond the inclusion of non-merchant facilities as discussed in section III.I.1. of this preamble. Therefore, we are not including any revisions to the threshold to subpart P or to the ability of hydrogen production facilities to off-ramp in this final rule. However, the EPA may further consider these comments and the information provided as we evaluate next steps concerning the collection of information from hydrogen production facilities and consider approaches to improving our understanding of hydrogen as a fuel source, including to inform any potential future rulemakings.

Comment: Three commenters did not support the requirement to report combustion from hydrogen production process units under subpart P in lieu of subpart C as proposed in 40 CFR 98.160(c). Two commenters stated that these units may not be metered separately from other combustion units located at an integrated facility, which would require additional metering to comply with subpart P reporting of combustion emissions directly associated with the hydrogen production process. These commenters stated that if combustion emissions directly associated with the hydrogen production process must be reported under subpart P, engineering estimations for fuel consumption should be allowed. One commenter recommended that EPA implement a threshold to limit the applicability of the subpart to larger hydrogen production facilities.

Response: Steam methane reforming (SMR) is an endothermic process, and heating and reheating of fuels and feedstocks to maintain reaction temperatures is an integral part of the steam methane reforming reaction. Therefore, subpart P has always required the reporting of ''fuels and feedstocks'' used in the hydrogen production unit and subpart C should only be used for ''. . . each stationary combustion unit other than hydrogen production process units'' (40 CFR 98.162(c)). We have long noted that the emissions from most SMR furnaces include a mixture of process and combustion emissions.[15] For more accurate comparison of CEMS measured emissions with those estimated using the mass balance method, we required reporting of the combustion emissions from the SMR furnace as part of the subpart P emissions. Our proposed revisions, therefore, were not a new requirement, but a further clarification of the existing requirements in subpart P, as we interpret them. Based on previous reviews of the emissions intensities from hydrogen production as compiled from subpart P reported data, we estimate that there are only a few facilities that do not include the SMR furnace or process heaters combustion emissions in their subpart P emission totals. To allow time for those facilities to measure fuel used in stationary combustion units associated with hydrogen production (*e.g.,* reforming furnaces and hydrogen production process unit heaters), we decided to include in this final rule a limited allowance for BAMM for those facilities that may still need to add appropriate monitoring equipment (as demonstrated through meeting the specified criteria in the final provision). We also note that subpart C units reporting under the common pipe reporting configuration at 40 CFR 98.36(c)(3) may use company records to subtract out the portion of the fuel diverted to other combustion unit(s) prior to performing the GHG emissions calculations for the group of units using the common pipe option. Regarding the recommendation to implement a threshold to limit applicability to larger hydrogen production facilities, we are not taking final action on any revisions to the threshold to subpart P, therefore, facilities with hydrogen production plants will continue to determine applicability to part 98 based on the existing requirements of 40 CFR 98.2(a). A facility that contains a source category listed in table A–4 to subpart A of part 98 (which includes hydrogen production) must report only if the estimated combined annual emissions from stationary fuel combustion units, miscellaneous uses of carbonate, and all applicable source categories in tables A–3 and table A–4 of part 98 are 25,000 mtCO_2e or more. Therefore, the applicability of the subpart is already limited to larger hydrogen production facilities.

Comment: One commenter stated that EPA's proposed mass balance equation under 40 CFR 98.163(d), equation P–4, requires further revision to ensure that it is accurate for refineries that have non-merchant hydrogen plants (such as those currently reporting under subpart Y). The commenter added that to ensure proper accounting, the variable ''$C_{offsite,n}$'' should be further revised to include language for non-merchant hydrogen plants as follows: ''Mass of carbon other than CO_2 or methanol collected from the hydrogen production

[15] See, *e.g., https://ccdsupport.com/confluence/pages/viewpage.action?pageId=173080691.*

unit and transferred off site or reported elsewhere by the facility under this part, from company records for month n (metric tons carbon).''

Response: Following consideration of comments on similar proposed revisions in other subparts, as discussed in section III.K.2. of this preamble, we are not taking final action at this time on proposed amendments to equation P–4 to allow the subtraction of carbon contained in products other than CO_2 or methanol and the carbon contained in methanol from the carbon mass balance used to estimate CO_2 emissions. However, we acknowledge this concern and agree that an analogous scenario may also occur within a facility that contains a captive (non-merchant) hydrogen production process unit. For example, some hydrogen production processes may operate without the water-gas-shift reaction and produce a syngas of hydrogen and carbon monoxide. For merchant plants, this syngas would be sold as a product for use as a fuel or as a feedstock for chemical production process. For a non-merchant plant, the syngas may be used on-site as a fuel or feedstock rather than sold off-site as a product. If a captive hydrogen production unit produces syngas for use as a fuel for an on-site stationary combustion unit, for example, the rule as proposed would not have allowed the subtraction of the carbon in the syngas from the emissions from the hydrogen production unit, resulting in double counting the CO_2 emissions related to this carbon (from both the hydrogen production unit and from the stationary combustion source). Most refineries with captive hydrogen production units seek to produce hydrogen for use in their refining process units and, therefore, use the water-gas-shift reaction to make pure hydrogen rather than syngas. However, production of syngas is possible under some circumstances. Although we are not finalizing equation P–4 as proposed, because the rule currently requires the reporting of carbon other than CO_2 or methanol that is transferred off site, we have revised the reporting requirements to clarify that the reported value, for non-merchant hydrogen production facilities, should include the quantity of carbon other than CO_2 or methanol that is transferred to a separate process unit within the facility for which GHG emissions associated with this carbon are being reported under other provisions of part 98.

Comment: One commenter supported the separate reporting of hydrogen that is produced and hydrogen that is only purified, but requested that the EPA provide sufficient implementation time and allow for best available monitoring methods to be used until installation of necessary monitoring equipment could occur.

Another commenter was supportive of reporting steam consumption data (*i.e.,* annual net quantity of steam consumed). However, the commenter added that there may be situations where steam is sourced from equipment (*e.g.,* a stand-alone boiler) distinct from a waste heat boiler associated with the SMR process; the commenter stated the rule should allow for flexibility in how the steam production and consumption is measured and quantified, including the ability to utilize best available monitoring methods.

Other commenters opposed reporting steam consumption data. One commenter opposing the requirements stated it could result in duplicative reporting based on what is proposed to be reported under subpart B. Two commenters stated that the EPA failed to provide justification for the requirement. Two commenters stated that it may be necessary for the EPA to issue an additional supplemental notice of proposed rulemaking to take comment on any such justification.

Response: Subpart P only provides monitoring requirements for fuels and feedstocks, it does not specify monitoring requirements for other reported data, for example, ammonia and methanol production. There are often cases in part 98 where there are reporting elements, but not specific monitoring requirements. In such cases, company records, engineering estimates, and similar approaches may be used (in addition to direct measurement methods) to report these quantities. As such, there is no need for BAMM provisions related to additional reporting requirements that require separately reporting produced and purified hydrogen quantities and net steam consumption.

We also note that the subpart P requirement is process unit specific, which is not duplicative of the proposed subpart B facility- or subpart-level reporting requirements. We also disagree that we did not provide rationale for the proposed requirements. These requirements (as with many of the other proposed requirements for subpart P) are aimed to obtain better information to verify reported emissions. For example, if a facility is a net steam purchaser, some emissions resulting from activities that support the hydrogen production process may occur at the steam production site. Thus, knowing the net steam consumption may help explain why the emissions to production ratios for these facilities based on reported data do not fall within the expected ranges. Understanding this could result in less correspondence from the EPA to verify these facilities' reports and therefore reduce the burden to these facilities.

J. Subpart Q—Iron and Steel Production

We are finalizing the amendments to subpart Q of part 98 (Iron and Steel Production) as proposed. This section discusses the final revisions to subpart Q. The EPA received comments on the proposed requirements for subpart Q; see the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart Q. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal. We are also finalizing as proposed confidentiality determinations for new data elements resulting from the revisions to subpart Q as described in section VI. of this preamble.

1. Revisions To Improve the Quality of Data Collected for Subpart Q

The EPA is finalizing revisions to subpart Q, as proposed in the 2022 Data Quality Improvements Proposal, to enhance the quality and accuracy of the data collected. First, we are revising 40 CFR 98.176(g) for all unit types (taconite indurating furnace, basic oxygen furnace, non-recovery coke oven battery, sinter process, EAF, decarburization vessel, and direct reduction furnace) and all calculation methods (direct measurement using CEMS, carbon mass balance methodologies, or site-specific emission factors) to require that facilities report the type of unit, the annual production capacity, and the annual operating hours for each unit.

The EPA is also finalizing revisions to correct equation Q–5 in 40 CFR 98.173(b)(1)(v) to remove an error introduced into the equation in prior revisions (81 FR 89188, December 9, 2016). The final rule corrects the equation to remove an unnecessary fraction symbol. See section III.H.1. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on these revisions and their supporting basis.

2. Revisions To Streamline and Improve Implementation for Subpart Q

The EPA is finalizing two revisions to subpart Q to streamline monitoring. First, we are revising 40 CFR

98.174(b)(2) to provide the option for facilities to determine the carbon content of process inputs and outputs by use of analyses provided by material recyclers that manage process outputs for sale or use by other industries. Material recyclers conduct testing on their inputs and products to provide to entities using the materials downstream, and therefore perform carbon content analyses using similar test methods and procedures as suppliers. The final revisions include a minor harmonizing change to 40 CFR 98.176(e)(2) to require reporters to indicate if the carbon content was determined from information supplied by a material recycler.

The EPA is also finalizing revisions to 40 CFR 98.174(b)(2) to incorporate a new test method, ASTM E415–17, *Standard Test Method for Analysis of Carbon and Low-Alloy Steel by Spark Atomic Emission Spectrometry* (2017), for carbon content analysis of low-alloy steel. The new method is incorporated by reference in 40 CFR 98.7 and 98.174(b)(2) for use for steel, as applicable. The addition of this alternative test method will provide additional flexibility for reporters. We are also finalizing one harmonizing change to the reporting requirements of 40 CFR 98.176(e)(2), to clarify that the carbon content analysis methods available to report are those methods listed in 40 CFR 98.174(b)(2). See section III.H.2. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on these revisions and their supporting basis.

K. Subpart S—Lime Production

We are finalizing several amendments to subpart S of part 98 (Lime Production) as proposed. In some cases, we are finalizing the proposed amendments with revisions. Section III.K.1. of this preamble discusses the final revisions to subpart S. The EPA received several comments on the proposed subpart S revisions which are discussed in section III.K.2. of this preamble. We are also finalizing as proposed related confidentiality determinations for data elements resulting from the revisions to subpart S, as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart S

The EPA is finalizing several revisions to subpart S of part 98 (Lime Manufacturing) as proposed to improve the quality of the data collected from this subpart. First, we are finalizing the addition of reporting requirements for reporters using the CEMS methodology, in order to improve our understanding of source category emissions and our ability to verify reported data. The EPA is adding data elements under 40 CFR 98.196(a) to collect annual averages of the chemical composition input data on a facility-basis, including the annual arithmetic average calcium oxide content (mt CaO/mt tons lime) and magnesium oxide content (mt MgO/mt lime) for each type of lime produced, for each type of calcined lime byproduct and waste sold, and for each type of calcined lime byproduct and waste not sold. These data elements rely on an arithmetic average of the measurements rather than requiring reporters to weight by quantities produced in each month. Collecting average chemical composition data for CEMS facilities will provide the EPA the ability to develop a process emission estimation methodology for CEMS reporters, which can be used to verify the accuracy of the reported CEMS emission data.

The EPA is also finalizing additional data elements for reporters using the mass balance methodology (*i.e.,* reporters that comply using the requirements at 40 CFR 98.193(b)(2)). The final rule includes new data elements under 40 CFR 98.196(b) to collect the annual average results of the chemical composition analysis of all lime byproducts or wastes not sold (*e.g.,* a single facility average calcium oxide content calculated from the calcium oxide content of all lime byproduct types at the facility), and the annual quantity of all lime byproducts or wastes not sold (*e.g.,* a single facility total calculated as the sum of all quantities, in tons, of all lime byproducts at the facility not sold during the year). These amendments will allow the EPA to build verification checks for the actual inputs entered (*e.g.,* MgO content). Because the final data elements rely on annual averages of the chemical composition measurements and an annual quantity of all lime byproducts or wastes at the facility, they are distinct from the data entered into the EPA's verification software tool. Additional information on these revisions and their supporting basis may be found in section III.I. of the preamble to the 2022 Data Quality Improvements Proposal.

In the 2022 Data Quality Improvements Proposal, the EPA proposed to improve the methodology for calculation of annual CO_2 process emissions from lime production to account for CO_2 that is captured from lime kilns and used on-site. Specifically, we proposed to modify equation S–4 to subtract the CO_2 that is captured and used in on-site processes, with corresponding revisions to the recordkeeping requirements in 40 CFR 98.197(c) (to record the monthly amount of CO_2 from the lime manufacturing process that is captured for use in all on-site processes), minor amendments to the reporting elements in 40 CFR 98.196(b)(1) (to clarify reporting of annual net emissions), 40 CFR 98.196(b)(17) (to clarify reporters do not need to account for CO_2 that was not captured but was used on-site), and to clarify that reporters must account for CO_2 usage from all on-site processes, including for manufacture of other products, in the total annual amount of CO_2 captured. Following consideration of comments received, the EPA is not taking final action at this time on the proposed revisions to equation S–4, or the corresponding revisions to 40 CFR 98.196(b)(1) and 98.197(c). We are finalizing the clarifying revisions to 40 CFR 98.196(b)(17), as proposed. We are also finalizing an editorial correction to equation S–4 to add a missing equation symbol. See section III.K.2. of this preamble for additional information on related comments and the EPA's response.

2. Summary of Comments and Responses on Subpart S

This section summarizes the major comments and responses related to the proposed amendments to subpart S. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart S.

Comment: One commenter opposed the proposed modifications to equation S–4 requiring monthly subtraction of CO_2 used on-site, stating it would be considerably more burdensome for lime producers that currently track and report this usage on an annual basis. The commenter requested that the EPA continue to allow the annual reporting of CO_2 usage, and thus implement an annual subtraction from total process emissions from all lime kilns combined.

Response: The EPA proposed revisions to subparts G (Ammonia Manufacturing), P (Hydrogen Production), and S (Lime Manufacturing) that would have required monthly measurement of captured CO_2 used to manufacture other products on-site or non-CO_2 carbon sent off-site to external users. It would also have modified the subpart-level equations to require that these amounts

be subtracted from the emissions total. However, the EPA needs additional time to consider these comments and whether a consistent approach across these three subparts should be required or whether there are circumstances where alternative approaches might be warranted. Therefore, the EPA is not taking final action on these proposed revisions to subparts G, P, and S for at this time but may consider implementing these or similar revisions in future rulemakings.

L. Subpart U—Miscellaneous Uses of Carbonate

The EPA is finalizing one minor change to subpart U of part 98 (Miscellaneous Uses of Carbonate). The revision in this final rule is a harmonizing change following review of comments received on proposed subpart ZZ to part 98 (Ceramics Manufacturing) (see section III.EE. of this preamble for additional information on the related comments and the EPA's response). We are revising the source category definition for subpart U at 40 CFR 98.210(b) to clarify that ceramics manufacturing is excluded from the source category. Section 98.210(b) excludes equipment that uses carbonates or carbonate-containing materials that are consumed in production of cement, glass, ferroalloys, iron and steel, lead, lime, phosphoric acid, pulp and paper, soda ash, sodium bicarbonate, sodium hydroxide, or zinc. We are adding the text ''or ceramics'' to ensure that there is no duplicative reporting between subpart U and new subpart ZZ.

M. Subpart X—Petrochemical Production

We are finalizing several amendments to subpart X of part 98 (Petrochemical Production) as proposed. This section summarizes the final revisions to subpart X. The EPA received only minor comments on the proposed requirements for subpart X. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart X.

We are finalizing as proposed several amendments to subpart X to improve the quality of data reported and to clarify the calculation, recordkeeping, and reporting requirements. First, we are finalizing a clarification to the emissions calculation requirements for flares in 40 CFR 98.243(b)(3) and (d)(5) to cross-reference 40 CFR 98.253(b) of subpart Y; these revisions clarify that subpart X reporters are not required to report emissions from combustion of pilot gas and from gas released during startup, shutdown, and malfunction (SSM) events of <500,000 standard cubic feet (scf)/day that are excluded from equation Y–3.

Next, we are finalizing as proposed the addition of new reporting requirements intended to improve the quality of the data collected under the GHGRP. First, we are finalizing reporting a new data element in 40 CFR 98.246(b)(7) and (c)(3). For each flare that is reported under the CEMS and optional ethylene combustion methodologies, facilities must report the estimated fractions of the total CO_2, CH_4, and N_2O emissions from each flare that are due to combusting petrochemical off-gas. The final rule will allow the fractions attributed to each petrochemical process unit that routes emissions to the flare to be estimated using engineering judgment. This change will allow more accurate quantification of emissions both from individual petrochemical process units and from the industry sector as a whole. Next, the EPA is finalizing addition of a requirement in 40 CFR 98.246(c)(6) to report the names and annual quantity (in metric tons) of each product produced in each ethylene production process for emissions estimated using the optional ethylene combustion methodology; this improves consistency with the product reporting requirements under the CEMS and mass balance reporting options.

We are finalizing, as proposed, a number of amendments that are intended to remove redundant or overlapping requirements and to clarify the data to be reported, as follows:

- For facilities that use the mass balance approach, we are finalizing amendments to 40 CFR 98.246(a)(2) to remove the requirement to report feedstock and product names, which previously overlapped with reporting requirements in 40 CFR 98.246(a)(12) and (13).
- We are finalizing revisions to 40 CFR 98.246(a)(5) to clarify the petrochemical and product reporting requirements for integrated ethylene dichloride/vinyl chloride monomer (EDC/VCM) process units. The amendments clarify the rule for facilities with an integrated EDC/VCM process unit that withdraw small amounts of the EDC as a separate product stream. The final rule is revised at 40 CFR 98.246(a)(5) to specify that (1) the portion of the total amount of EDC produced that is an intermediate in the production of VCM may be either a measured quantity or an estimate; (2) the amount of EDC withdrawn from the process unit as a separate product (*i.e.,* the portion of EDC produced that is not utilized in the VCM production) is to be measured in accordance with 40 CFR 98.243(b)(2) or (3); and (3) the sum of the two values is to be reported under 40 CFR 98.246(a)(5) as the total quantity of EDC petrochemical from an integrated EDC/VCM process unit.
- We are finalizing a change in 40 CFR 98.246(a)(13) to clarify that the amount of EDC product to report from an integrated EDC/VCM process unit should be only the amount of EDC, if any, that is withdrawn from the integrated process unit and not used in the VCM production portion of the integrated process unit.
- For facilities that use CEMS, we are finalizing amendments to 40 CFR 98.246(b)(8) to clarify the reporting requirements for the amount of EDC petrochemical when using an integrated EDC/VCM process unit, by removing language related to considering the petrochemical process unit to be the entire integrated EDC/VCM process unit.
- For facilities that use the optional ethylene combustion methodology to determine emissions from ethylene production process units, we are finalizing revisions to 40 CFR 98.246(c)(4) to clarify that the names and annual quantities of feedstocks that must be reported will be limited to feedstocks that contain carbon.
- We are finalizing changes to 40 CFR 98.246(a)(15) to more clearly specify that molecular weight must be reported for gaseous feedstocks and products only when the quantity of the gaseous feedstock or product used in equation X–1 is in standard cubic feet; the molecular weight does not need to be reported when the quantity of the gaseous feedstock or product is in kilograms.

Additional information on the EPA's rationale for these revisions may be found in section III.K. of the preamble to the 2022 Data Quality Improvements Proposal.

We are also finalizing as proposed confidentiality determinations for new data elements resulting from the revisions to subpart X, as described in section VI. of this preamble.

N. Subpart Y—Petroleum Refineries

We are finalizing several amendments to subpart Y of part 98 (Petroleum Refineries) as proposed. This section summarizes the final revisions to subpart Y. The EPA received several comment letters on the proposed

requirements for subpart Y. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart Y.

We are also finalizing as proposed confidentiality determinations for new data elements resulting from the revisions to subpart Y, as described in section VI. of this preamble.

1. Revisions To Improve the Quality of Data Collected for Subpart Y

The EPA is finalizing as proposed several amendments to subpart Y of part 98 to improve data collection, clarify rule requirements, and correct an error in the rule. First, we are finalizing amendments to the provisions for delayed coking units (DCU) to add reporting requirements for facilities using mass measurements from company records to estimate the amount of dry coke at the end of the coking cycle in 40 CFR 98.256(k)(6)(i) and (ii). These new paragraphs will require facilities to additionally report, for each DCU: (1) the internal height of the DCU vessel; and (2) the typical distance from the top of the DCU vessel to the top of the coke bed (*i.e.,* coke drum outage) at the end of the coking cycle (feet). These new elements will allow the EPA to estimate and verify the reported mass of dry coke at the end of the cooling cycle as well as the reported DCU emissions.

We are also finalizing revisions to equation Y–18b in 40 CFR 98.253(i)(2), to include a new variable ''f_{coke}'' to allow facilities that do not completely cover the coke bed with water prior to venting or draining to accurately estimate the mass of water in the drum. The ''f_{coke}'' variable is defined as the fraction of coke-filled bed that is covered by water at the end of the cooling cycle just prior to atmospheric venting or draining, where a value of one (1) represents cases where the coke is completely submerged in water. The second term in equation Y–18b represents the volume of coke in the drum, and is subtracted from the water-filled coke bed volume to determine the volume of water. We are also finalizing revisions to the equation terms ''M_{water}'' and ''H_{water}'' to add the phase ''or draining'' to specify that these parameters reflect the mass of water and the height of water, respectively, at the end of the cooling cycle just prior to atmospheric venting or draining. We are finalizing harmonizing revisions to the recordkeeping requirements at 40 CFR 98.257(b)(45) and (46) and a corresponding recordkeeping requirement at 40 CFR 98.257(b)(53).

To help clarify that the calculation methodologies in 40 CFR 98.253(c) and 98.253(e) are specific to coke burn-off emissions, we are finalizing the addition of ''from coke burn-off'' immediately after the first occurrence of ''emissions'' in the introductory text of 40 CFR 98.253(c) and 98.253(e).

We are also finalizing corrections to an inconsistency inadvertently introduced into subpart Y by amendments published on December 9, 2016 (81 FR 89188), which created an apparent inconsistency about whether to include or exclude SSM events less than 500,000 scf/day in equation Y–3. This final rule clarifies in 40 CFR 98.253(b) that SSM events less than 500,000 scf/day may be excluded, but only if reporters are using the calculation method in 40 CFR 98.253(b)(1)(iii). We are also finalizing revisions to remove the recordkeeping requirements in existing 40 CFR 98.257(b)(53) through (56) and to reserve 40 CFR 98.257(b)(54) through (56). These requirements should have been removed in the December 9, 2016 amendments, which removed the corresponding requirement in 40 CFR 98.253(j) to calculate CH_4 emissions from DCUs using the process vent method (equation Y–19). The EPA is also finalizing corrections to an erroneous cross-reference in 40 CFR 98.253(i)(5), which inaccurately defines the term ''M_{stream}'' in equation Y–18f for DCUs, to correct the cross-reference to § 98.253(i)(4) instead of § 98.253(i)(3). Additional information on the EPA's rationale for these revisions may be found in section III.L.1. of the preamble to the 2022 Data Quality Improvements Proposal.

The EPA is finalizing as proposed one additional revision to improve data quality from the 2023 Supplemental Proposal. Specifically, we are finalizing the addition of a requirement to report the capacity of each asphalt blowing unit, consistent with the existing reporting requirements for other emissions units under subpart Y. The final rule requires that facilities provide the maximum rated unit-level capacity of the asphalt blowing unit, measured in mt of asphalt per day, in 40 CFR 98.256(j)(2). Additional information on the EPA's rationale for these revisions may be found in section III.H. of the preamble to the 2023 Supplemental Proposal.

2. Revisions To Streamline and Improve Implementation for Subpart Y

The EPA is finalizing one change to subpart Y to streamline monitoring. We are finalizing an option for reporters to use mass spectrometer analyzers to determine gas composition and molecular weight without the use of a gas chromatograph. The final rule adds the inclusion of direct mass spectrometer analysis as an allowable gas composition method in 40 CFR 98.254(d). This change will allow reporters to use the same analyzers used for process control or for compliance with continuous sampling which are proposed to be provided under the National Emissions Standards for Hazardous Air Pollutants from Petroleum Refineries (40 CFR part 63, subpart CC), to comply with GHGRP requirements in subpart Y. Additional information on these revisions and their supporting basis may be found in section III.L.2. of the preamble to the 2022 Data Quality Improvements Proposal.

Consistent with changes we are finalizing to subpart P of part 98 (Hydrogen Production) from the 2023 Supplemental Proposal, we are finalizing revisions to remove references to non-merchant hydrogen production plants in 40 CFR 98.250(c) and to delete and reserve 40 CFR 98.252(i), 98.255(d), and 98.256(b). We are also finalizing as proposed revisions to remove references to coke calcining units in 40 CFR 98.250(c) and 98.257(b)(16) through (19) and to remove and reserve 40 CFR 98.252(e), 98.253(g), 98.254(h), 98.254(i), 98.256(i), and 98.257(b)(27) through (31). As proposed in the 2023 Supplemental Proposal, we are finalizing the addition of new subpart WW to part 98 (Coke Calciners), and these provisions are no longer necessary under subpart Y. Additional information on these revisions and their supporting basis may be found in section III.H. of the preamble to the 2023 Supplemental Proposal.

O. Subpart AA—Pulp and Paper Manufacturing

We are finalizing the amendments to subpart AA of part 98 (Pulp and Paper Manufacturing) as proposed. The EPA received no comments regarding the proposed revisions to subpart AA. Additional rationale for these amendments is available in the preamble to the 2023 Supplemental Proposal. The EPA is revising 40 CFR 98.273 to add a biogenic calculation methodology for estimation of CH_4, N_2O, and biogenic CO_2 emissions for units that combust biomass fuels (other

than spent liquor solids) from table C–1 to subpart C of part 98 or that combust biomass fuels (other than spent liquor solids) with other fuels. We are also revising 40 CFR 98.276(a) to remove incorrect references to biogenic CH_4 and N_2O and correcting a typographical error at 40 CFR 98.277(d), as proposed. Additional rationale for these amendments is available in the preamble to the 2023 Supplemental Proposal.

P. Subpart BB—Silicon Carbide Production

We are finalizing the amendments to subpart BB of part 98 (Silicon Carbide Production) as proposed. The EPA received no comments regarding the proposed revisions to subpart BB. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal. The EPA is finalizing a reporting requirement at 40 CFR 98.286(c) such that if CH_4 abatement technology is used at silicon carbide production facilities, then facilities must report: (1) the type of CH_4 abatement technology used and the date of installation for each technology; (2) the CH_4 destruction efficiency (percent destruction) for each CH_4 abatement technology; and (3) the percentage of annual operating hours that CH_4 abatement technology was in use for all silicon carbide process units or production furnaces combined. For each CH_4 abatement technology, reporters must either use the manufacturer's specified destruction efficiency or the destruction efficiency determined via a performance test; if the destruction efficiency is determined via a performance test, reporters must also report the name of the test method that was used during the performance test. Following the initial annual report containing this information, reporters will not be required to resubmit this information unless the information changes during a subsequent reporting year, in which case, the reporter must update the information in the submitted annual report. The final revisions to subpart BB also add a recordkeeping requirement at 40 CFR 98.287(d) for facilities to maintain a copy of the reported information. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal. The EPA is also finalizing, as proposed, confidentiality determinations for the additional data elements to be reported as described in section VI. of this preamble.

Q. Subpart DD—Electrical Transmission and Distribution Equipment Use

We are finalizing several amendments to subpart DD of part 98 (Electrical Transmission and Distribution Equipment Use) as proposed. In some cases, we are finalizing the proposed amendments with revisions. Section III.Q.1. of this preamble discusses the final revisions to subpart DD. The EPA received several comments on the proposed subpart DD revisions which are discussed in section III.Q.2. of this preamble. We are also finalizing as proposed confidentiality determinations for new data elements resulting from the final revisions to subpart DD, as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart DD

This section summarizes the final amendments to subpart DD. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other final revisions to 40 CFR part 98, subpart DD can be found in this section and section III.Q.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal.

a. Revisions To Improve the Quality of Data Collected for Subpart DD

The EPA is finalizing several revisions to subpart DD to improve the quality of the data collected under this subpart. First, we are generally finalizing the proposed revisions to the calculation, monitoring, and reporting requirements of subpart DD to require reporting of additional F–GHGs, except insulating gases with weighted average GWPs less than or equal to one will remain excluded from reporting under subpart DD. These final amendments will help to account for use and emissions of replacements for SF_6, including fluorinated gas mixtures, with lower but still significant GWPs. We are revising 40 CFR 98.300(a) to redefine the source category to include equipment containing ''fluorinated GHGs (F–GHGs), including but not limited to sulfur-hexafluoride (SF_6) and perfluorocarbons (PFCs).'' These changes include:

- Revising the threshold determination in 40 CFR 98.301 by adding new equations DD–1 and equation DD–2 (see section III.Q.1.b. of this preamble).
- Revising the GHGs to report at 40 CFR 98.302 by adding a new equation DD–3, which is also used in the definition of ''reportable insulating gas,'' discussed below.
- Redesignating equation DD–1 as equation DD–4 at 40 CFR 98.303 and revising the equation to estimate emissions from all F–GHGs within the existing calculation methodology, including F–GHG mixtures. Equation DD–4 will maintain the facility-level mass balance approach of tracking and accounting for decreases, acquisitions, disbursements, and net increase in total nameplate capacity for the facility each year, but will apply the weight fraction of each F–GHG to determine the user emissions by gas. In the final rule, we are making two clarifications to equation DD–4 in addition to the revisions that were proposed. These are discussed further below.
- Updating the monitoring and quality assurance requirements at 40 CFR 98.304(b) to account for emissions from additional F–GHGs.
- To address references to F–GHGs and F–GHG mixtures, we are finalizing the term ''insulating gas'' which is defined as ''any fluorinated GHG or fluorinated GHG mixture, including but not limited to SF_6 and PFCs, that is used as an insulating and/or arc quenching gas in electrical equipment.''
- To clarify which insulating gases are subject to reporting requirements, we are adding the term ''reportable insulating gas,'' which is defined as ''an insulating gas whose GWP, as calculated in equation DD–3, is greater than one. A fluorinated GHG that makes up either part or all of a reportable insulating gas is considered to be a component of the reportable insulating gas.'' In many though not all cases, we are replacing occurrences of the proposed phrase ''fluorinated GHGs, including PFCs and SF_6'' with ''fluorinated GHGs that are components of reportable insulating gases.''
- Adding harmonizing requirements to the term ''facility'' in the definitions section at 40 CFR 98.308 and the requirements at 40 CFR 98.302, 98.305, and 98.306 to require reporters to account for the mass of each F–GHG for each electric power system.

As noted above, following consideration of comments received, the EPA is revising these requirements from proposal to continue to exclude insulating gases with weighted average 100-year GWPs of less than one. Based on a review of the subpart DD data submitted to date, the EPA has concluded that excluding insulating gases with GWPs of less than one from reporting under subpart DD will have little effect on the accuracy or completeness of the GWP-weighted totals reported under subpart DD or

under the GHGRP generally at this time, and will decrease the reporting burden for facilities. See section III.Q.2. of this preamble for a summary of the related comments and the EPA's response.

Also as noted above, we are making two clarifications to equation DD–4 in addition to the revisions that were proposed. First, to account for the possibility that the same fluorinated GHG could be a component of multiple reportable insulating gases, we are inserting a summation sign at the beginning of the right side of equation DD–4 to ensure that emissions of each fluorinated GHG ''i'' are summed across all reportable insulating gases ''j.'' Second, upon further consideration of equation DD–4 and its relationship to the newly defined terms ''new equipment'' and ''retiring equipment,'' we are modifying the terms for acquisitions and disbursements of reportable insulating gas j to account for acquisitions and disbursements of reportable insulating gas that are linked to the acquisition or sale of all or part of an electric power system. These include acquisitions or disbursements of reportable insulating gas inside equipment that is transferred while in use, acquisitions or disbursements of insulating gas inside equipment that is transferred from or to entities other than electrical equipment manufacturers and distributors while the equipment is not in use, and acquisitions or disbursements of insulating gas in bulk from or to entities other than chemical producers or distributors. Accounting for these acquisitions and disbursements in equation DD–4 ensures that the terms for acquisitions and disbursements of reportable insulating gas will be mathematically consistent with other terms in the equation, including the terms for the net increase in total nameplate capacity and the quantity of gas stored in containers at the end of the year. The term for the net increase in the total nameplate capacity will reflect the new definitions of ''new equipment'' and ''retiring equipment,'' which include transfers of equipment while in use. Similarly, the term for the quantity of reportable insulating gas stored in containers at the end of the year will reflect acquisitions or disbursements of reportable insulating gas stored in containers from or to all other entities, including other electric power systems. If these acquisitions or disbursements of gas in equipment or in bulk are not accounted for in the equation, the result will be incorrect. The revised terms are consistent with the definitions of ''new'' and ''retired'' in their treatment of hermetically sealed pressure equipment, with such equipment being included in terms related to equipment that is transferred while not in use, but excluded from terms related to equipment that is transferred while in use. We are also making harmonizing changes to the reporting requirements at 40 CFR 98.306, revising paragraphs (f), (g), and (i) (to be redesignated as paragraph (k)), and adding paragraphs (i), (n), and (o). These harmonizing revisions do not substantively change the reporting requirements as proposed and therefore would not substantively impact the burden to reporters.

With minor changes, we are finalizing the proposed requirements in 40 CFR 98.303(b) for users of electrical equipment to follow certain procedures when they elect to measure the nameplate capacities (in units of mass of insulating gas) of new and retiring equipment rather than relying on the rated nameplate capacities provided by equipment manufacturers. As proposed, this option will be available only for closed pressure equipment with a voltage capacity greater than 38 kilovolts (kV), not for hermetically sealed pressure equipment or smaller closed-pressure equipment. These procedures are intended to ensure that the nameplate capacity values that equipment users measure match the full and proper charges of insulating gas in the electrical equipment. These procedures are similar to and compatible with the procedures for measuring nameplate capacity adopted by the California Air Resources Board (CARB) in its Regulation for Reducing Greenhouse Gas Emissions from Gas Insulated Switchgear.[16]

Specifically, electrical equipment users electing to measure the nameplate capacities of any new or retiring equipment will be required at 40 CFR 98.303(b)(1) to measure the nameplate capacities of all eligible new and retiring equipment in that year and in all subsequent years. For each piece of equipment, the electrical equipment user will be required to calculate the difference between the user-measured and rated nameplate capacities, verifying that the rated nameplate capacity was the most recent available from the equipment manufacturer. Where a user-measured nameplate capacity differs from the rated nameplate capacity by two percent or more, the electrical equipment user will be required at 40 CFR 98.303(b)(2) to adopt the user-measured nameplate capacity for that equipment for the remainder of the equipment's life. Where a user-measured nameplate capacity differs from the rated nameplate capacity by less than two percent, the electrical equipment user will have the option at 40 CFR 98.303(b)(3) to adopt the user-measured nameplate capacity, but if they chose to do so, they must adopt the user-measured nameplate capacities for all new and retiring equipment whose user-measured nameplate capacity differed from the rated nameplate capacity by less than two percent.

With minor changes, the EPA is finalizing the proposed requirements at 40 CFR 98.303(b)(4) and (5) for when electrical equipment users measure the nameplate capacity of new equipment that they install and for when they measure the nameplate capacity of retiring equipment. These final requirements ensure that electrical equipment users:

- Correctly account for the mass of insulating gas contained in new equipment upon delivery from the manufacturer (*i.e.,* the holding charge), and correctly account for the mass of insulating gas contained in equipment upon retirement, measuring the actual temperature-adjusted pressure and comparing that to the temperature-adjusted pressure that reflects the correct filling density of that equipment.
- Use flowmeters or weigh scales that meet certain accuracy and precision requirements to measure the mass of insulating gas added to or recovered from the equipment;
- Use pressure-temperature charts and pressure gauges and thermometers that meet certain accuracy and precision requirements to fill equipment to the density specified by the equipment manufacturer or to recover the insulating gas from the equipment to the correct blank-off pressure, allowing appropriate time for temperature equilibration; and
- Ensure that insulating gas remaining in the equipment, hoses and gas carts is correctly accounted for.

After consideration of comments, we are including a requirement to follow the procedure specified by the equipment manufacturer to ensure that the measured temperature accurately reflects the temperature of the insulating gas, *e.g.,* by measuring the insulating gas pressure and vessel temperature after allowing appropriate time for the temperature of the transferred gas to equilibrate with the vessel temperature. Also after consideration of comments, we are (1) adding a requirement that facilities that use flow meters to measure the mass of insulating gas added to new equipment must keep the

[16] See *https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2020/sf6/fro.pdf.*

mass flow rate within the range specified by the flowmeter manufacturer, and (2) not finalizing the option to use mass flowmeters to measure the mass of the insulating gas recovered from equipment. We are making both changes because the accuracy and precision of flowmeters can decrease significantly when the mass flow rate declines below the minimum specified by the flow meter manufacturer for accurate and precise measurements.

As proposed, we are allowing equipment users to account for any leakage from the equipment using one of two approaches. In both approaches, users must measure the temperature-compensated pressure of the equipment before they remove the insulating gas from that equipment and compare the measured temperature-compensated pressure to the temperature-compensated pressure corresponding to the full and proper charge of the equipment (the design operating pressure). If the measured temperature-compensated pressure is different from the temperature-compensated pressure corresponding to the full and proper charge of the equipment, the equipment user may either (1) add or remove insulating gas to or from the equipment until the equipment reaches its full and proper charge; recover the gas until the equipment reached a pressure of 0.068 pounds per square inch, absolute (psia) (3.5 Torr) or less; and weigh the recovered gas (charge adjustment approach), or (2) if (a) the starting pressure of the equipment is between its temperature-compensated design operating pressure and five (5) pounds per square inch (psi) below that pressure, and (b) the insulating gas is recovered to a pressure no higher than 5 psia (259 Torr),[17] recover the gas that was already in the equipment; weigh it; and account mathematically for the difference between the quantity of gas recovered from the equipment and the full and proper charge (mathematical adjustment approach, equation DD–5).

In the final rule, we are allowing use of the mathematical adjustment approach in somewhat more limited circumstances than proposed. We proposed that to use the mathematical adjustment approach to calculate the nameplate capacity, facilities would need to recover a quantity of insulating gas equivalent to at least 90 percent of the full manufacturer-rated nameplate capacity of the equipment, which would have provided more flexibility on the starting and ending pressures of the equipment during the recovery process. The proposed requirement was based on an analysis of the proposed accuracies and precisions of measuring devices and their impacts on the accuracy and precision of the mathematical adjustment approach, which indicated that 90 percent of the gas must be recovered to limit the uncertainty of the calculation to below 2 percent. We also recognized that departures from the ideal gas law could result in additional, systematic errors in the mathematical adjustment approach and therefore requested comment on the option of adding compressibility factors, which account for these departures, to equation DD–5 (proposed as equation DD–4). Such compressibility factors are not constant but are functions of the pressure and temperature of the insulating gas based on an equation of state specific to that insulating gas. We did not receive any comment on this option, and after considering the matter further, we believe that performing calculations using compressibility factors would prove too complex to implement in the field to obtain accurate nameplate capacity values. Without compressibility factors, departures of the insulating gas from the ideal gas law limit the reliability of the mathematical adjustment approach except within the ranges of starting and ending pressures described above. Consequently, we are finalizing the mathematical adjustment method as proposed but are restricting its use to the specified ranges of starting and ending pressures. Under these circumstances, any systematic errors in the mathematical adjustment approach are generally expected to fall below 0.5 percent, leading to maximum total errors (accounting for both departures from the ideal gas law and limits on the accuracy and precision of measuring devices) of approximately two percent. (For more discussion of this issue, see ''Update to the Technical Support for Proposed Revisions to Subpart DD, Electrical Transmission and Distribution Equipment Use,'' included in the docket for this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424).

Given these restrictions, the mathematical adjustment approach cannot be used to calculate the nameplate capacity of equipment that cannot have the insulating gas inside of it recovered below atmospheric pressure. However, as noted above, the approach can still be used for situations where the blank-off pressure of a gas cart is above 3.5 Torr (0.068 psia) but below 5 psia and/or where the starting pressure of the electrical equipment is no more than 5 psi lower than its temperature-compensated design operating pressure. (Note that equipment whose starting pressure is above the temperature-compensated design operating pressure will need to have the excess gas recovered until it reaches the design operating pressure, at which point the nameplate capacity measurement can begin.)

We are finalizing as proposed requirements at 40 CFR 98.303(b)(6) that allow users to measure the nameplate capacity of electrical equipment earlier during maintenance activities that require opening the gas compartment. The equipment user will still be required to follow the measurement procedures required for retiring equipment at 40 CFR 98.303(b)(5) to measure the nameplate capacity, and the measured nameplate capacity must be recorded, but will not be used in equation DD–3 until that equipment is actually retired.

We are finalizing as proposed requirements at 40 CFR 98.303(b)(7) and (8) to require that, where the electrical equipment user is adopting the user-measured nameplate capacity, the user must affix a revised nameplate capacity label showing the revised nameplate value and the year the nameplate capacity adjustment process was performed to the device by the end of the calendar year in which the process was completed. For each piece of electrical equipment whose nameplate capacity is adjusted during the reporting year, the revised nameplate capacity value must be used in all rule provisions wherein the nameplate capacity is required to be recorded, reported, or used in a calculation.

To ensure that the mass balance method is based on consistent nameplate capacity values throughout the life of the equipment, we are finalizing at 40 CFR 98.303(b)(9) that electrical equipment users are allowed to measure and revise the nameplate capacity value of any given piece of equipment only once, unless the nameplate capacity itself is likely to have changed due to changes to the equipment (*e.g.,* replacement of the equipment bushings).

To help ensure that electrical equipment users obtain accurate measurements of their equipment's nameplate capacities, we are finalizing requirements at 40 CR 98.303(b)(10) that

[17] While the mathematical adjustment approach is expected to yield accurate results if the final pressure is 5 psia or less, facilities are encouraged to recover the insulating gas until they reach the blank-off pressure of the gas cart, which is generally expected to fall below 5 psia. Note that where the final pressure is equal to or less than 0.068 psia, the gas remaining in the equipment is estimated to account for a negligible share of the total and therefore facilities are not required to use the Mathematical Adjustment Method to account for it.

electrical equipment users must use measurement devices that meet the following accuracy and precision requirements when they measure the nameplate capacities of new and retiring equipment:

- Flow meters must be certified by the manufacturer to be accurate and precise to within one percent of the largest value that the flow meter can, according to the manufacturer's specifications, accurately record.
- Pressure gauges must be certified by the manufacturer to be accurate and precise to within 0.5 percent of the largest value that the gauge can, according to the manufacturer's specifications, accurately record.
- Temperature gauges must be certified by the manufacturer to be accurate and precise to within ±1.0 °F; and
- Scales must be certified by the manufacturer to be accurate and precise to within one percent of the true weight.

Additional information on these revisions and their supporting basis may be found in section III.N.1. of the preamble to the 2022 Data Quality Improvements Proposal.

We are finalizing at 40 CFR 98.306(r) and (s) (proposed as 40 CFR 98.306(o) and (p)) requirements for equipment users who measure and adopt nameplate capacity values to report the total rated and measured nameplate capacities across all the equipment whose nameplate capacities were measured and for which the measured nameplate capacities have been adopted in that year.

We are finalizing requirements in 40 CFR 98.307(b) as proposed for equipment users to keep records of certain identifying information for each piece of equipment for which they measure the nameplate capacity: the rated and measured nameplate capacities, the date of the nameplate capacity measurement, the measurements and calculations used to obtain the measured nameplate capacity (including the temperature-pressure curve and/or other information used to derive the initial and final temperature adjusted pressures of the equipment), and whether or not the measured nameplate capacity value was adopted for that piece of equipment.

To clarify the mass balance methodology in 40 CFR 98.303, we are adding definitions for "energized," "new equipment," and "retired equipment," at 40 CFR 98.308 as proposed. We are finalizing the definition of "energized" as proposed to mean "connected through busbars or cables to an electrical power system or fully-charged, ready for service, and being prepared for connection to the electrical power system. Energized equipment does not include spare gas insulated equipment (including hermetically-sealed pressure switchgear) in storage that has been acquired by the facility, and is intended for use by the facility, but that is not being used or prepared for connection to the electrical power system." The final definition more clearly designates what equipment is considered to be installed and functioning as opposed to being in storage.

With two minor changes, we are finalizing the proposed definition for "new equipment." "New equipment" is defined as "either (1) any gas insulated equipment, including hermetically-sealed pressure switchgear, that is not energized at the beginning of the reporting year but is energized at the end of the reporting year, or (2) any gas insulated equipment other than hermetically-sealed pressure switchgear that has been transferred while in use, meaning it has been added to the facility's inventory without being taken out of active service (*e.g.,* when the equipment is sold to or acquired by the facility while remaining in place and continuing operation)." Similarly, we are finalizing the definition for "retired equipment" with two minor changes. "Retired Equipment" is defined as "either (1) any gas insulated equipment, including hermetically-sealed pressure switchgear, that is energized at the beginning of the reporting year but is not energized at the end of the reporting year, or (2) any gas insulated equipment other than hermetically-sealed pressure switchgear that has been transferred while in use, meaning it has been removed from the facility's inventory without being taken out of active service (*e.g.,* when the equipment is acquired by a new facility while remaining in place and continuing operation)." The proposed definitions both included two sentences, where the first sentence specified that the equipment changed from "not energized" to "energized" (or vice versa), and the second sentence preceded the phrase "that has been transferred while in use" with "This includes." Upon review of the proposed definitions, we realized that they could lead to confusion because equipment that is transferred while in use does not change from "not energized" to "energized" or vice versa, and therefore cannot be "included" in the sets of equipment that change from "not energized" to "energized" or vice versa. We therefore replaced "This includes" with "or." We also realized that including hermetically-sealed pressure switchgear in equipment that is transferred while in use would trigger requirements to inventory the acquired (new) or disbursed (retired) hermetically-sealed pressure switchgear for purposes of the mass balance calculation (equation DD–4) and the reporting requirements at 40 CFR 98.306(a)(2) and (4). We did not intend to trigger these requirements for hermetically sealed pressure equipment that is transferred during use. Such requirements would be inconsistent with the intent and effect of the current provision at 40 CFR 98.306(a)(1), which excludes existing hermetically-sealed pressure switchgear from the requirement to report the existing nameplate capacity total at the beginning of the year. We therefore excepted hermetically sealed switchgear from equipment that is transferred while in use in both definitions. With these minor changes, the definitions clarify how the terms "new" and "retired" should be interpreted for purposes of equation DD–3.

b. Revisions To Streamline and Improve Implementation for Subpart DD

The EPA is finalizing several revisions to subpart DD to streamline requirements. First, we are revising the applicability threshold of subpart DD at 40 CFR 98.301 largely as proposed, in order to align with revisions to include additional F–GHGs in subpart DD. However, as discussed above, insulating gases with weighted average GWPs less than or equal to 1 will remain excluded from reporting under subpart DD. We are replacing the existing nameplate capacity threshold with an emissions threshold of 25,000 $mtCO_2e$ per year of F–GHGs that are components of reportable insulating gases (*i.e.,* insulating gases whose weighted average GWPs, as calculated in equation DD–3, are greater than one (1)). To calculate their F–GHG emissions for comparison with the threshold, electrical equipment users will use one of two new equations finalized in subpart DD at 40 CFR 98.301, equations DD–1 and DD–2. The equations explicitly include not only the nameplate capacity of the equipment but also an updated default emission factor and the GWP of each insulating gas.

We are also finalizing revisions to the existing calculation, monitoring, and reporting requirements of subpart DD to require reporting of additional F–GHGs beyond SF_6 and PFCs that are components of reportable insulating gases. The new equations DD–1 and DD–2 that we are finalizing for the applicability threshold require potential

reporters to account for the total nameplate capacity of all equipment containing reportable insulating gases (located on-site and/or under common ownership or control), including equipment containing F–GHG mixtures, and multiply by the weight fraction of each F–GHG (for gas mixtures), the GWP for each F–GHG, and an emission factor of 0.10 (representing an emission rate of 10 percent).

We are finalizing harmonizing changes in multiple sections of subpart DD to renumber equation DD–1 and maintain cross-references to the equation. We are also finalizing revisions to the existing threshold in 40 CFR 98.301 and table A–3 to subpart A (General Provisions). Additional information on these revisions and their supporting basis may be found in section III.N.2. of the preamble to the 2022 Data Quality Improvements Proposal.

Finally, we are removing an outdated monitoring provision at 40 CFR 98.304(a), which reserves a prior requirement for use of BAMM that applied solely for RY2011.

2. Summary of Comments and Responses on Subpart DD

This section summarizes the major comments and responses related to the proposed amendments to subpart DD. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart DD.

a. Comments on Revisions To Improve the Quality of Data Collected for Subpart DD

Comment: One commenter asked for clarification regarding whether the equipment user needs to account for insulating gas remaining inside gas-insulated equipment (GIE) that are transferred to another entity (vendor) for repair or salvage. The commenter asserted that since the equipment is leaving the inventory with gas inside, it should be counted as both retired equipment and a gas disbursement. The commenter suggested the ''Disbursements'' term in equation DD–3 be modified to include similar language to the ''Acquisitions'' term, to clarify that gas inside equipment that is transferred to another entity for repair or salvage, in addition to equipment that is sold, counts as a disbursement.

Response: The EPA agrees with the commenter and is revising the ''Disbursements'' term in equation DD–3 (being finalized as equation DD–4) to account for gas ''transferred'' as well as ''sold'' to ''other entities.'' As discussed in section III.Q.1. of this preamble, we are making a number of clarifications to the ''Acquisitions'' and ''Disbursements'' terms in equation DD–4 to accommodate the full range of possible acquisitions and disbursements by electric power systems, which will improve the accuracy and completeness of equation DD–4 and the associated reporting and recordkeeping requirements.

Comment: One commenter suggested that the EPA revise the nameplate capacity adjustment text as follows: first, to remove the word ''covered'' prior to ''insulating gas'' in 40 CFR 98.303(b)(4)(ii)(A), since ''covered'' is not included in the EPA's definition of insulating gas.

Response: The EPA agrees with the commenter and is revising 40 CFR 98.303(b)(4)(ii)(A) as suggested to reflect the language which is used in the definitions and to minimize confusion. As discussed in section III.Q.1. of this preamble, we are introducing the term ''reportable insulating gas'' to distinguish between insulating gas that is included in subpart DD (''reportable'') because it has a weighted average GWP greater than 1 and insulating gas that is not reportable because it has a weighted average GWP of 1 or less.

Comment: Two commenters suggested the EPA change the language in 40 CFR 98.303(b)(5)(ii), which was proposed as a requirement to ''convert the initial system pressure to a temperature-compensated initial system pressure by using the temperature/pressure curve for that insulating gas.'' The commenters stated that the temperature/pressure curve is not intended for conversions of initial system pressure to temperature-compensated pressure. The commenters suggested that the requirement should be to compare the measured initial system pressure and vessel temperature to the equipment manufacturer's temperature-pressure curve specific for the equipment to confirm the equipment is at the proper operating pressure, prior to recovery of the insulating gas. One commenter recommended two options for measuring initial gas pressure: (1) use external pressure and temperature gauges according to 40 CFR 98.303(b)(5)(i); or (2) if an integrated temperature-compensated gas pressure gauge was used for the initial gas fill and to monitor and maintain the gas at the proper operating pressure over the service life of the circuit breaker, use the same gauge to determine whether the circuit breaker is at the proper operating pressure.

Response: The EPA agrees with the commenters regarding the language at 40 CFR 98.303(b)(5)(ii) and is finalizing the requirement as follows: ''Compare the initial system pressure and temperature to the equipment manufacturer's temperature/pressure curve for that equipment and insulating gas.'' Regarding allowing use of an integrated temperature-compensated gas pressure gauge, use of such a gauge is allowed if the gauge is certified by the gauge manufacturer to be accurate and precise to within 0.5 percent of the largest value that the gauge can, according to the manufacturer's specifications, accurately record. It is EPA's understanding that many gauges that are built into the electrical equipment do not meet these accuracy and precision requirements. However, if they do, the rule does not prohibit their use in nameplate capacity measurements.

Comment: One commenter objected to the proposed requirement to recover the insulating gas to a blank-off pressure not greater than 3.5 Torr during the nameplate capacity measurement. The commenter noted that not all facilities own gas carts capable of reaching 3.5 Torr, and, for some GIE, that level of pressure is not necessary for an accurate reading. The commenter recommended that the GIE recovery be performed to allow for 99.1 percent or greater recovery of the insulating gas.

Response: As discussed above, the EPA is finalizing a requirement that facilities measuring the nameplate capacity of their equipment recover the gas to a pressure of at most 5 psia (258.6 Torr). This will accommodate gas carts that are not capable of reaching 3.5 Torr. To ensure that the gas remaining in the equipment at pressures above 3.5 Torr is accounted for, facilities that recover the gas to a pressure between 5 psia and 3.5 Torr will be required to use the mathematical adjustment approach (equation DD–5) to calculate the full nameplate capacity. As discussed in the preamble to the proposed rule, the EPA estimates that 0.1 percent of the full and proper charge of insulating gas would remain in the equipment at 3.5 Torr (assuming that a full and proper charge has a pressure of 3800 Torr), a negligible fraction. However, the fraction of gas remaining after recovery of 99.1 percent of the gas, 0.9%, is not negligible, but represents a significant systematic underestimate compared to the 2% tolerance for nameplate capacity measurements. Since it is straightforward to correct for this systematic underestimate by using the

mathematical adjustment approach, we are requiring use of equation DD–5 in such situations.

Comment: One commenter representing manufacturers of electrical equipment recommended that after insulating gas was added to a piece of electrical equipment, facilities should allow at least 24 hours to allow the gas to condition itself to its container in order to confirm the correct density has been met.

Response: The EPA is adding a requirement to 40 CFR 98.303(b)(4)(ii) that facilities follow the procedure specified by the electrical equipment manufacturer to ensure that the measured temperature accurately reflects the temperature of the insulating gas, *e.g.,* by measuring the insulating gas pressure and vessel temperature after allowing appropriate time for the temperature of the transferred gas to equilibrate with the vessel temperature. This allows for the possibility that some electrical equipment, *e.g.,* electrical equipment with smaller charge sizes, may require less than 24 hours for the insulating gas temperature to equilibrate with the temperature of the vessel. Because achieving the correct density of the insulating gas in the equipment is important to the proper functioning of the equipment, the guidance provided by the equipment manufacturer should be sufficient to ensure that the appropriate density is achieved for purposes of the nameplate capacity measurement.

Comment: Commenters representing electrical equipment users and manufacturers provided input on the use of mass flow meters to measure the nameplate capacities of new and retiring electrical equipment. One commenter provided recommended edits to the proposed text to add requirements to ensure that a minimum gas flow is maintained while measuring the mass of insulating gas being added to new equipment. The commenter stated that to ensure that the flowmeter was properly configured for its application, the maximum and minimum flow rates of the meter, as well as the displacement of the pumps and compressors on the gas cart being used, must be taken into consideration. The commenter added that, in general, mass flow meters designed for high flow applications will not be suitable for low flow conditions and meters designed for low flow applications will not be suitable for high flow conditions. This commenter also recommended adding the use of an in-calibration cylinder scale as an alternative option for measuring the gas transferred during the equipment filling process. Two commenters recommended removing the option to use a mass flow meter to measure the mass of insulating gas recovered from retiring equipment due to the potential for errors when a mass flow meter is used in this process. The commenters stated that use of a mass flow meter to measure the insulating gas recovered is not recommended since a mass flow meter does not accurately measure gas at low flow rates. Instead, the commenters recommended that the gas container weighing method should be used to accurately measure the total weight of insulating gas recovered from the equipment. One commenter added that the process of weighing all gas removed from a GIE and transferred into a cylinder includes weighing all the gas trapped in hoses and in gas cart, which would not be accounted for by the flow meter; the commenter pointed out that the gas (trapped in hoses and in the gas cart) would need to be moved into cylinders to be accurately weighed with a cylinder scale.

Response: After consideration of these comments, the EPA is finalizing the proposed provisions for measuring the nameplate capacities of new and retiring equipment with two changes. First, we are requiring that facilities that use mass flow meters to measure the mass of insulating gas added to new equipment must keep the mass flow rate within the range specified by the mass flow meter manufacturer to assure an accurate and precise mass flow meter reading. Second, we are removing the option to use mass flow meters to measure the quantity of gas recovered from retiring equipment. We have analyzed the impact of the uncertainty of flowmeters at low flow rates on overall nameplate capacity measurements, and we have concluded that this impact may lead to large errors under some circumstances. As noted by the commenters, the relative error for flowmeters can increase when the flowmeter is used to measure mass flow rates below a certain fraction of the maximum full-scale value, and the mass flow rate will gradually decline as the insulating gas is transferred from the container to the equipment or vice versa, reducing the density of the gas inside the source vessel. For measuring the quantity of insulating gas added to new equipment, this issue can be addressed by requiring that the mass flow rate be kept within the range specified by the mass flow meter manufacturer, which can be accomplished by, *e.g.,* switching to a full container when the density of the insulating gas in the current container falls below the minimum level. However, for measuring the quantity of insulating gas recovered from retiring equipment, the insulating gas is being transferred from the equipment itself, and the recovery process therefore inevitably lowers the mass flow rate below the minimum level. For this reason, we are not taking final action on the option to use flowmeters to measure the quantity of insulating gas recovered from retiring equipment.

In our analysis of this issue, we reviewed our proposal at 40 CFR 98.303(b)(10) that mass flow meters must be accurate and precise to within one percent of the largest value that the flow meter can, according to the manufacturer's specifications, accurately record, *i.e.,* the maximum full-scale value. This means that the relative error of the flowmeter could rise hyperbolically from one percent of the measured value (when the measured value equals the maximum value) to much higher levels at lower flow rates, *e.g.,* 2 percent of the flow rate at half the maximum, 4 percent of the flow rate at one quarter of the maximum, 10 percent of the flow rate at one tenth the maximum, etc. These rising relative errors lead to overall errors in the mass flow measurement that are far above one percent. Even if the flow meter is accurate to within one percent of the measured value over a ten-fold range of flow rates, errors at lower flow rates can be significant. In an example provided to us by a company that provides insulating gas recovery equipment (gas carts) and insulating gas recovery services to electric power systems, the relative error of the measurement of the flow rate rose by a factor of five when the flow rate fell below 10 percent of the maximum full-scale value. If the error of a flowmeter climbed from 1 percent to 5 percent when the flow rate fell below 10 percent of the maximum full-scale value, the measurement of the total mass recovered would have a maximum uncertainty of 1.4 percent, which can result in overall errors above 2 percent in the nameplate capacity measurement as a whole (accounting also for the uncertainties of measured pressures, etc.).

Regarding one commenter's recommendation that we allow weigh scales to be used to measure the quantity of gas filled into new equipment, we are finalizing our proposal at 40 CFR 98.303(b)(4)(ii)(A) to allow use of weigh scales for this measurement.

Comment: Two commenters requested the EPA remove the term ''precise'' from proposed 40 CFR 98.303(b)(10). Both commenters stressed that accuracy is more important. One commenter stated that equipment certified to be accurate

and precise may be difficult to find, and another additionally asserted there is little value in precision.

Response: In the final rule, we are finalizing as proposed the accuracy and precision requirements for gauges, flow meters, and weigh scales used to measure nameplate capacities. To obtain an accurate measurement of the nameplate capacity of a piece of equipment, measurement devices must be both accurate and precise. As discussed in the technical support document for the proposed rule,[18] the term ''accurate'' indicates that multiple measurements will yield an average that is near the true value, while the term ''precise'' indicates that multiple measurements will yield consistent results. A measurement device that is accurate without being precise may show inconsistent results from measurement to measurement, and these individual inconsistent results may be significantly different from the true value even if their average is not. Since measurements of nameplate capacity are generally expected to be taken only once for a particular piece of equipment, the devices on which the individual measurements are taken must be both accurate and precise for the measurements to yield results that are near the true values.

Comment: One commenter suggested redefining the definition of ''insulating gas'' to including any gas with a GWP greater than one (1) and not any fluorinated GHG or fluorinated GHG mixture. The commenter urged that the proposed definition ignores other potential gases that may come onto the market that are not fluorinated but still have a GWP. The commenter stated that defining insulating gas to include any gas with a GWP greater than 1 used as an insulating gas and/or arc quenching gas in electrical equipment would mirror the threshold implemented by the California Air Resources Board and would provide consistency for reporters across Federal and State reporting rules.

Response: In the final rule, the EPA is not requiring electric power systems to track or report emissions of insulating gases with weighted average 100-year GWPs of one or less. Based on a review of the subpart DD data submitted to date, the EPA has concluded that excluding insulating gases with weighted average GWPs of one or less from reporting under subpart DD will have little effect on the accuracy or completeness of the GWP-weighted totals reported under subpart DD or under the GHGRP generally. Between 2011 and 2021, the highest emitting facilities reporting under subpart DD reported SF_6 emissions ranging from 8 to 23 mt (unweighted) or 190,000 to 540,000 $mtCO_2e$. Over the same period, total emissions across all facilities have ranged from 96 to 171 mt (unweighted) or 2.3 to 4.1 million $mtCO_2e$. At GWPs of one, these weighted totals would be equivalent to the unweighted quantities reported, which constitute approximately 0.004% (1/23,500) of the GWP-weighted totals. This does not account for the fact that for the first few years it is sold, equipment containing insulating gases with weighted average GWPs of one or less will make up a small fraction of the total nameplate capacity of the electrical equipment in use. (Electrical equipment has a lifetime of about 40 years, so only a small fraction of the total stock of equipment is retired and replaced each year.) Even in a worst-case scenario where the annual emission rate of the equipment containing a very low-GWP insulating gas was assumed to equal the total nameplate capacity of all the equipment installed (implying an emission rate of 100 percent, higher than any ever reported under the GHGRP), the total GWP-weighted emissions reported under subpart DD would be considerably smaller than those reported under any other subpart: total unweighted nameplate capacities reported across all facilities to date have ranged between 4,847 and 6,996 mt. At GWPs of 1, these totals would fall under the 15,000 and 25,000 $mtCO_2e$ quantities below which individual facilities are eventually allowed to exit the program under the off-ramp provisions, as applicable.

To monitor trends in the replacement of SF_6 by insulating gases with weighted average GWPs less than one, the EPA will continue to track supplies of such insulating gases under subparts OO and QQ and will track deliveries of such insulating gases in equipment or containers under subpart SS.

b. Comments on Revisions To Streamline and Improve Implementation for Subpart DD

Comment: One commenter supported the proposed threshold for subpart DD but wanted the EPA to clarify that reporters that do not think they will fall below the revised reporting threshold or are not otherwise using F–GHGs other than SF_6 do not need to recalculate their emissions to show they must report.

Response: The applicability threshold is for determining whether entities must initially begin reporting to the GHGRP. Facilities that have reported have calculated their emissions more precisely using the mass balance approach. If those calculations have shown that they are eligible to exit the program under the off-ramp provisions of subpart A of part 98 (40 CFR 98.2(i)), they do not need to report again unless facility emissions exceed 25,000 $mtCO_2e$. On the other hand, if the calculations have shown that the facility does not meet the existing off-ramp conditions to exit the program, they must continue reporting regardless of the results of the threshold calculation at 40 CFR 98.301.

R. Subpart FF—Underground Coal Mines

We are finalizing the amendments to subpart FF of part 98 (Underground Coal Mines) as proposed. The EPA received no comments objecting to the proposed revisions to subpart FF; therefore, there are no changes from the proposal to the final rule. The EPA is finalizing two technical corrections to: (1) correct the term ''MCF_i'' in equation FF–3 to subpart FF to revise the term ''$1\text{-}(fH2O)_1$'' to ''$1\text{-}(fH2O)_i$'', and (2) to correct 40 CFR 98.326(t) to add the word ''number'' after the word ''identification'' to clarify the reporting requirement. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal.

S. Subpart GG—Zinc Production

This section discusses the final revisions to subpart GG. We are finalizing amendments to subpart GG of part 98 (Zinc Production) as proposed. The EPA received only supportive comments for the proposed revisions to subpart GG. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart GG. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal.

The EPA is finalizing one revision to add a reporting requirement at 40 CFR 98.336(a)(6) and (b)(6) for the total amount of electric arc furnace (EAF) dust annually consumed by all Waelz kilns at zinc production facilities. The final data elements will only require segregation and reporting of the mass of EAF dust consumed for all kilns. These requirements apply to reporters using either the CEMS direct measurement or mass balance calculation

[18] See ''Technical Support for Proposed Revisions to Subpart DD (2021),'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424.

methodologies. Reporters currently collect information on the EAF dust consumed on a monthly basis as part of their existing operations as a portion of the inputs to equation GG–1 to subpart GG; reporters will only be required to sum all EAF dust consumed on a monthly basis for each kiln and then for all kilns at the facility for reporting and entering the information into e-GGRT. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal. We are also finalizing as proposed confidentiality determinations for new data elements resulting from the final revisions to subpart GG, as described in section VI. of this preamble.

T. Subpart HH—Municipal Solid Waste Landfills

We are finalizing several amendments to subpart HH of part 98 (Municipal Solid Waste Landfills) as proposed. In some cases, we are finalizing the proposed amendments with revisions. In other cases, we are not taking final action on the proposed amendments. Section III.T.1. of this preamble discusses the final revisions to subpart HH. The EPA received several comments on proposed subpart HH revisions which are discussed in section III.T.2. of this preamble. We are also finalizing as proposed confidentiality determinations for new data elements resulting from the final revisions to subpart HH, as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart HH

This section summarizes the final amendments to subpart HH. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart HH can be found in this section and section III.T.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

The EPA is finalizing several revisions to subpart HH to improve the quality of data collected under the GHGRP. First, the EPA is finalizing revisions to update the factors used in modeling CH_4 generation from waste disposed at landfills in table HH–1 to subpart HH. As explained in the 2022 Data Quality Improvements Proposal, subpart HH uses a model to estimate CH_4 generation that considers the quantity of MSW landfilled, the degradable organic carbon (DOC) content of that MSW, and the first order decay rate (k) of the DOC. Table HH–1 to subpart HH provides DOC and k values that a reporter must use to calculate their CH_4 generation based on the different categories of waste disposed at that landfill and the climate in which the landfill is located. The EPA previously conducted a multivariate analysis of data reported under subpart HH to estimate updated DOC and k values for each waste characterization option. Details of this analysis are available in the memorandum from Meaghan McGrath, Kate Bronstein, and Jeff Coburn, RTI International, to Rachel Schmeltz, EPA, ''Multivariate analysis of data reported to the EPA's Greenhouse Gas Reporting Program (GHGRP), Subpart HH (Municipal Solid Waste Landfills) to optimize DOC and k values,'' (June 11, 2019), available in the docket for this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424. The EPA is finalizing the following changes as proposed:

- For the Bulk Waste option, amending the bulk waste DOC value in table HH–1 from 0.20 to 0.17.
- For the Modified Bulk Waste option, for bulk MSW waste without inerts and (C&D) waste, amending the DOC value from 0.31 to 0.27.
- For the Waste Composition option, adding a DOC for uncharacterized MSW of 0.32, and revising 40 CFR 98.343(a)(2) to reference using this uncharacterized MSW DOC value rather than the bulk MSW value for waste materials that could not be specifically assigned to the streams listed in table HH–1 for the Waste Composition option.

The EPA is also revising the default decay rate values in table HH–1 for the Bulk Waste option and the Modified Bulk MSW option and adding k value ranges for uncharacterized MSW for the Waste Composition Option. The final k values, which have been revised from those proposed, are shown in table 4 of this preamble. The revised defaults represent the average optimal k values derived through an additional optimization analysis conducted in response to comments where the bulk waste DOC value was set to the revised value of 0.17 and optimal k values were determined for each precipitation category.

TABLE 4—REVISED DEFAULT k VALUES

Factor	Subpart HH default	Units
k values for Bulk Waste option and Modified Bulk MSW option		
k (precipitation plus recirculated leachate <20 inches/year)	0.033	yr − 1.
k (precipitation plus recirculated leachate 20–40 inches/year)	0.067	yr − 1.
k (precipitation plus recirculated leachate >40 inches/year)	0.098	yr − 1.
k value range for Waste Composition option		
k (uncharacterized MSW)	0.033 to 0.098	yr − 1.

The revisions to the DOC and k values in table HH–1 reflect the compositional changes in materials that are disposed at landfills. These updated factors will allow MSW landfills to more accurately model their CH_4 generation. We are also clarifying in the final rule that starting in RY2025 these new DOC and k values are to be applied for disposal years 2010 and later, consistent with when the compositional changes occurred. Additional information on these revisions and their supporting basis may be found in section III.Q. of the preamble to the 2022 Data Quality Improvements Proposal and in the memorandum ''Revised Analysis and Calculation of Optimal k Values for Subpart HH MSW Landfills Using a 0.17 DOC Default and Timing Considerations'' included in Docket ID. No. EPA–HQ–OAR–2019–0424.

We are also finalizing, as proposed, revisions to account for CH_4 emission events that are not well quantified under the GHGRP including: (1) a poorly operating or non-operating gas collection system; and (2) a poorly operating or non-operating destruction device. The EPA is finalizing, as proposed, revisions and additions to address these scenarios as follows:

- Revising equations HH–7 and HH–8 to more clearly indicate that the ''f_{Rec}'' term is dependent on the gas collection system, to clarify how the equation

applies to landfills that may have more than one gas collection system and may have multiple measurement locations associated with a single gas collection system.

- Clarifying in ''f_{Rec}'' that the recovery system operating hours only include those hours when the system is operating normally. Facilities should not include hours when the system is shut down or when the system is poorly operating (*i.e.,* not operating as intended). Poorly operating systems can be identified when pressure, temperature, or other parameters indicative of system performance are outside of normal variances for a significant portion of the system's gas collection wells.
- For equations HH–6, HH–7, and HH–8, revising the term ''f_{Dest}'' to clarify that the destruction device operating hours exclude periods when the destruction device is poorly operating. Facilities should only include those periods when flow was sent to the destruction device and the destruction device was operating at its intended temperature or other parameter that is indicative of effective operation. For flares, periods when there is no flame present must be excluded from the annual operating hours.

Following consideration of comments received, the EPA is finalizing two minor clarifications of the term ''$f_{Dest,n}$'' in equations HH–7 and HH–8. First, we are removing the redundant phrase ''as measured at the nth measurement location.'' Second, we are removing the word ''pilot'' to clarify that for flares used as a destruction device, the annual operating hours must exclude any period in which no flame is present, either pilot or main. These changes account for variances in flare operation, *e.g.,* flares which may only use a pilot on startup. See section III.T.2. of this preamble for additional information on related comments and the EPA's response.

In the 2023 Supplemental Proposal, we proposed that facilities that conduct surface-emissions monitoring must use that data and correct the emissions calculated in equations HH–6, HH–7, and HH–8 to account for excess emissions when the measured surface methane concentration exceeded 500 ppm based on a correction term added to those equations. We also proposed for facilities not conducting surface-emissions monitoring to use collection efficiencies that are 10-percentage points lower than the historic collection efficiencies in table HH–3 to subpart HH. Following consideration of comments received, we are not taking final action on the surface-emissions monitoring correction term that was proposed. Instead, we are finalizing the proposed lower collection efficiencies in table HH–3 to subpart HH, but applying the reduced collection efficiencies for all reporters under subpart HH. See section III.T.2. of this preamble for additional information on related comments and the EPA's response.

The EPA is also finalizing several revisions to the reporting requirements for subpart HH, including more clearly identifying reporting elements associated with each gas collection system, each measurement location within a gas collection system, and each control device associated with a measurement location. First, we are finalizing revisions to landfills with gas collection systems consistent with the proposed revisions in the methodology, *i.e.,* to separately require reporting for each gas collection systems and for each measurement location within a gas collection system. We are requiring, for each measurement location that measures gas to an on-site destruction device, certain information be reported about the destruction device, including: type of destruction device; the total annual hours where gas was sent to the destruction device; a parameter indicative of effective operation, such as the annual operating hours where active gas flow was sent to the destruction device and the destruction device was operating at its intended temperature; and the fraction of the recovered methane reported for the measurement location directed to the destruction device. We are also requiring reporting of identifying information for each gas collection system, each measurement location within a gas collection system, and each destruction device. We are also finalizing reporting requirements for landfills with gas collection systems to indicate the applicability of the NSPS (40 CFR part 60, subparts WWW or XXX), state plans implementing the EG (40 CFR part 60, subparts Cc or Cf), and Federal plans (40 CFR part 62, subparts GGG and OOO).

In the 2023 Supplemental Proposal, the EPA also sought comment on how other CH_4 monitoring technologies, *e.g.,* satellite imaging, aerial measurement, vehicle-mounted mobile measurement, or continuous sensor networks, might enhance subpart HH emissions estimates. The EPA did not propose, and therefore is not taking final action on, any amendments to subpart HH to this effect. However, the EPA did seek comment on the availability of existing monitoring technologies, and regulatory approaches and provisions necessary to incorporate such data into subpart HH for estimating annual emissions. We will continue to review the comments received along with other studies and may amend subpart HH to allow the incorporation of additional measurement or monitoring methodologies in the future.

2. Summary of Comments and Responses on Subpart HH

This section summarizes the major comments and responses related to the proposed amendments to subpart HH. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart HH.

Comment: Numerous commentors stated that methane detection technology, specifically top-down direct measurement from aerial studies, has greatly improved the ability to observe and quantify emissions from landfills (*e.g.,* Krautwurst, et al., 2017; Cusworth, et al., 2022).[19] [20] Some commenters noted that, among several studies in California, Maryland, Texas, and Indiana, there are discrepancies between observed data collected from these new detection technologies and the estimated emissions from the models that the EPA currently uses. Several commenters pointed to a recent study (Nesser, et al., 2023) using satellite data that highlighted that at 33 of 70 landfills studied, U.S. GHG Inventory landfill emissions are underestimated by 50 percent when compared to the current top-down approaches.[21] These discrepancies indicate methane emissions from landfills may be considerably higher than currently recorded. Some commenters stated that advanced methane monitoring technology has improved significantly in effectiveness and cost, and provided specific input regarding advanced methane monitoring technologies available for landfills and how their data might enhance subpart

[19] Krautwurst, S., et al., (2017). ''Methane emissions from a Californian landfill, determined from airborne remote sensing and in situ measurements.'' Atmos. Meas. Tech. 10:3429–3452. *https://doi.org/10.5194/amt-10-3429-2017.*

[20] Cusworth, D., et al., (2020). ''Using remote sensing to detect, validate, and quantify methane emissions from California solid waste operations.'' Environ. Res. Lett. 15: 054012.

[21] Nesser, H., et al. 2023. High-resolution U.S. methane emissions inferred from an inversion of 2019 TROPOMI satellite data: contributions from individual states, urban areas, and landfills, *EGUsphere* [preprint], *https://doi.org/10.5194/egusphere-2023-946,* 2023.

HH emissions reporting. The commenters pointed to both screening and close-range technologies that would be beneficial for pinpointing leaks or emission sources, and outlined several technologies including satellite imaging, aerial measurements, vehicle-mounted mobile measurement, and continuous sensor networks. The commenters recommended comprehensive monitoring with both screening and close-range technologies to provide full coverage. The commenters suggested the use of these technologies to catch large emission events that are not accounted for in the existing reporting requirements. Commenters noted that the EPA could review submitted reports and activity data to determine how to best quantify the observed large release events as compared to annual reported emissions (*e.g.,* updating f_{Rec} or f_{Dest} values to account for periods of downtime or poor performance not captured that contributed to a large discrepancy).

Other commenters recommended that the EPA create a mechanism under subpart HH for receiving and considering third-party observational data that the EPA could then use to revise reported emissions as necessary. Some commenters suggested the EPA base a threshold for these sources of 100 kg/hour. Commenters also recommended setting assumptions for the duration of the emissions similar to those proposed for subpart W of part 98 (Petroleum and Natural Gas Systems). Some commenters suggested the EPA should embrace for landfills the same tiered methane emissions monitoring approach as is utilized in its proposed rulemaking for the oil and gas sector. Commenters also suggested a tiered approach that combines continuous monitoring ground systems with periodic remote sensing along with approaches for translating methane concentrations from top-down sources to source-specific emission rates. Commenters urged that the sooner the EPA can move toward top-down or facility-wide measurement of emissions for reporting or validation of reported values, the sooner reported and measured emissions would be reconcilable and verifiable. A few commenters also recommended that the EPA facilitate the flow of information from other agencies (the National Aeronautics and Space Administration (NASA), National Oceanic and Atmospheric Administration (NOAA), National Institute of Standards and Technology (NIST), and U.S. Department of Energy (DOE)), third parties, and operators to find and mitigate plumes faster.

Several commenters provided recommendations for additional reporting requirements such as gas collection and capture system (GCCS) type and design, destruction device type and characteristics, monitoring technologies, site cover type, construction periods, and compliance issues which may relate to closures of control devices.

Response: The EPA agrees that recent aerial studies indicate methane emissions from landfills may be considerably higher than bottom-up emissions reported under subpart HH for some landfills. Emissions may be considerably higher due to emissions from poorly operating gas collection systems or destruction devices and leaking cover systems. The supplemental proposal included revisions to the monitoring and calculation methodologies in subpart HH to account for these scenarios. In particular, proposed equations HH–6, HH–7, and HH–8 included modifications to incorporate direct measurement data collected from methane surface-emissions monitoring. In the supplemental proposal, we also requested information about other direct measurement technologies and how their data may enhance emissions reporting under subpart HH. We received many responses to our request. Based on the comments received, we are not taking final action at this time regarding the incorporation of other direct measurement technologies for the following reasons. First, most top-down, facility measurements are taken over limited durations (a few minutes to a few hours) typically during the daylight hours and limited to times when specific meteorological conditions exist (*e.g.,* no cloud cover for satellites; specific atmospheric stability and wind speed ranges for aerial measurements). These direct measurement data taken at a single moment in time may not be representative of the annual CH_4 emissions from the facility, given that many emissions are episodic. If emissions are found during a limited duration sampling, that does not necessarily mean they are present for the entire year. And if emissions are not found during a limited duration sampling, that does not mean significant emissions are not occurring at other times. Extrapolating from limited measurements to an entire year therefore creates risk of either over or under counting actual emissions. Second, while top-down measurement methods, including satellite and aerial methods, have proven their ability to identify and measure large emissions events, their detection limits may be too high to detect emissions from sources with relatively low emission rates or that are spread across large areas, which is common for landfills.[22] This is likely why only seven percent of the landfills in the Duren, et al. (2019) study had detectable emissions. The EPA will continue to review additional information on existing and advanced methodologies and new literature studies, and consider ways to effectively incorporate these methods and data in future revisions under subpart HH for estimating annual emissions.

For the oil and gas sector, the super-emitter program that allows third-party measurement data to be submitted was proposed under 40 CFR part 60, subpart OOOOb (87 FR 74702, December 6, 2022). The GHGRP looked to use this information, but we did not develop or propose such a program under the GHGRP. As such, this type of program is beyond the scope of the proposed rule. We will consider whether developing and implementing a similar super-emitter program within subpart HH of part 98 or the overall GHGRP is appropriate under future rulemakings.

We proposed, and are finalizing, several additional reporting elements including, for landfills with a gas collection system, information on the applicability of the NSPS (40 CFR part 60, subparts WWW or XXX), state plans implementing the EG (40 CFR part 60, subparts Cc or Cf), and Federal plans (40 CFR part 62, subparts GGG and OOO). We note that several of the items suggested are already reporting elements. For example, we already require reporting of a description of the gas collection system, such as the manufacturer, capacity, and number of wells, which provides requested information on GCCS type and design. We also proposed and are finalizing reporting requirements for the type of destruction device. We already require reporting of cover type. We consider the reporting requirements to be sufficient based on the current methodologies used to estimate CH_4 emissions. We will consider the need for additional reporting elements if we incorporate additional measurement or monitoring methodologies in future rulemakings.

Comment: Several commentors expressed limited support for the proposed use of surface emission monitoring data to help account for

[22] Duren, et al. 2019. ''California's methane super-emitters.'' *Nature,* Vol. 575, Issue 7781, pp. 180–184, available at *https://doi.org/10.1038/s41586-019-1720-3.* Available in the docket for this rulemaking, Docket ID. No. EPA–HQ–OAR–2023–0234.

emissions from cover leaks. These commenters either recommended that the EPA use more quantitative emission measurement methods instead of surface-emissions monitoring or to require that the surface-emissions monitoring be conducted at 25-foot intervals consistent with California and other state requirements, and to use a lower leaks definition of 25 parts per million volume (ppmv), rather than using the proposed 30-meter intervals (about 98-foot intervals) with leaks defined as concentrations of 500 ppmv or more above background, to help ensure the surface-emissions monitoring identifies all leaks from the landfill's surface. Other commenters opposed the proposed use of a surface-emissions monitoring correction term in equations HH–6, HH–7, and HH–8. One commenter noted that the correction term that the EPA proposed relied on one study conducted over 20 years ago at one landfill in Canada. This commenter cited several other studies [23] [24] [25] [26] that showed significant variability in correlations between surface methane concentrations and methane emissions and indicated that the EPA should not rely on the results of this limited single study. Another commenter suggested that there is nothing special from a technical perspective of 500 ppmv surface concentration that should drive a step function change in correcting for emissions and surface oxidation, as proposed by the EPA. This commenter indicated that there is already uncertainty in the gas collection efficiencies and that including the proposed surface methane concentration term simply adds to the uncertainty. The commenter recommended mandating the use of lower collection efficiencies when there is evidence of a high number of exceedances or a high surface methane concentration, rather than adding the surface methane concentration term to equations HH–6, HH–7, and HH–8. This commenter also cited the work of Dr. Tarek Abichou (Kormi, et al., 2017 and 2018) for using surface concentration measurements to estimate emissions.[27] [28]

Response: After considering comments received and reviewing additional studies, including those cited by the commenters, we are not taking final action on the proposed surface-emissions monitoring correction term at this time.[29] Upon review of the literature studies cited by one commenter (Abichou, et al., 2011; Abidini, 2014; Lando, et al., 2017; Hettiarachchi, et al., 2023), we confirmed that there is significant variability in measured surface concentrations and methane emissions flux across different landfills. The proposed correction factor, attributed to Heroux, et al. (2010),[30] was the smallest of the correlation factors found across the other cited literature studies we reviewed. Based on a preliminary review of the additional study data, a more central tendency estimate of the correction factor term would be four to six times higher than the correction term proposed.

Due to the high uncertainty in the proposed correction factor, we are assessing whether the correction term proposed for equations HH–6, HH–7, and HH–8 is the most appropriate method for developing a site-specific correction for the overall gas collection efficiency for reporters under subpart HH. The approach presented by Kormi, et al. (2017, 2018) uses a Gaussian plume model in conjunction with surface methane concentration measurements to estimate emissions. This approach appears too complex to incorporate into subpart HH. We are also evaluating other direct measurement technologies for assessing more accurate, landfill-specific gas collection efficiencies. Therefore, we decided not to take final action on the proposed correction term for equations HH–6, HH–7, and HH–8 at this time while we consider and evaluate other options. The EPA will continue to review additional information on existing and advanced methodologies and new literature studies and consider ways to effectively incorporate these methods and data in future revisions under subpart HH for estimating annual emissions.

Comment: Numerous commenters cited studies suggesting that subpart HH underestimates the actual methane emissions released from landfills.[31] [32] These commenters noted that the underestimation in subpart HH emissions is primarily due to high default gas collection efficiencies in subpart HH. Two commenters asserted that gas collection efficiencies over 90 percent should not be used. One of these commenters noted that despite its own two-year study indicating otherwise, the EPA uses a 95 percent collection efficiency for landfills with final covers.[33] Two commenters opposed the EPA's use of the Maryland landfill data to support the proposed 10-percentage point decrease in landfill gas collection efficiencies, noting that these gas collection efficiencies were calculated based on modeled methane generation rather than actual methane emissions measurements. One commenter further suggested that the Maryland study was not properly peer-reviewed and is not suitable for use by the EPA in rulemaking according to the EPA's Summary of General Assessment Factors For Evaluating the Quality of Scientific and Technical Information (hereinafter referred to as "General Assessment Factors").[34] The commenter further stated that the Maryland study is based on a small subset of landfills that is likely not representative of the sector and the EPA's reliance on that study to support a change to the default collection efficiency table (table HH–3

[23] Abichou, T., J. Clark, and J. Chanton. 2011. "Reporting central tendencies of chamber measured surface emission and oxidation." *Waste Management,* 31: 1002–1008. *https://doi.org/10.1016/j.wasman.2010.09.014.*

[24] Abedini, A.R. 2014. Integrated Approach for Accurate Quantification of Methane Generation at Municipal Solid Waste Landfills. Ph.D. thesis, Dept. of Civil Engineering, University of British Columbia.

[25] Lando, A.T., H. Nakayama, and T. Shimaoka. 2017. "Application of portable gas detector in point and scanning method to estimate spatial distribution of methane emission in landfill." *Waste Management,* 59: 255–266. *https://doi.org/10.1016/j.wasman.2016.10.033.*

[26] Hettiarachchi, H., E. Irandoost, J.P. Hettiaratchi, and D. Pokhrel. 2023. "A field-verified model to estimate landfill methane flux using surface methane concentration measurements." *J. Hazard. Toxic Radioact. Waste,* 27(4): 04023019. *https://doi.org/10.1061/JHTRBP.HZENG-1226.*

[27] Kormi, T., N.B.H. Ali, T. Abichou, and R. Green. 2017. "Estimation of landfill methane emissions using stochastic search methods." *Atmospheric Pollution Research,* 8(4): 597–605. *https://dx.doi.org/10.1016/j.apr.2016.12.020.*

[28] Kormi, T., et al. 2018. "Estimation of fugitive landfill methane emissions using surface emission monitoring and Genetic Algorithms optimization." *Waste Management* 2018, 72: 313–328. *https://dx.doi.org/10.1016/j.wasman.2016.11.024.*

[29] Irandoost, E. (2020). An Investigation on Methane Flux in Landfills and Correlation with Surface Methane Concentration (Master's thesis, University of Calgary, Calgary, Canada). Retrieved from *https://prism.ucalgary.ca. http://hdl.handle.net/1880/111978.*

[30] Héroux, M., C. Guy and D. Millette. 2010. "A statistical model for landfill surface emissions." *J. of the Air & Waste Management Assoc.* 60:2, 219–228. *https://doi.org/10.3155/1047-3289.60.2.219.*

[31] Oonk, H., 2012. "Efficiency of landfill gas collection for methane emissions reduction." *Greenhouse Gas Measurement and Management,* 2:2–3, 129–145. *https://doi.org/10.1080/20430779.2012.730798.*

[32] Nesser, H., et al., 2023. "High-resolution U.S. methane emissions inferred from an inversion of 2019 TROPOMI satellite data: contributions from individual states, urban areas, and landfills." *EGUsphere* [preprint], *https://doi.org/10.5194/egusphere-2023-946.*

[33] ARCADIS, 2012. Quantifying Methane Abatement Efficiency at Three Municipal Solid Waste Landfills; Final Report. Prepared for U.S. EPA, Office of Research and Development, Research Triangle Park, NC. EPA Report No. EPA/600/R–12/003. January. *https://nepis.epa.gov/Exe/ZyPDF.cgi/P100DGTB.PDF?Dockey=P100DGTB.PDF.*

[34] Available at *https://www.epa.gov/sites/default/files/2015-01/documents/assess2.pdf.* Accessed January 9, 2024.

to subpart HH) is inappropriate and will lead to inaccurate reporting of GHG emissions from the sector. This commenter stated that the EPA should continue to rely on the gas collection efficiencies recommended in the Solid Waste Industry for Climate Solutions (''SWICS'') white paper entitled *Current MSW Industry Position and State-of-the-Practice on LFG Collection Efficiency, Methane Oxidation, and Carbon Sequestration in Landfills.*[35] According to the commenter, the SWICS white paper is more comprehensive and relevant than the Maryland study. The commenters noted that the SWICS white paper is being revised and encouraged the EPA to delay revisions to the gas collection efficiency until the revised SWICS white paper is released.

Response: We reviewed the various studies cited by commenters, including available versions of the SWICS white paper. Upon review of these papers and comments received, we maintain our position that the historical collection efficiencies are overstated and that it is appropriate to apply the lower collection efficiency to all landfills. In our review of the SWICS white paper, which was the basis for the historical gas collection efficiencies, we noted that data were omitted due to poor operation of gas collection system. Thus, we consider the historical gas collection efficiencies to be representative of ideal gas collection efficiencies. In our proposal, we required facilities that conduct surface-emission monitoring data to apply a correction factor that would reduce the overall collection efficiency, clearly indicating that we thought the current collection efficiencies are overstated, even for regulated landfills. While we expected that the surface emission correction factor would result in lower emissions than those calculated using the 10-percentage point decrease in collection efficiency, based on our review of other studies correlating surface methane concentrations with methane flux, a more central tendency correlation factor is projected to yield emissions similar to a 10-percentage point decrease in collection efficiency. All the measurement study data we reviewed suggests that current GHGRP collection efficiencies are overstated on average by 10-percentage points or more (Duan, et al., 2022 and Nesser, et al., 2023).[36] In reviewing the data from Nesser, et al. (2023), including the supplemental information,[37] we found that all 38 landfills for which gas collection systems were reported were subject to the NSPS or EG. Comparing the gas collection efficiencies directly reported in the GHGRP, 35 of the 38 landfills had lower or similar measured gas collection efficiencies to those reported in subpart HH. With a 10-percentage point decrease in the default gas collection efficiencies, measured gas collection efficiencies were still at least 10-percentage points lower for 20 of the 38 landfills, approximately equivalent for 13 landfills, and only higher than subpart HH proposed lower default collection efficiencies for 5 of the landfills. Similar low average collection efficiencies were noted by Duan, et al., (2022). Therefore, based on direct measurement data for landfills, we determined it is appropriate to finalize the lower default gas collection efficiencies and apply the lower gas collection efficiency for all landfills.

While the Maryland study data suggests that the gas collection efficiency for voluntary systems may be lower than for regulated gas collection systems, we agree with commenters that these gas collection efficiencies are based on modeled generation rather than measured emissions. The DOC values for individual landfills can vary significantly and the differences observed could be due to differences in the wastes managed at the different Maryland landfills. We could not identify direct measurement study data by which to support further reductions in gas collection efficiencies for voluntary gas collection systems. Therefore, we are providing a single set of gas collection efficiencies for subpart HH reporters to use.

In conclusion, we are finalizing gas collection efficiencies that are lower than those historically provided in subpart HH by 10-percentage points based on comments received and review of recent landfill methane emission measurement studies for landfills with gas collection systems. We had proposed these collection efficiencies for facilities not conducting surface emission monitoring, but we are now finalizing these lower gas collection efficiencies for all landfills.

Comment: Several commenters provided input on the proposed revisions to equations HH–6 through HH–8 to subpart HH to capture emissions from other large release events. Two commenters suggested that the EPA should require monitoring of both the pilot light and flow rate and that the ''f_{Dest}'' term should be excluded during any period the combustion device is not operating properly. The commenters specified that ''f_{Dest}'' should be excluded during any period when the reporter has operational data indicating that the combustion device is not operating according to manufacturer specifications or when the reporter has received credible monitoring data showing an unlit or malfunctioning control device.

One commenter stated that the proposed revisions would be difficult to implement and tend to capture very limited or marginal data. The commenter asserted that gas collection systems by nature require constant adjustment of temperature, pressure, and other parameters or may be subject to frequent repairs that would not be expected to affect the overall control efficiency. The commenter asked the EPA to remove ''normally'' from the first sentence of the proposed definition of ''f_{Rec}'' and remove ''or poor operation, such as times when pressure, temperature, or other parameters indicative of operation are outside of normal variances,'' from the second sentence.

The commenter also expressed concerns regarding how the proposed revisions to ''f_{Dest}'' applies to flares, stating that a large portion of landfill controls use open flares, or are equipped with automatic shutoffs, which have no parameters for monitoring effective operation other than the presence of a flame. The commenter requested the sentence addressing the pilot flame (''For flares, times when there is no pilot flame present must be excluded from the annual operating hours for the destruction device.'') be removed from the proposed revision of ''f_{Dest},'' because it is confusing, unnecessary, and technically incorrect, as a pilot is typically only required during startup.

One commenter also requested the EPA remove the phrase ''. . . as measured at the nth measurement location'' from the first sentence of ''f_{Dest}'' description; the commenter stated the text adds confusion by implying that the time gas is sent to the nth measurement location is equal to the time gas is sent to the control device, which may be incorrect for measurement locations with more than one control device. The commenter also

[35] SCS Engineers. 2009. Current MSW Industry Position and State-of-the-Practice on LFG Collection Efficiency, Methane Oxidation, and Carbon Sequestration in Landfills. Prepared for Solid Waste Industry for Climate Solutions (SWICS). Version 2.2. *https://www.scsengineers.com/wp-content/uploads/2015/03/Sullivan_SWICS_White_Paper_Version_2.2_Final.pdf.*

[36] Duan, Z., Kjeldsen, P., & Scheutz, C. (2022). Efficiency of gas collection systems at Danish landfills and implications for regulations. Waste management (New York, N.Y.), 139, 269–278. *https://doi.org/10.1016/j.wasman.2021.12.023.*

[37] See *https://egusphere.copernicus.org/preprints/2023/egusphere-2023-946/egusphere-2023-946-supplement.pdf.*

proposed a definition striking out ''The annual operating hours for the destruction device should include only those periods when flow was sent to the destruction device and the destruction device was operating at its intended temperature or other parameter indicative of effective operation.'' The commenter added that because flares and other destruction devices are designed with fail-closed valves or other devices to prevent venting of gas when they are not operating, applying the definition as written overestimates emissions when a measurement location has more than one destruction device and all devices are not operating at the same time.

Response: The EPA agrees with the commenters regarding monitoring the flow rate of the landfill gas; however, a change to the proposed rule is not necessary in this case as the continuous monitoring of the gas flow is already required in 40 CFR 98.343. The EPA disagrees with the comment that ''EPA should likewise specify that f_{Dest} must be excluded during any period when the pilot light and flow rate are not meeting manufacturer specifications for complete combustion.'' Adding this specification to the rule is not necessary as the revision to the definition of f_{Dest} already accounts for this scenario. The proposed revision to the f_{Dest} definition in the supplemental proposal states, ''The annual operating hours for the destruction device should include only those periods when flow was sent to the destruction device and the destruction device was operating at its intended temperature or other parameter indicative of effective operation.'' Thus, if the destruction device has manufacturer specifications for effective operation that are not met during its operation, the revision to the f_{Dest} definition requires those periods to be excluded in the hours for f_{Dest}. We will further evaluate how credible monitoring data may be defined and excluded from f_{Dest} in a future rulemaking.

The EPA disagrees with the proposed edits to the definition of f_{Rec}, which are to remove the word ''normally'' from the first sentence and remove the phrase ''or poor operation, such as times when pressure, temperature, or other parameters indicative of operation are outside of normal variances'' from the second sentence. These edits would allow for all operating hours in the calculation regardless of how the system operated. We asked for comment on what set of parameters should be used to identify poorly operating periods and whether a threshold on the proportion of wells operating outside of their normal operating variance should be included in the definition of f_{Rec} to define periods of poor performance.

With regards to the commenters' input on the definition of f_{Dest}, the EPA agrees with removing ''as measured at the nth measurement location'' from the first sentence of the definition as the commenter notes, ''flares and other destruction devices are designed with fail-closed valves or other devices to prevent venting of gas when they are not operating, keeping that phrase can overestimate emissions when a measurement location has more than one destruction device and all devices are not operating at the same time.'' We are revising this sentence to remove ''as measured at the nth measurement location.'' We disagree with removing from the definition ''For flares, times when there is no pilot flame present must be excluded from the annual operating hours for the destruction device.'' Instead, we are revising this sentence to read ''For flares, times when there is no flame present must be excluded from the annual operating hours for the destruction device.'' We believe the lack of a flame is an indication the flare is not operating effectively. Lastly, we disagree with removing the sentence, ''The annual operating hours for the destruction device should include only those periods when flow was sent to the destruction device and the destruction device was operating at its intended temperature or other parameter indicative of effective operation.'' We believe this sentence is necessary to ensure the calculation of f_{Dest} represents proper operation of the destruction device.

Comment: We received several comments regarding the revised DOC values. Some commenters supported lowering of the default DOC for bulk waste from 0.20 to 0.17, citing similar findings in a 2019 Environmental Research and Education Foundation (EREF) study.[38] These commenters generally opposed the proposed default value of 0.27 for bulk MSW (excluding inerts and construction and demolition (C&D) waste) and the proposed default value of 0.32 for uncharacterized wastes and recommended the use of either the value of 0.19 from the EREF report or the 0.17 value for bulk wastes for these other general waste categories. According to these commenters, the EPA's method for determining the DOC for bulk MSW (excluding inerts and C&D waste) does not comport with how landfills characterize and manage input waste streams, and the high default DOC value for bulk MSW makes the modified bulk MSW option unusable. Other commenters opposed the proposed reduction in bulk waste and bulk MSW default DOC values, indicating that this will lead to lower emissions over the life of the landfill when research indicates emissions inventories of landfill emissions underestimate actual emissions. One commenter referenced a paper (Bahor, et al., 2010) that, according to the commenter, validated the default DOC of MSW to be 0.20.[39] Other commenters noted that many landfill reporters were taking advantage of the composition method by only reporting inerts and uncharacterized wastes. These commenters supported the proposed default value of 0.32 for uncharacterized wastes.

Response: The EPA included a DOC of 0.20 for bulk waste in subpart HH because the data we reviewed circa 2000 to 2010 indicated that was the best fit DOC value.[40] As noted in the memorandum ''Modified Bulk MSW Option Update'' included in Docket ID. No. EPA–HQ–OAR–2019–0424, we have seen a significant decrease in the percentage of paper and paperboard products being landfilled due to increased recycling of these waste streams. This change in the composition of MSW landfilled supports and confirms the drop in DOC from 0.20 to 0.17 over the time period between 2005 and 2011. With respect to the Bahor, et al. (2010) study, it appears that the HHV measurement data was made using data from 1996 to 2006, with biogenic correction factors developed over 2007 and 2008. Based on the timing of the measurements made, agreement with the DOC value of 0.20 is not surprising and consistent with the findings by which we originally used a default DOC value of 0.20. We specifically sought to reassess the average DOC values considering more recent data to account for potential changes in DOC values over the past decade. Based on our analysis, an average DOC value of 0.17 provides a better fit with current landfill practices. Therefore, we are finalizing a revision of the default DOC value to

[38] The Environmental Research & Education Foundation (2019). ''Analysis of Waste Streams Entering MSW Landfills: Estimating DOC Values & the Impact of Non-MSW Materials.'' Available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424.

[39] Bahor, Brian, et al. 2010. ''Life-cycle assessment of waste management greenhouse gas emissions using municipal waste combustor data.'' *Journal of Environmental Engineering* 136.8 (2010): 749–755. *https://doi.org/10.1061/(ASCE)EE.1943-7870.0000189.*

[40] RTI International (2004). Solid Waste Inventory Support—Review Draft: Documentation of Methane Emission Estimates. Prepared for U.S. EPA, Office of Atmospheric Programs, Washington, DC. September 29.

0.17 as proposed. However, we note that the proposed revision was not clear regarding how the new DOC value should be incorporated into the facility's emissions estimate. Some reporters may only begin applying the new DOC value to new wastes being disposed of in 2025 and later years. Other reporters may opt to revise the DOC value for all wastes disposed of in the landfill for all previous disposal years. This could lead to significant discrepancies between emissions reported by reporters with similar landfills and also between the emissions reported for different years by a given reporter. As noted in this discussion, we expect that wastes disposed of prior to 2010 are best characterized using a default DOC value of 0.20 and that wastes disposed of in 2010 and later years are best characterized using a default DOC of 0.17. Therefore, while we are finalizing a revision in the default bulk waste DOC value to 0.17, we are also finalizing clarifications to these revisions to incorporate these revisions consistently across reporters and consistent with the timeframe where the reduction in DOC occurred. Specifically, we are maintaining the historic DOC value of 0.20 for historic disposal years (prior to 2010) and, starting with RY2025, requiring the use of the revised DOC value of 0.17 for disposal years 2010 and later (see memorandum ''Revised Analysis and Calculation of Optimal k values for Subpart HH MSW Landfills Using a 0.17 DOC Default and Timing Considerations'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424).

With respect to the proposed DOC value for bulk MSW (excluding inerts and C&D waste), the approach we used to develop the proposed DOC value is consistent with the approach we used when we originally developed and provided the modified bulk waste option following consideration of comments received (75 FR 66450, October 28, 2010). This option was specifically provided to address comments that the waste composition option was too detailed for most landfill operators to use and that landfill operators should have the opportunity to characterize some of the waste received as inerts under the bulk waste option. Because the DOC values for bulk waste option were derived based on the full quantity of waste disposed at landfills, that DOC value for bulk waste intrinsically includes inerts. Therefore, we sought to develop a representative MSW DOC value that excludes inerts for use in the modified bulk MSW option. We disagree that this makes the modified bulk waste option inaccurate or unusable. On the contrary, we find that using the bulk waste DOC value in the modified bulk MSW option would be less accurate for predicting the CH_4 generation for the modified bulk MSW option because the DOC value for bulk waste was determined by the full quantity of waste disposed at landfills including inerts and C&D waste. We also agree with commenters that some reporters are misusing the waste composition option in order to separately account for inerts but then use the bulk waste DOC value for the rest of the MSW. We conducted a multivariant analysis to project the DOC of uncharacterized MSW in landfills for which reporters used the waste composition method and the DOC for this uncharacterized waste was estimated to be 0.32. This agrees well with the proposed DOC value for bulk MSW of 0.27 and confirms that, when facilities separately report inert waste quantities, the DOC for the remaining MSW (excluding inerts and C&D waste) is much higher than suggested by some of the commenters. Consequently, we concluded that our proposed values of 0.27 for bulk MSW (excluding inerts and C&D waste) and 0.32 for uncharacterized waste should be finalized as proposed. Similar to our clarification regarding how the revision in bulk waste DOC must be implemented, we are finalizing requirements to use the current bulk MSW (excluding inerts and C&D waste) DOC value of 0.31 for historic disposal years (prior to 2010) and requiring the use of the revised bulk MSW (excluding inerts and C&D waste) DOC value of 0.27 for disposal years 2010 and later, consistent with the timeline for which these values were determined. Because we have no method to indicate a change in DOC for uncharacterized wastes, we are requiring the use of the new DOC for uncharacterized waste using the composition option of 0.32 for all years for which the composition option was used.

We also disagree with commenters that having a high bulk MSW default DOC value makes the modified bulk MSW method unusable. Based on waste characterization data as reported for RY2022, approximately 23 percent use the modified bulk MSW method, which suggests a quarter of the reports find the modified bulk MSW option useful. While this option was specifically provided for landfills that accept large quantities of C&D waste or inert waste streams, we disagree that its use should be restricted to that scenario. There is significant variability in the DOC of bulk waste from landfill to landfill. There are many cases when the quantity of landfill gas recovered exceeds the modeled methane generation rates. This is a clear indication that the default DOC (and/or k value) is too low. For reporters with high actual CH_4 generation rates, as noted by the quantity of CH_4 recovered at the landfill, we find that the use of the modified bulk MSW option is appropriate for these reporters and would likely provide a more accurate estimate of modeled CH_4 generation, even if these reporters do not have large quantities of inert or C&D wastes. We encourage reporters that have CH_4 recovery rates exceeding their modeled CH_4 generation rates to evaluate and use, as appropriate, the modified bulk MSW or waste composition options in order to more accurately estimate modeled methane generation.

Comment: Several comments supported revisions to decay rate constants (k values) that more closely match the IPCC recommendations. Other comments were critical of the revisions, suggesting the proposed k values were too high. One commenter noted that the original k values were developed using a separate analysis considering the use of the CH_4 generation potential (Lo, analogous to the DOC input for the first order decay model used in subpart HH). The commenter noted that optimizing k and DOC values simultaneously can lead to extreme and unrealistic values because an error in one value causes an offsetting error in the other. The commenter also stated that the EPA allowed an extremely wide range for the ''optimized'' k values (*e.g.,* 0.001 to 0.400 for dry climates) and should have constrained the k values to more realistic values. The commenter also suggested that the EPA rely on its own research as published in PLoS ONE (Jain et al., 2021).[41] Finally, the commenter suggested that multivariant analysis was not peer-reviewed and therefore does not appear to comply with the General Assessment Factors.

Response: The EPA reviewed the documentation supporting the existing DOC and k value defaults used for subpart HH (RTI International, 2004). Importantly, the memorandum documents that the development of the DOC and k values utilized a two-step process. The first step was a

[41] Jain, P., et al. 2021. ''Greenhouse gas reporting data improves understanding of regional climate impact on landfill methane production and collection.'' PLoS ONE, at 1–3, 10–11 (Feb. 26, 2021), available at *https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0246334.*

multivariant analysis, similar to the analysis conducted in 2019 (McGrath et al., 2019), which was used to determine an optimal DOC value. The second step was to determine optimal k values for each precipitation range using the optimal DOC value from the multivariant analysis. At proposal, we used the DOC and k values determined directly from the multivariant analysis. After consideration of the comments received and the approach used historically, we determined that it would be more appropriate to determine optimal k values once the default DOC value is established. We agree with the commenter that using a fixed DOC value (set at the proposed bulk waste DOC value of 0.17), we expect that the optimal k values in a single-variable analysis would have less variability and better predict methane generation across landfills when using the revised DOC default. Therefore, we conducted this second step of the analysis using the original data set for facilities using the bulk waste approach to determine the optimal k values for these landfills, given a default DOC value of 0.17 (the bulk waste DOC value recommended in the McGrath et al. (2019) memo based on the multivariant analysis).

We also reviewed additional literature to assess reasonable ranges for k values. We found that the lowest allowed k value of 0.001 yr^{-1} was unrealistic and much lower than any k value reported in the literature. We identified some studies suggesting a k value of 0.4 yr^{-1} is possible for wet landfills (or landfills using leachate recirculation). After our review of the additional literature, we revised the allowable k value range from 0.001–0.4 yr^{-1} to 0.007–0.3 yr^{-1}. The results of applying this second step of the analysis, consistent with the approach used previously to develop default k values, indicate that the optimal k values for dry, moderate, and wet climates were 0.033, 0.067, and 0.098 yr^{-1}, respectively (see memorandum ''Revised Analysis and Calculation of Optimal k Values for Subpart HH MSW Landfills Using a 0.17 DOC Default and Timing Considerations'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424). These values are lower than those developed from the multivariant analysis, but still significantly higher than the current defaults in subpart HH. These values also align well with IPCC recommended k value ranges for moderately decaying waste and the k values reported by Jain, et al. (2021). Table 5 of this preamble presents a comparison of the old subpart HH and revised k values with the values recommended by the IPCC and Jain, et al. (2021).

TABLE 5—COMPARISON OF FINALIZED DECAY RATE CONSTANTS (k VALUES IN YRS^{-1}) BY PRECIPITATION RANGE

Precipitation zone	Historic subpart HH and inventory default decay value (k)	Revised subpart HH default decay value (k)	IPCC default decay value (k) ranges for moderately decaying waste	Jain, et al. (2021), recommended k value (and 95% confidence range)
Dry (<20 inches/year)	0.02	0.033	0.04–0.05	0.043 (0.033–0.054)
Moderate (20–40 inches/year)	0.038	0.067	0.04–0.1	0.074 (0.061–0.088)
Wet (>40 inches/year)	0.057	0.098	0.07–0.17	0.090 (0.077–0.105)

Similar to the incorporation of the new DOC values, we note that the proposed revision was not clear regarding how the new k values for bulk waste under the ''Bulk waste option'' and bulk MSW under the ''Modified bulk MSW option'' should be incorporated into the facility's emissions estimate. While we are finalizing revisions for the default bulk waste k values for dry, moderate, and wet climates as 0.033, 0.067, and 0.098 yr^{-1}, respectively, we are also finalizing clarifications to these revisions to incorporate these revisions consistently across reporters and consistent with the timeframe where the reduction in DOC occurred. Specifically, starting in RY2025, we are maintaining the historic k values of 0.20, 0.038, and 0.057 yr^{-1} for historic disposal years (prior to 2010) and requiring the use of the revised k values of 0.033, 0.067, and 0.098 yr^{-1} for disposal years 2010 and later. We are finalizing requirements under the modified bulk waste MSW option to use the current bulk MSW (excluding inerts and C&D waste) k values of 0.02 to 0.057 yr^{-1} for historic disposal years (prior to 2010) and requiring the use of the revised bulk MSW (excluding inerts and C&D waste) k values of 0.033 to 0.098 yr^{-1} for disposal years 2010 and later, consistent with the timeline for which these values were determined. Because we have no method to indicate a change in k value for uncharacterized wastes, we are requiring the use of the new k values for uncharacterized waste using the composition option of 0.033 to 0.098 for all years for which the composition option was used.

With respect to compliance with the General Assessment Factors, we considered a wide variety of information, including peer-reviewed material, when developing our proposed and final k values. While our technical support documents are not formally peer reviewed at proposal, we consider the proposal/public review process to be an adequate forum for public review of our analysis and conclusions. After considering the public comments received, we revised our analysis to more closely match the original approach used to determine default k values. We also adjusted our allowable range for k values based on public comment and additional literature review. All information we have reviewed indicate that the historic subpart HH k values are too low and that the values we determined in our re-analysis of the data will provide improved methane generation estimates. For these reasons, we are finalizing revised k values for subpart HH of 0.033, 0.067, and 0.098 yr^{-1} for dry, moderate, and wet climates, respectively. These k values apply to bulk waste, bulk MSW, and uncharacterized MSW, as proposed.

U. Subpart OO—Suppliers of Industrial Greenhouse Gases

We are finalizing several amendments to subpart OO of part 98 (Suppliers of Industrial Greenhouse Gases) as proposed. Section III.U.1. of this preamble discusses the final revisions to subpart OO. The EPA received comments on the proposed revisions to subpart OO which are discussed in section III.U.2. of this preamble. We are also finalizing as proposed confidentiality determinations for new data elements resulting from the revisions to subpart OO as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart OO

This section summarizes the final amendments to subpart OO. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart OO can be found in this section and section III.U.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

The EPA is finalizing several revisions to subpart OO of part 98 that will improve the quality of the data collection under the GHGRP. First, we are adding a requirement at 40 CFR 98.417(c)(7) for bulk importers of F–GHGs to include, as part of the information required for each import in the annual report, the customs entry number. The customs entry number is provided as part of the U.S. Customs and Border Protection (CBP) Form 7501: Entry Summary and is assigned for each filed CBP entry for each shipment. The EPA has made one minor clarification from proposal. We initially proposed the requirement as the ''customs entry summary number''; the final rule modifies 40 CFR 98.416(a)(7) to clarify the requirement to the ''customs entry number,'' which is associated with the CBP Form 7501, ''Entry Summary.''

As proposed, we are adding a reporting requirement at 40 CFR 98.416(k) that suppliers of N_2O, saturated PFCs, SF_6, and fluorinated HTFs identify the end uses for which the N_2O, SF_6, saturated PFC, or fluorinated HTF is used and the aggregated annual quantities of N_2O, SF_6, each saturated PFC, or each fluorinated HTF transferred to each end use, if known. As discussed in the proposed rules, this requirement is based on a similar requirement in subpart PP to part 98 (Suppliers of Carbon Dioxide) and is intended to provide additional insight into the identities and magnitudes of the uses of these compounds, which are currently less well understood than those of other industrial GHGs such as HFCs, although the GWP-weighted totals supplied are relatively large.

The EPA is also finalizing a clarification to the reporting requirements for importers and exporters of F–GHGs, F–HTFs, or N_2O, to revise the required reporting of ''commodity code,'' which is required for importers at 40 CFR 98.416(c)(6) and for exporters at 40 CFR 98.416(d)(4), to clarify that reporters should submit the Harmonized Tariff System (HTS) code for each F–GHG, F–HTF, or N_2O shipped. Reporters will enter the full 10-digit HTS code with decimals, to extend to the statistical suffix, as it was entered on related customs forms. See section III.S. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on the EPA's rationale for these changes.

As discussed in section III.A.1.b. of this preamble, we are finalizing related revisions to the definition of ''fluorinated HTF,'' previously included in subpart I of part 98 (Electronics Manufacturing), and to move the definition to subpart A of part 98 (General Provisions), to harmonize with the changes to subpart OO.

Finally, we are finalizing revisions to 40 CFR 98.416(c) and (d) to clarify that certain exceptions to the reporting requirements for importers and exporters are voluntary, consistent with our original intent. To implement this change, we are finalizing revisions to insert ''importers may exclude'' between ''except'' and ''for shipments'' in the first sentence of § 98.416(c) and (d), deleting the ''for.'' We are also finalizing revisions to clarify that imports and exports of transshipments will both have to be either included or excluded for any given importer or exporter, and we are finalizing a similar clarification for heels. These changes ensure that importers and exporters treat the exceptions consistently. See section III.K. of the preamble to the 2023 Supplemental Proposal for additional information on these revisions and their supporting basis.

In the 2023 Supplemental Proposal, the EPA proposed a requirement at 40 CFR 98.416(c) for bulk importers of F–GHGs to provide, for GHGs that are not regulated substances under 40 CFR part 84 (Phasedown of Hydrofluorocarbons), copies of the corresponding U.S. CBP entry forms (*e.g.,* CBP Form 7501) in their annual report. Following consideration of public comments received on a similar proposed revision to subpart QQ of part 98 (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment and Closed-Cell Foams), including concerns regarding the availability of this information and the potential burden of submitting large volumes of entry forms, the EPA is not taking final action on the proposed revision to subpart OO. See section III.W. of this preamble for additional information.

2. Summary of Comments and Responses on Subpart OO

This section summarizes the major comments and responses related to the proposed amendments to subpart OO. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart OO.

Comment: One commenter requested that we clarify that chemical supply ''end use'' refers to industry category only, such as electronics or semiconductor use, and does not refer to more specific uses. The commenter recommended that specific purchases and purposes of chemical use should be considered industry confidential business information and therefore protected from public disclosure. The commenter also noted that chemical suppliers or distributors do not typically have visibility to end use, particularly specific end use categories.

Response: As discussed in section VI. of this preamble, we are planning to finalize our proposed determination that the two new subpart OO data elements (the end use(s) to which the N_2O, SF_6, each PFC, or each fluorinated HTF is transferred and the aggregated annual quantity of the GHG that is transferred to that end use application) are ''Eligible for Confidential Treatment.'' This will protect the data from public disclosure. Regarding suppliers' knowledge of the uses of compounds within each industry, suppliers are required to report the end uses only ''if known.'' For N_2O, SF_6, and saturated PFCs, the end uses that we identified in the proposed rule coincided with individual industries and not specific uses within those industries. For fluorinated HTFs, the end uses that we identified in the proposed rule coincided with some specific uses within industries, such as cleaning versus temperature control within the electronics industry. This was because different end uses, even within the same industry, have different emission patterns, which affect the relationship between emissions and consumption of these compounds. (For example, end uses that quickly emit the F–HTF, such as cleaning, are expected to have emissions that are close to consumption, whereas end uses that store the F–HTF, such as process cooling, may have emissions that are less than half of consumption.) However, the electronics industry, unlike other industries that

use F–HTFs, reports its F–HTF emissions to EPA. Thus, in the subpart OO electronic reporting form, we are planning to list ''electronics manufacturing'' (including manufacturing of semiconductors, MEMS, photovoltaic cells, and displays), and not specific uses within electronics manufacturing, among the end uses whose consumption of the fluorinated HTF will be reported.

V. Subpart PP—Suppliers of Carbon Dioxide

We are finalizing several amendments to subpart PP of part 98 (Suppliers of Carbon Dioxide) as proposed. This section discusses the final revisions to subpart PP. The EPA received comments on the proposed revisions to subpart PP. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart PP.

The EPA is finalizing several revisions to subpart PP to improve the quality of the data collected from this subpart. As proposed, we are adding new 40 CFR 98.420(a)(4) and a new definition to 40 CFR 98.6 to explicitly include direct air capture (DAC) as a capture option under subpart PP. Unlike conventional capture sources where CO_2 is separated during the manufacturing or treatment phase of product stream, DAC captures CO_2 from ambient air using aqueous or solid sorbents, which is then processed into a concentrated stream for utilization or injection underground. This final rule provides that DAC, ''with respect to a facility, technology, or system, means that the facility, technology, or system uses carbon capture equipment to capture carbon dioxide directly from the air. DAC does not include any facility, technology, or system that captures carbon dioxide (1) that is deliberately released from a naturally occurring subsurface spring or (2) using natural photosynthesis.''

The EPA is also finalizing an amendment to the definition of ''carbon dioxide stream'' in 40 CFR 98.6 to add ''captured from ambient air (*e.g.,* direct air capture)'' to the definition so that it reads, ''Carbon dioxide stream means carbon dioxide that has been captured from an emission source (*e.g.,* a power plant or other industrial facility), captured from ambient air (*e.g.,* direct air capture), or extracted from a carbon dioxide production well plus incidental associated substances either derived from the source materials and the capture process or extracted with the carbon dioxide.''

We are finalizing harmonizing changes to 40 CFR 98.422, 98.423, 98.426, and 98.427 to add references to DAC into the reporting requirements. The final rule also amends 40 CFR 98.426 as proposed to add additional reporting requirements in paragraph (i) to require DAC facilities to report the annual quantities and sources (*e.g.,* non-hydropower renewable sources, natural gas, oil, coal) of on-site and off-site sourced electricity, heat, and combined heat and power used to power the DAC plant. These quantities must represent the electricity and heat used starting from the air intake at the facility and ending with the compressed CO_2 stream (*i.e.,* the CO_2 stream ready for supply for commercial applications or, if maintaining custody of the stream, sequestration or injection of the stream underground). These quantities must be provided per energy source, if known. For electricity provided to the DAC plant from the grid, reporters must additionally provide identifying information for the facility and electric utility company. In addition, for on-site sourced electricity, heat, and combined heat and power, DAC facilities must indicate whether flue gas is also captured by the DAC process unit. These changes will aid the EPA in understanding this emerging technology at facilities that utilize DAC and in better understanding potential net emissions impacts associated with DAC facilities (particularly given that interest in DAC is primarily intended to be a carbon removal technology to achieve climate benefits). See section III.T. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on the EPA's rationale for these changes.

The EPA is finalizing two additional revisions to improve data quality. First, we are finalizing the addition of a data element to 40 CFR 98.426(f) that will require suppliers to report the annual quantity of CO_2 in metric tons that is transferred for use in geologic sequestration with EOR subject to new subpart VV to part 98 (Geologic Sequestration of Carbon Dioxide With Enhanced Oil Recovery Using ISO 27916). To inform the revision of the subpart PP electronic reporting form, the EPA also sought comment on potential end use applications to add to 40 CFR 98.426(f), such as algal systems, chemical production, and mineralization processes, such as the production of cements, aggregates, or bicarbonates. However, because 40 CFR 98.426(f) already includes a reporting category for ''other,'' the existing rule already provides flexibility for this reporting, and we are not taking final action on the addition of specific end-use applications to 40 CFR 98.426 at this time. The EPA may consider the addition of other end-use applications in a future rulemaking.

Second, the EPA is finalizing as proposed that 40 CFR 98.426(h) will apply to any facilities that capture a CO_2 stream from a facility subject to 40 CFR part 98 and supply that CO_2 stream to facilities that are subject to either subpart RR (Geologic Sequestration of Carbon Dioxide) or new subpart VV. The revised paragraph will no longer apply only to suppliers that capture CO_2 from EGUs subject to subpart D (Electricity Generation), but also to suppliers that capture CO_2 from any direct emitting facility that is subject to 40 CFR part 98 and transfer to facilities subject to subparts RR or VV. Reporters must provide the facility identification number associated with the facility that is the source of the captured CO_2 stream, each facility identification number associated with the annual GHG reports for each subpart RR and subpart VV facility to which CO_2 is transferred, and the annual quantity of CO_2 transferred to each subpart RR and VV facility. See section III.L. of the preamble to the 2023 Supplemental Proposal for additional information.

The EPA also requested comment on, but did not propose, expanding the requirement at 40 CFR 98.426(h) such that facilities subject to subpart PP would report transfers of CO_2 to any facilities reporting under 40 CFR part 98, not just those subject to subparts RR and VV. This would include reporting the amount of CO_2 transferred on an annual basis as well as the relevant GHGRP facility identification numbers. The EPA further requested comment on whether information regarding additional end uses would be available to facilities. Following consideration of public comments, we are not extending the reporting requirements at this time but may consider doing so in a future rulemaking.

We are finalizing, with revisions, related confidentiality determinations for data elements resulting from the revisions to subpart PP as described in section VI. of this preamble.

W. Subpart QQ—Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment and Closed-Cell Foams

We are finalizing the amendments to subpart QQ of part 98 (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged

Equipment and Closed-Cell Foams) as proposed. In some cases, we are finalizing the proposed amendments with revisions. Section III.W.1. discusses the final revisions to subpart QQ. The EPA received several comments on proposed subpart QQ revisions which are discussed in section III.W.2. We are also finalizing as proposed confidentiality determinations for new data elements resulting from the final revisions to subpart QQ, as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart QQ

This section summarizes the final amendments to subpart QQ. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart QQ can be found in this section and section III.W.2. of this preamble. Additional rationale for these amendments are available in the preamble to the 2023 Supplemental Proposal.

We are finalizing two revisions from the 2023 Supplemental Proposal. We are finalizing requirements for importers and exporters of fluorinated GHGs contained in pre-charged equipment or closed-cell foams to include, for each import and export, the HTS code (for importers, at 40 CFR 98.436(a)(7)) and the Schedule B code (for exporters, at 40 CFR 98.436(b)(7)) used for shipping each equipment type. These requirements are consistent with the final revisions to subpart OO of part 98 (Suppliers of Industrial Greenhouse Gases), which clarify that reporters should submit the HTS code for each shipment, as discussed in section III.U. of this preamble. See section III.S. of the preamble to the 2023 Supplemental Proposal for additional information on the EPA's rationale for these changes.

The EPA also proposed to revise 40 CFR 98.436 to add a requirement to include collecting copies of the U.S. CBP entry form (*e.g.,* CBP form 7501) for each reported import, which are currently maintained as records under 40 CFR 98.437(a). Following consideration of public comments, the EPA is not taking final action on the proposed requirement to submit copies of each U.S. CBP entry form. See section III.W.2. of this preamble for a summary of the related comments and the EPA's response.

2. Summary of Comments and Responses on Subpart QQ

This section summarizes the major comments and responses related to the proposed amendments and supplemental amendments to subpart QQ. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart QQ.

Comment: Several commenters contested the EPA's proposed requirements to collect a copy of the corresponding U.S. CBP entry form (*e.g.,* Form 7501) for each reported import in 40 CFR 98.436. Some commenters asserted that the information available in the forms is currently provided electronically to CBP through the Automated Commercial Environment (ACE) and should be available to the EPA within the need for reporters to develop or submit copies. The commenters noted that this information should be sufficient to identify which entries are subject to data requirements under subpart QQ. Commenters recommended that the EPA should coordinate with CBP through established bodies (*e.g.,* the Border Interagency Executive Council and Commercial Targeting and Analysis Center, to which the EPA already participates) to identify and utilize this data. One commenter specifically recommended that the EPA review the Entry Summary Line Detail Report, which would show the total quantity reported for entry summary lines by tariff number for the reported unit of measure. The commenters stated that such reports capture the actual data in CBP's system, as filed by importers, and should be sufficient to ensure that the Agency is able to improve the verification and accuracy of the data it collects. One commenter expressed that if the EPA is unable to identify applicable entries through more efficient means, importers should only be asked to identify specific entry numbers that will allow the EPA to identify the applicable electronic submissions within ACE.

Commenters objected to the implied submission of hard-copy entry records as an unnecessary administrative burden. Commenters stated that the proposed requirement runs counter to CBP's longstanding effort to collect import data and documents electronically. One commenter stated that submittal of the border crossing document would necessitate a substantial amount of additional work and resources to comply, including gathering documentation from multiple sources prior to annual reporting. Another commenter noted that in some cases, importers could be required to file over 70,000 entries or forms. One commenter stated that this would require at least 1,300 manual searches for the appropriate forms for each entry. Commenters urged that this would be prohibitively expensive and burdensome. One commenter pointed out that this would require substantial modifications to automakers' existing information systems and processes for their GHG and related reporting obligations. Other commenters noted that paper form requirements would obfuscate industry efforts to further automate their record-keeping and reporting systems. One commenter added that the increased volume of documentation would likely put much more pressure on businesses than they can manage based on the current requirement to file data by March 31st of the year following the reporting year.

One commenter stated that the CBP forms would merely confirm the amount of foam board imported or exported and would not validate the F–GHG quantity which is the intent of the report. The commenter continued that, even if border documents were provided, it would be impossible for the EPA to validate the current reports as the calculations involved to provide the volume of F–gas per board foot would require detailed technical knowledge, including density of the foam board.

Some commenters asserted that the entry form requirement runs counter to Executive Order 13659 and 19 U.S.C. 1411(d), as amended by sections 106 and 107 of the Trade Facilitation and Trade Enforcement Act of 2015, which advance the goal of providing for electronic transmission of import data and seek to eliminate the need for duplicative information submissions across U.S. government agencies with regulatory authority related to goods entered or imported into the United States.

Other commenters questioned the EPA's requirements to require reporting of the HTS) code for each type of pre-charged equipment or closed-cell foam imported and/or the Schedule B code for each type of pre-charged equipment or closed-cell foam exported. One commenter questioned whether the inclusion of both HTS codes and Schedule B codes is necessary for validation of the data that is currently collected, as all polystyrene foams use the same codes. The commenter urged that requiring more than one type of document would prove redundant in showing product type; be burdensome for manufacturers and for the EPA; and would not provide any additional

clarity or validation to the current report.

Another commenter stated that only the border crossing document (which includes the customs tariff number, with the first six digits of an HTS and Schedule B number) should be required as part of the annual report. The commenter noted that these border crossing documents share highly sensitive information such as quantity and price, so should be handled securely. One commenter reiterated that all data proposed to be collected is, and would be, considered highly confidential business information. The commenter added that access to this type of information is restricted internally, which adds complexity to who could manage and deal with the processing of this documentation within facilities.

Response: The EPA is revising the final rule to remove the requirement for reporters to submit copies of their U.S. CBP form 7501. Following consideration of comments received, it has been determined that annually reporting these documents could pose a significant burden for many reporters. Therefore, the EPA is not adopting the proposed data reporting requirement in the final rule.

The EPA is finalizing the proposed requirement to report HTS codes (for imports) and Schedule B codes (for exports) to assist the Agency in verification of data. This requirement will allow the EPA to better compare reported GHGRP data with data from other government sources, specifically CBP records. As only one type of code (HTS or Schedule B) will be required based on whether the shipment is an import or export, this will not require the reporting of redundant information to the EPA. Furthermore, we are making ''No Determination'' of confidentiality for this data element. ''No Determination'' means that the EPA is not making a confidentiality determination through rulemaking at this time. If necessary, the EPA will evaluate and determine the confidentiality status of this data on a per-facility basis in accordance with the provisions of 40 CFR part 2, subpart B.

X. Subpart RR—Geologic Sequestration of Carbon Dioxide

We are finalizing amendments to subpart RR of part 98 (Geologic Sequestration of Carbon Dioxide) as proposed. This section discusses the substantive final revisions to subpart RR. The EPA received only one supportive comment for subpart RR. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart RR. Additional rationale for these amendments is available in the preamble to the 2023 Supplemental Proposal.

We are adding a definition for ''offshore'' to 40 CFR 98.449 to mean ''seaward of the terrestrial borders of the United States, including waters subject to the ebb and flow of the tide, as well as adjacent bays, lakes or other normally standing waters, and extending to the outer boundaries of the jurisdiction and control of the United States under the Outer Continental Shelf Lands Act.'' This definition clarifies the applicability of subpart RR to offshore geologic sequestration activities, including on the outer continental shelf. Additional rationale for these amendments is available in the preamble to the 2023 Supplemental Proposal.

Y. Subpart SS—Electrical Equipment Manufacture or Refurbishment

We are finalizing several amendments to subpart SS of part 98 (Electrical Equipment Manufacture or Refurbishment) as proposed. In some cases, we are finalizing the proposed amendments with revisions. Section III.Y.1. of this preamble discusses the substantive final revisions to subpart SS. The EPA received several comments on the proposed revisions to subpart SS which are addressed in section III.Q.2. of this preamble. We are also finalizing as proposed confidentiality determinations for new data elements resulting from the revisions to subpart SS as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart SS

This section summarizes the final amendments to subpart SS. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other final revisions to 40 CFR part 98, subpart SS can be found in this section and section III.Y.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal.

a. Revisions To Improve the Quality of Data Collected for Subpart SS

The EPA is finalizing several revisions to subpart SS to improve the quality of the data collected from this subpart. We are generally finalizing as proposed revisions to the calculation, monitoring, and reporting requirements of subpart SS (at 40 CFR 98.452, 98.453, 98.454, and 98.456) to require reporting of additional F–GHGs as defined under 40 CFR 98.6, except electrical equipment manufacturers and refurbishers will not be required to report emissions of insulating gases with weighted average GWPs of one (1) or less. However, they will be required to report the quantities of insulating gases with weighted average GWPs of one or less, as well as the nameplate capacities of the associated equipment, that they transfer to their customers. To implement these revisions, we are finalizing revisions that redefine the source category at 40 CFR 98.450 to include equipment containing ''fluorinated GHGs (F–GHG), including but not limited to sulfur-hexafluoride (SF_6) and perfluorocarbons (PFCs).'' The changes also apply to the threshold in 40 CFR 98.451, which we are revising as discussed in section III.Y.1. of this preamble. Facilities also must consider additional F–GHGs purchased by the facility in estimating emissions for comparison to the threshold.

The revisions to subpart SS include the addition of a new equation SS–1 in the reporting threshold at 40 CFR 98.451 (discussed in section III.Y.b. of this preamble) and a new equation SS–2 in the GHGs to report at 40 CFR 98.452. Equation SS–2 is also used in the definition of ''reportable insulating gas,'' discussed in this section of the preamble. We are also making minor revisions to equations SS–1 through SS–6 (which we are renumbering as SS–3 through SS–8 to accommodate new equations SS–1 and SS–2) to incorporate the estimation of emissions from all F–GHGs within the existing calculation methodology. To account for the possibility that the same fluorinated GHG could be a component of multiple reportable insulating gases, we are inserting in the final rule a summation sign at the beginning of the right side of equation SS–3 to ensure that emissions of each fluorinated GHG i are summed across all reportable insulating gases j. In addition, we are updating the monitoring and quality assurance requirements to account for emissions from additional F–GHGs, and harmonizing revisions to the reporting requirements such that reporters account for the mass of each F–GHG at the facility level.

We are also finalizing the proposed definition of ''insulating gas'' and adding the term ''reportable insulating gas,'' which is defined as ''an insulating gas whose weighted average GWP, as calculated in equation SS–2, is greater

than one. A fluorinated GHG that makes up either part or all of a reportable insulating gas is considered to be a component of the reportable insulating gas.'' This term is intended to distinguish between insulating gases whose emissions must be reported under subpart SS and insulating gases whose emissions are not required to be reported under subpart SS (although, as noted above, the quantities of all insulating gases supplied to customers must be reported). In many though not all cases, we are also replacing occurrences of the proposed phrase ''fluorinated GHGs, including PFCs and SF_6'' with ''fluorinated GHGs that are components of reportable insulating gases.'' In addition, we are finalizing revisions to add reporting of an ID number or descriptor for each insulating gas and the name and weight percent of each insulating gas reported. The EPA has also made one minor clarification from proposal. We initially proposed 40 CFR 98.456(u) to require reporting of an ID number or descriptor for each unique insulating gas. To clarify the applicability of this requirement for those gases mixed on-site, the final rule clarifies that facilities must report an ID number or other appropriate descriptor that is unique to the reported insulating gas, and for each ID number or descriptor reported, the name and weight percent of each fluorinated gas in the insulating gas. See section III.U.1. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on these revisions and their supporting basis.

b. Revisions To Streamline and Improve Implementation for Subpart SS

To account for changes in the usage of certain GHGs and reduce the likelihood that the reporting threshold will cover facilities with emissions well below 25,000 mtCO$_2$e, we are generally finalizing revisions to the applicability threshold of subpart SS as proposed. (The one change is the introduction of the term ''reportable insulating gas,'' as described in this section III.Y. of the preamble.) The revisions remove the consumption-based threshold at 40 CFR 98.451 and instead require facilities to estimate total annual GHG emissions for comparison to the 25,000 mtCO$_2$e threshold by introducing a new equation, equation SS–1. The equation SS–1 continues to be based on the total annual purchases of insulating gases, but establishes an updated comparison to the threshold, and accounts for the additional fluorinated gases reported by industry. Potential reporters are required to account for the total annual purchases of all reportable insulating gases and multiply the purchases of each reportable insulating gas by the GWP for each F–GHG and the emission factor of 0.10 (or 10 percent). The final rule threshold methodology is more appropriate because it represents the actual fluorinated gases used by a reporter; these revisions also streamline the reporting requirements to focus Agency resources on the substantial emission sources within the sector. Additionally, the changes revise the inclusion of subpart SS in the existing table A–3 to subpart A. Because we are providing a method for direct comparison to the 25,000 mtCO$_2$e threshold, we are removing subpart SS from table A–3 and including the subpart in table A–4 to subpart A. This will require facilities to determine applicability according to 40 CFR 98.2(a)(2) and consider the combined emissions from stationary fuel combustion sources (subpart C), miscellaneous use of carbonates (subpart U), and other applicable source categories. Including subpart SS in table A–4 to subpart A is consistent with other GHGRP subparts that use the 25,000 mtCO$_2$e threshold included under 40 CFR 98.2(a)(2) to determine applicability. See section III.U.2. of the preamble to the 2022 Data Quality Improvements Proposal for additional information on these revisions and their supporting basis.

2. Summary of Comments and Responses on Subpart SS

This section summarizes the major comments and responses related to the proposed amendments to subpart SS. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart SS.

Comment: One commenter suggested redefining the definition of ''insulating gas'' to including any gas with a GWP greater than one and not any fluorinated GHG or fluorinated GHG mixture. The commenter urged that the proposed definition ignores other potential gases that may come onto the market that are not fluorinated but still have a GWP potential. The commenter stated that defining insulating gas under subpart SS to include any gas with a GWP greater than one used as an insulating gas and/or arc quenching gas in electrical equipment would mirror the threshold implemented by the California Air Resources Board and would provide consistency for reporters across Federal and State reporting rules.

Response: In the final rule, the EPA is not requiring electrical equipment manufacturers and refurbishers to report emissions of insulating gases with weighted average 100-year GWPs of one or less, but the EPA is requiring such facilities to report the quantities of insulating gases with GWPs of one or less, as well as the nameplate capacity of the associated equipment, that they transfer to their customers. Based on a review of the subpart SS data submitted to date, the EPA has concluded that excluding emissions of insulating gases with weighted average GWPs of one or less from reporting under subpart SS will have little effect on the accuracy or completeness of the GWP-weighted totals reported under subpart SS or under the GHGRP generally. Between 2011 and 2021, total SF_6 and PFC emissions across all facilities reporting under subpart SS have ranged from 5 to 15 mt (unweighted) or 120,000 to 350,000 mtCO$_2$e. At GWPs of one, these weighted totals would be equivalent to the unweighted quantities reported, which constitute approximately 0.004% (1/23,500) of the GWP-weighted totals. Even in a worst-case scenario where the annual manufacturer emissions of a very low-GWP insulating gas were assumed to equal the total quantity of that gas transferred from manufacturers to customers (implying an emission rate of 100%, higher than any ever reported under subpart SS), the total GWP-weighted emissions reported under subpart SS would be considerably smaller than those reported under any other subpart: total unweighted quantities shipped to customers reported across all facilities to date have ranged between 196 and 372 mt. At GWPs of 1, these totals would fall well below the 15,000- and 25,000 mtCO$_2$e quantities below which individual facilities are eventually allowed to exit the program under the off-ramp provisions of subpart A of part 98 (40 CFR 98.2(i)), as applicable.

While the EPA is not requiring electrical equipment manufacturers and refurbishers to report their emissions of insulating gases with GWPs of one or less, the EPA is requiring such facilities to report the quantities of insulating gases with weighted average GWPs of one or less, as well as the nameplate capacity of the associated equipment, that they transfer to their customers. Tracking such transfers is important to understanding the extent to which substitutes for SF_6 are replacing SF_6 as an insulating gas, which will inform future policies and programs under provisions of the CAA. The EPA

anticipates that tracking transfers to customers will involve a lower burden than tracking emissions and other quantities in addition to transfers.

Z. Subpart UU—Injection of Carbon Dioxide

We are finalizing the amendments to subpart UU of part 98 (Injection of Carbon Dioxide) as revised in the 2023 Supplemental Proposal. This section discusses the final revisions to subpart UU. The EPA received only one supportive comments on the proposed revision to subpart UU in the 2023 Supplemental Proposal. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart UU.

The EPA initially proposed amendments to subpart UU in the 2022 Data Quality Improvements Proposal that were intended to harmonize with revisions to add new subpart VV to part 98 (Geologic Sequestration of Carbon Dioxide With Enhanced Oil Recovery Using ISO 27916). Subpart VV is described further in section III.Z. of this preamble. However, we received comments on the 2022 Data Quality Improvements Proposal saying that the applicability of proposed subpart VV was unclear. The EPA subsequently re-proposed revisions to 40 CFR 98.470 in the 2023 Supplemental Proposal. As described in sections III.O. of the preamble of the 2023 Supplemental Proposal, the EPA proposed, and is finalizing, revisions to § 98.470 of subpart UU of part 98 to clarify the applicability of each subpart when a facility quantifies their geologic sequestration of CO_2 in association with EOR operations through the use of the CSA/ANSI ISO 27916:19 method. Specifically, we are clarifying that facilities with a well or group of wells that must report under subpart VV shall not also report data for those same wells under subpart UU. These changes also clarify how CO_2–EOR projects that may transition to use of the CSA/ANSI ISO 27916:19 method during a reporting year will be required to report for the portion of the reporting year before they began using CSA/ANSI ISO 27916:19 and for the portion after they began using CSA/ANSI ISO 27916:19. Additional rationale for these amendments is available in the preamble to the 2023 Supplemental Proposal.

AA. Subpart VV—Geologic Sequestration of Carbon Dioxide With Enhanced Oil Recovery Using ISO 27916

We are finalizing several amendments to add subpart VV (Geologic Sequestration of Carbon Dioxide With Enhanced Oil Recovery Using ISO 27916) to part 98 as proposed. Section III.Z.1. of this preamble discusses the final requirements of subpart VV. The EPA received several comments on the proposed subpart VV which are discussed in section III.V.2. of this preamble. We are also finalizing as proposed related confidentiality determinations for data elements resulting from the revisions to subpart VV as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart VV

This section summarizes the substantive final amendments to subpart VV. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart VV can be found in this section. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal 2023 Supplemental Proposal.

a. Source Category Definition

In the 2022 Data Quality Improvements Proposal, the EPA proposed adding a new source category, subpart VV, to part 98 to add calculation and reporting requirements for quantifying geologic sequestration of CO_2 in association with EOR operations, which would only apply to facilities that quantify the geologic sequestration of CO_2 in association with EOR operations in conformance with the ISO standard designated as CSA/ANSI ISO 27916:19, *Carbon dioxide capture, transportation and geological storage—Carbon dioxide storage using enhanced oil recovery.*[42] In our initial proposal, the EPA outlined the source category definition, rationale for no threshold, calculation methodology, and monitoring, recordkeeping, and reporting requirements. We noted at that time that under existing GHGRP requirements, facilities that receive CO_2 for injection at EOR operations report under subpart UU (Injection of Carbon Dioxide), and facilities that geologically sequester CO_2 through EOR operations may instead opt-in to subpart RR (Geologic Sequestration of Carbon Dioxide). The EPA proposed to add new subpart VV to require reporting of incidental CO_2 storage associated with EOR based on the CSA/ANSI ISO 27916:19 standard. We subsequently received detailed comments saying that the applicability of proposed subpart VV was unclear, specifically, proposed 40 CFR 98.480 ''Definition of the Source Category.'' The commenters were uncertain whether the EPA had intended to require facilities using CSA/ANSI ISO 27916:19 to report under subpart VV or whether facilities that used CSA/ANSI ISO 27916:19 would have the option to choose under which subpart they would report to: subpart RR, subpart UU, or subpart VV.

In the 2023 Supplemental Proposal, the EPA subsequently reproposed §§ 98.480 and 98.481 of subpart VV to clarify the applicability to each subpart. As explained in section III.P. of the preamble the 2023 Supplemental Proposal, the EPA clarified that if a facility elects to use the CSA/ANSI ISO 27916:19 method for quantifying geologic sequestration of CO_2 in association with EOR operations, then the facility would be required under the GHGRP to report under new subpart VV (unless the facility chooses to report under subpart RR and has received an approved Monitoring, Reporting, and Verification Plan (MRV Plan) from EPA). The EPA further clarified that subpart VV is not intended to apply to facilities that use the content of CSA/ANSI ISO 27916:19 for a purpose other than demonstrating secure geologic storage, such as only as a reference material or for informational purposes. Following review of subsequent comments received on the reproposed source category definition, we are finalizing the definition of the source category as proposed in the 2023 Supplemental Proposal.

b. Reporting Threshold

In the 2022 Data Quality Improvements Proposal, the EPA proposed no threshold for reporting under subpart VV (*i.e.,* that subpart VV would be an ''all-in'' reporting subpart). The EPA also proposed under 40 CFR 98.480(c) that facilities subject only to subpart VV would not be required to report emissions under subpart C or any other subpart listed in 40 CFR 98.2(a)(1) or (2), consistent with the requirements for existing reporters under subpart UU. In the 2023 Supplemental Proposal, the EPA maintained no threshold is required for reporting, but amended the regulatory text to clarify that all CO_2–

[42] Although the title of the standard references only EOR, Clause 1.1 of CSA/ANSI ISO 27916:19 indicates that the standard can apply to enhanced gas recovery as well. Therefore, any reference to EOR in subpart VV also applies to enhanced gas recovery.

EOR projects using CSA/ANSI ISO 27916:19 as a method of quantifying geologic sequestration that do not report under subpart RR would report under subpart VV. We also proposed text at 40 CFR 98.481(c) to clarify how CO_2–EOR projects previously reporting under subpart UU that begin using CSA/ANSI ISO 27916:19 part-way through a reporting year must report. The EPA is finalizing these requirements as reproposed in the 2023 Supplemental Proposal.

Additionally, we are finalizing revisions at 40 CFR 98.481(b) that facilities subject to subpart VV will not be subject to the off-ramp requirements of 40 CFR 98.2(i). Instead, once a facility opts-in to subpart VV, the owner or operator must continue for each year thereafter to comply with all requirements of the subpart, including the requirement to submit annual reports, until the facility demonstrates termination of the CO_2–EOR project following the requirements of CSA/ANSI ISO 27916:19. The operator must notify the Administrator of its intent to cease reporting and provide a copy of the CO_2–EOR project termination documentation prepared for CSA/ANSI ISO 27916:19.

c. Calculation Methods

In the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal, the EPA proposed incorporating the quantification methodology of CSA/ANSI ISO 27916:19 for calculation of emissions. Under CSA/ANSI ISO 27916:19, the mass of CO_2 stored is determined as the total mass of CO_2 received minus the total mass of CO_2 lost from project operations and the mass of CO_2 lost from the EOR complex. The EOR complex is defined as the project reservoir, trap, and such additional surrounding volume in the subsurface as defined by the operator within which injected CO_2 will remain in safe, long-term containment. Specific losses include those from leakage from production, handling, and recycling facilities; from infrastructure (including wellheads); from venting/flaring from production operations; and from entrainment within produced gas/oil/water when this CO_2 is not separated and reinjected. We are finalizing the calculation requirements as proposed.

d. Monitoring, QA/QC, and Verification Requirements

The EPA is finalizing as proposed the requirement for reporters to use the applicable monitoring and quality assurance requirements set forth in CSA/ANSI ISO 27916:19.

e. Procedures for Estimating Missing Data

The EPA is finalizing as proposed the requirement for reporters to use the applicable missing data and quality assurance procedures set forth in CSA/ANSI ISO 27916:19.

f. Data Reporting Requirements

The EPA is finalizing, as proposed, that facilities will report the amount of CO_2 stored, inputs included in the mass balance equation used to determine CO_2 stored using the CSA/ANSI ISO 27916:19 methodology, and documentation providing the basis for that determination as set forth in CSA/ANSI ISO 27916:19. Documentation includes providing the CSA/ANSI ISO 27916:19 EOR Operations Management Plan (OMP), which is required to specify: (1) a geological description of the site and the procedures for field management and operational containment during the quantification period; (2) the initial containment assurance plan to identify potential leakage pathways; (3) the plan for monitoring of potential leakage pathways; and (4) the monitoring methods for detecting and quantifying losses and how this will serve to provide the inputs into site-specific mass balance equations. Reporters must also specify any changes made to containment assurance and monitoring approaches and procedures in the EOR OMP made within the reporting year.

We are also finalizing the reporting of the following information per CSA/ANSI ISO 27916:19: (1) the quantity of CO_2 stored during the year; (2) the formula and data used to quantify the storage, including the quantity of CO_2 delivered to the CO_2–EOR project and losses during the year; (3) the methods used to estimate missing data and the amounts estimated; (4) the approach and method for quantification utilized by the operator, including accuracy, precision and uncertainties; (5) a statement describing the nature of validation or verification, including the date of review, process, findings, and responsible person or entity; and (6) the source of each CO_2 stream quantified as storage. The final rule also requires that reporters provide a copy of the independent engineer or geologist's certification as part of reporting to subpart VV, if such a certification has been made.

Finally, the EPA is finalizing a notification for project termination. The final rule specifies that the time for cessation of reporting under subpart VV is the same as under CSA/ANSI ISO 27916:19; the operator must notify the Administrator of its intent to cease reporting and provide a copy of the CO_2–EOR project termination documentation.

g. Records That Must Be Retained

The EPA is finalizing as proposed the requirement that reporters meet the record retention requirements of 40 CFR 98.3(g) and the applicable recordkeeping retention requirements set forth in CSA/ANSI ISO 27916:19.

2. Summary of Comments and Responses on Subpart VV

The EPA received several comments for subpart VV; the majority of these comments were received on the 2022 Data Quality Improvements Proposal and were previously addressed in the preamble to the 2023 Supplemental Proposal (see section III.P. of the preamble to the 2023 Supplemental Proposal). The EPA received only supportive comments on the proposed revisions to subpart VV in the 2023 Supplemental Proposal; see the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart VV.

BB. Subpart WW —Coke Calciners

We are finalizing the addition of subpart WW to part 98 (Coke Calciners) with revisions in some cases. Section III.BB.1. of this preamble discusses the final requirements of subpart WW. The EPA received several comments on the proposed subpart WW which are discussed in section III.BB.2. of this preamble. We are also finalizing as proposed related confidentiality determinations for data elements resulting from the revisions to subpart WW as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart WW

This section summarizes the substantive final amendments to subpart WW. Major changes in this final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart WW can be found in this section. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

a. Source Category Definition

The EPA is finalizing the source category definition as proposed, with one minor clarification. Specifically, we proposed that the coke calciner source category consists of process units that heat petroleum coke to high temperatures in the absence of air or oxygen for the purpose of removing impurities or volatile substances in the petroleum coke feedstock. Following review of comments received, the EPA is revising the source category definition from that proposed to remove the language ''in the absence of air or oxygen.'' See section III.BB.2. of this preamble for additional information on related comments and the EPA's response. The final definition of the coke calciner source category includes, but is not limited to, rotary kilns or rotary hearth furnaces used to calcine petroleum coke and any afterburner or other equipment used to treat the process gas from the calciner. The source category includes all coke calciners, not just those co-located at petroleum refineries, to provide consistent requirements for all coke calciners.

b. Reporting Threshold

In the 2023 Supplemental Proposal, the EPA proposed no threshold for reporting under subpart WW. Because coke calciners are large emission sources, they are expected to emit over the 25,000 $mtCO_2e$ threshold generally required to report under existing GHGRP subparts with thresholds, and nearly all of them are also projected to exceed the 100,000 $mtCO_2e$ threshold. Therefore, the EPA projects that there are limited differences in the number of reporting facilities based on any of the emission thresholds considered. For this reason, the EPA is finalizing the coke calciner source category as an ''all-in'' subpart (*i.e.,* regardless of their emissions profile).

c. Calculation Methods

Coke calciners primarily emit CO_2, but also have CH_4 and N_2O emissions as part of the process gas emission control combustion device operation. The EPA is finalizing, as proposed in the 2023 Supplemental Proposal, that CO_2, CH_4, and N_2O emissions from each coke calcining unit be estimated.

The EPA reviewed a number of different emissions estimation methods for coke calciners. We subsequently proposed, and are finalizing, to require either one of two separate calculation methods, the use of a CEMS or the carbon mass balance method for estimating emissions. Each of these methodologies are used to estimate CO_2 emissions. We are also finalizing, as proposed, that coke calciners also estimate process CH_4 and N_2O emissions based on the total CO_2 emissions determined for the coke calciner and the ratio of the default CO_2 emission factor for petroleum coke in table C–1 to subpart C of part 98 to the default CH_4 and N_2O emission factors for petroleum products in table C–2 to subpart C of part 98. Under the final methods, petroleum refineries with coke calciners are able to maintain their current calculation methods. Additional detail on the calculation methods reviewed are available in section IV.B. of the preamble to the 2023 Supplemental Proposal.

Direct measurement using CEMS. The CEMS approach directly measures CO_2 concentration and total exhaust gas flow rate for the combined process and combustion source emissions. CO_2 mass emissions are calculated from these measured values using equation C–6 and, if necessary, equation C–7 in 40 CFR 98.33(a)(4).

The EPA proposed that the CEMS method under subpart WW would be implemented consistent with subpart Y of part 98 (Petroleum Refineries), which required reporters to determine CO_2 emissions from auxiliary fuel use discharged in the coke calciner exhaust stack using methods in subpart C of part 98, and to subtract those emissions from the measured CEMS emissions to determine the process CO_2 emissions. We are finalizing this requirement.

Carbon balance method. For those facilities that do not have a qualified CEMS in-place, facilities may use the carbon mass balance method, using data that is expected to be routinely monitored by coke calcining facilities. The carbon mass balance method uses the mass of green coke, calcined coke and petroleum coke dust removed from the dust collection system, along with the carbon content of the green and calcined coke, to estimate process CO_2 emissions; the methodology is the same as current equation Y–13 of 40 CFR 98.253(g)(2) that is used for coke calcining processes co-located at petroleum refineries.

d. Monitoring, QA/QC, and Verification Requirements

The EPA is finalizing the monitoring methods to subpart WW as proposed.

Direct measurement using CEMS. For direct measurement using CEMS, the CEMS method requires both a continuous CO_2 concentration monitor and a continuous volumetric flow monitor. Reporters required to or electing to use CEMS must install, operate, and calibrate the monitoring system according to subpart C (General Stationary Fuel Combustion Sources), which is consistent with the current requirements for coke calciner CO_2 CEMS monitoring requirements within subpart Y. We are finalizing that all CO_2 CEMS and flow rate monitors used for direct measurement of GHG emissions should comply with QA/QC procedures for daily calibration drift checks and quarterly or annual accuracy assessments, such as those provided in Appendix F to part 60 or similar QA/QC procedures. These requirements ensure the quality of the reported GHG emissions and are consistent with the current requirements for CEMS measurements within subparts A (General Provisions) and C of the GHGRP.

Carbon balance method. The carbon mass balance method requires monitoring of mass quantities of green coke fed to the process, calcined coke leaving the process, and coke dust removed from the process by dust collection systems. It also requires periodic determination of carbon content of the green and calcined coke. For coke mass measurements, we are finalizing that the measurement device be calibrated according to the procedures specified by the updated NIST HB 44–2023: *Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices,* 2023 edition (we have clarified the title and publication date of this method in the final rule) or the procedures specified by the manufacturer. We are requiring the measurement device be recalibrated either biennially or at the minimum frequency specified by the manufacturer. These requirements are to ensure the quality of the reported GHG emissions and to be consistent with the current requirements for coke calciner mass measurements within subpart Y.

For carbon content of coke measurements, the owner or operator must follow approved analytical procedures and maintain and calibrate instruments used according to manufacturer's instructions and to document the procedures used to ensure the accuracy of the measurement devices used. These requirements are to ensure the quality of the reported GHG emissions and to be consistent with the current requirements for coke calciner mass measurements within subpart Y. These determinations must be made monthly. If carbon content measurements are made more often than monthly, all measurements made within the calendar month must be used to determine the average for the month.

e. Procedures for Estimating Missing Data

The EPA is finalizing as proposed the procedures for estimating missing data. For the CEMS methodology, whenever a quality-assured value of a required parameter is unavailable (*e.g.,* if a CEMS malfunctions during unit operation or if a required fuel sample is not taken), a substitute data value for the missing parameter shall be used in the calculations. For missing CEMS data, the missing data procedures in subpart C must be used.

Under the carbon mass balance method, for each missing value of mass or carbon content of coke, reporters must use the average of the data measurements before and after the missing data period. If, for a particular parameter, no quality assured data are available prior to the missing data incident, the substitute data value must be the first quality-assured value obtained after the missing data period. Similarly, if no quality-assured data are available after the missing data incident, the substitute data value must be the most recently acquired quality-assured value obtained prior to the missing data period.

f. Data Reporting Requirements

The EPA is finalizing the data reporting requirements of subpart WW as proposed. For coke calcining units, the owner and operator shall report the coke calciner unit ID number and maximum rated throughput of the unit, the method used to calculate GHG emissions, and the calculated CO_2, CH_4, and N_2O annual emissions for each unit, expressed in metric tons of each pollutant emitted. We are also requiring the owner and operator to report the annual mass of green coke fed to the coke calcining unit, the annual mass of marketable petroleum coke produced by the coke calcining unit, the annual mass of petroleum coke dust removed from the process through the dust collection system of the coke calcining unit, the annual average mass fraction carbon content of green coke fed to the unit, and the annual average mass fraction carbon content of the marketable petroleum coke produced by the coke calcining unit.

g. Records That Must Be Retained

The EPA is finalizing the record retention requirements of subpart WW as proposed. Facilities are required to maintain records documenting the procedures used to ensure the accuracy of the measurements of all reported parameters, including but not limited to, calibration of weighing equipment, flow meters, and other measurement devices. The estimated accuracy of measurements made with these devices must also be recorded, and the technical basis for these estimates must be provided.

For the coke calciners source category, we are finalizing that the verification software specified in 40 CFR 98.5(b) be used to fulfill the recordkeeping requirements for the following five data elements:

- Monthly mass of green coke fed to the coke calcining unit;
- Monthly mass of marketable petroleum coke produced by the coke calcining unit;
- Monthly mass of petroleum coke dust removed from the process through the dust collection system of the coke calcining unit;
- Average monthly mass fraction carbon content of green coke fed to the coke calcining unit; and
- Average monthly mass fraction carbon content of marketable petroleum coke produced by the coke calcining unit.

2. Summary of Comments and Responses on Subpart WW

This section summarizes the major comments and responses related to the proposed subpart WW. The EPA previously requested comment on the addition of coke calciners production source category as a new subpart to part 98 in the 2022 Data Quality Improvements Proposal. The EPA received several comments for subpart WW on the 2022 Data Quality Improvements Proposal; many of these comments were previously addressed in the preamble to the 2023 Supplemental Proposal, wherein the EPA proposed to add new subpart WW for coke calciners (see section IV.B. of the preamble to the 2023 Supplemental Proposal). The EPA received additional comments regarding the proposed subpart WW following the 2023 Supplemental Proposal. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart WW.

Comment: One commenter stated that the description of coke calciners may be overly narrow. The commenter contended that the language ''in the absence of air or oxygen'' is not necessarily accurate. The commenter stated that air/oxygen is necessary for combustion to occur, and that the high temperatures required for proper calcination are from the combustion of volatiles and carbon in the green coke.

Response: We understand that air is introduced in the coke calciner to burn the volatiles from the coke, but the air is introduced in a limited fashion (limited oxygen) so that the complete combustion of coke in the calciner does not occur. However, we agree with the commenter that the phrase ''in the absence of air or oxygen'' may be too restrictive and we have deleted this phrase from the proposed source category description at 40 CFR 98.490(a) in the final rule.

Comment: One commenter stated that coke calciners that use refinery fuel gas or natural gas during startup or during hot standby should be allowed to report emissions from these fuel gases using a methodology from subpart C of part 98, separately from the coke calciner emissions. The commenter stated that where coke calcining and fuel gas combustion are occurring simultaneously, the fuel gas emissions should be subtracted from the emissions that are calculated using CEMS and the proposed stack flow methodology to avoid double counting. The commenter added that the requirements for fuel gas or natural gas composition and heat content use in coke calciners should be the same as required in subpart C.

Response: We agree with the commenter and the issues identified by the commenter were addressed in the 2023 Supplemental Proposal. We are finalizing these provisions for treating GHG emissions from auxiliary fuel use as proposed (see 40 CFR 98.493(b)(1)).

CC. Subpart XX—Calcium Carbide Production

We are finalizing the addition of subpart XX (Calcium Carbide Production) to part 98 as proposed. Section III.CC.1. of this preamble discusses the final requirements of subpart XX. The EPA received comments on the proposed subpart XX which are discussed in section III.CC.2. of this preamble. We are also finalizing as proposed related confidentiality determinations for data elements resulting from the addition of subpart XX as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart XX

This section summarizes the final amendments to subpart XX. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart XX can be found in this section and section III.CC.2. of this preamble.

Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

a. Source Category Definition

The EPA is finalizing the source category definition as proposed. We are defining calcium carbide production to include any process that produces calcium carbide. Calcium carbide is an industrial chemical manufactured from lime (CaO) and carbon, usually petroleum coke, by heating the mixture to 2,000 to 2,100 C (3,632 to 3,812 °F) in an electric arc furnace. During the production of calcium carbide, the use of carbon-containing raw materials (petroleum coke) results in emissions of CO_2.

Although we considered accounting for emissions from the production of acetylene at calcium carbide facilities in the 2022 Data Quality Improvements Proposal, we ultimately determined that acetylene is not produced at the one known plant that produces calcium carbide. For this reason, in the 2023 Supplemental Proposal we did not propose, and as such are not taking final action on, inclusion of reporting of CO_2 emissions from the production of acetylene from calcium carbide under subpart XX.

b. Reporting Threshold

In the 2023 Supplemental Proposal, the EPA proposed no threshold for reporting under subpart XX. The current estimate of emissions from the single known calcium carbide production facility in the United States exceeds 25,000 mtCO_2e by a factor of about 1.9. Therefore we are finalizing, as proposed, the calcium carbide source category as an ''all-in'' subpart. For a full discussion of the threshold analysis, please refer to section IV.C. of the preamble to the 2023 Supplemental Proposal.

c. Calculation Methods

In the 2023 Supplemental Proposal, the EPA reviewed the production processes and available emissions estimation methods for calcium carbide production including a default emission factor methodology, a carbon balance methodology (IPCC Tier 3), and direct measurement using CEMS (see section IV.C.5. of the preamble to the 2023 Supplemental Proposal). We subsequently proposed and are finalizing two different methods for quantifying GHG emissions from calcium carbide manufacturing, depending on current emissions monitoring at the facility. If a qualified CEMS is in place, the CEMS must be used. Otherwise, the facility can elect to either install a CEMS or elect to use the carbon mass balance method.

Direct measurement using CEMS. Facilities with an existing CEMS that meet the requirements outlined in subpart C of part 98 (General Stationary Fuel Combustion) are required to use CEMS to estimate combined process and combustion CO_2 emissions. Facilities are required to follow the requirements of subpart C to estimate all CO_2 emissions from the industrial source. Facilities will be required to follow subpart C to estimate emissions of CO_2, CH_4, and N_2O from stationary combustion.

Carbon balance method. For facilities that do not have CEMS that meet the requirements of 40 CFR part 98 subpart C, the alternate monitoring method is the carbon balance method. For any stationary combustion units included at the facility, facilities will be required to follow the existing requirements at 40 CFR part 98, subpart C to estimate emissions of CO_2, CH_4, and N_2O from stationary combustion. Use of facility specific information is consistent with IPCC Tier 3 methods and is the preferred method for estimating emissions for other GHGRP sectors.

d. Monitoring, QA/QC, and Verification requirements

The EPA is finalizing the monitoring, QA/QC, and verification requirements to subpart XX as proposed. We are finalizing two separate monitoring methods: direct measurement and a mass balance emission calculation.

Direct measurement using CEMS. For facilities where process emissions and/or combustion GHG emissions are contained within a stack or vent, facilities can take direct measurement of the GHG concentration in the stack gas and the flow rate of the stack gas using a CEMS. Under the final rule, if facilities use an existing CEMS to meet the monitoring requirements, they are required to use CEMS to estimate CO_2 emissions. Where the CEMS capture all combustion- and process-related CO_2 emissions, facilities will be required to follow the requirements of subpart C to estimate emissions.

The CEMS method requires both a continuous CO_2 concentration monitor and a continuous volumetric flow monitor. To qualify as a CEMS, the monitors are required to be installed, operated, and calibrated according to subpart C of part 98 (40 CFR 98.33(a)(4)), which is consistent with CEMS requirements in other GHGRP subparts.

Carbon balance method. For facilities using the carbon mass balance method, we are requiring the facility to determine the annual mass for each material used for the calculations of annual process CO_2 emissions by summing the monthly mass for the material determined for each month of the calendar year. The monthly mass may be determined using plant instruments used for accounting purposes, including either direct measurement of the quantity of the material placed in the unit or by calculations using process operating information.

For the carbon content of the materials used to calculate process CO_2 emissions, we are finalizing a requirement that the owner or operator determine the carbon content using material supplier information or collect and analyze at least three representative samples of the material inputs and outputs each year. The final rule will require the carbon content be analyzed at least annually using standard ASTM methods, including their QA/QC procedures. To reduce burden, if a specific process input or output contributes less than one percent of the total mass of carbon into or out of the process, the reporter does not have to determine the monthly mass or annual carbon content of that input or output.

e. Procedures for Estimating Missing Data

We are finalizing as proposed the use of substitute data whenever a quality-assured value of a parameter is used to calculate emissions is unavailable, or ''missing.'' If the carbon content analysis of carbon inputs or outputs is missing, the substitute data value will be based on collected and analyzed representative samples for average carbon contents. If the monthly mass of carbon-containing inputs and outputs is missing, the substitute data value will be based on the best available estimate of the mass of the inputs and outputs from all available process data or data used for accounting purposes, such as purchase records. The likelihood for missing process input or output data is low, as businesses closely track their purchase of production inputs. These missing data procedures are the same as those for the ferroalloy production source category, subpart K of part 98, under which the existing U.S. calcium carbide production facility currently reports.

f. Data Reporting Requirements

The EPA is finalizing, as proposed, that each carbon carbide production facility report the annual CO_2 emissions

from each calcium carbide production process, as well as any stationary fuel combustion emissions. In addition, we are finalizing requirements for facilities to provide additional information that forms the basis of the emissions estimates, along with supplemental data, so that we can understand and verify the reported emissions. All calcium carbide production facilities will be required to report their annual production and production capacity, total number of calcium carbide production process units, annual consumption of petroleum coke, each end use of any calcium carbide produced and sent off site, and, if the facility produces acetylene, the annual production of acetylene, the quantity of calcium carbide used for acetylene production at the facility, and the end use of the acetylene produced on-site. The EPA is also finalizing reporting the end use of calcium carbide sent off site, as well as acetylene production information for current or future calcium carbide production facilities, to inform future Agency policy under the CAA.

As proposed, we are finalizing requirements that if a facility uses CEMS to measure their CO_2 emissions, they will be required to also report the identification number of each process unit; the EPA is clarifying in the final rule that if a facility uses CEMS, emissions are reported from each CEMS monitoring location. If a CEMS is not used to measure CO_2 emissions, the facility will also report the method used to determine the carbon content of each material for each process unit, how missing data were determined, and the number of months missing data procedures were used.

g. Records That Must Be Retained

The EPA is finalizing as proposed the requirement that facilities maintain records of information used to determine the reported GHG emissions, to allow us to verify that GHG emissions monitoring and calculations were done correctly. If a facility uses a CEMS to measure their CO_2 emissions, they will be required to record the monthly calcium carbide production from each process unit and the number of monthly and annual operating hours for each process unit. If a CEMS is not used, the facility will be required to retain records of monthly production, monthly and annual operating hours, monthly quantities of each material consumed or produced, and carbon content determinations.

As proposed, we are finalizing requirements that the owner or operator maintain records of how measurements are made, including measurements of quantities of materials used or produced and the carbon content of process input and output materials. The procedures for ensuring accuracy of measurement methods, including calibration, must be recorded.

The final rule also requires the retention of a record of the file generated by the verification software specified in 40 CFR 98.5(b) including:

- Carbon content (percent by weight expressed as a decimal fraction) of the reducing agent (petroleum coke), carbon electrode, product produced, and nonproduct outgoing materials; and
- Annual mass (tons) of the reducing agent (petroleum coke), carbon electrode, product produced, and nonproduct outgoing materials.

2. Summary of Comments and Responses on Subpart XX

The EPA previously requested comment on the addition of a calcium carbide source category as a new subpart to part 98 in the 2022 Data Quality Improvements Proposal. The EPA received one comment objecting to the addition of the proposed source category and one comment on the potential calculation methodology. Subsequently, the EPA responded to the comments and proposed to add new subpart XX for calcium carbide (see section IV.C. of the preamble to the 2023 Supplemental Proposal). The EPA received no comments regarding proposed subpart XX following the 2023 Supplemental Proposal. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart XX.

DD. Subpart YY—Caprolactam, Glyoxal, and Glyoxylic Acid Production

We are finalizing the addition of subpart YY (Caprolactam, Glyoxal, and Glyoxylic Acid Production) to part 98 with revisions in some cases. Section III.DD.1. of this preamble discusses the final requirements of subpart YY. Major comments, as applicable, are addressed in section III.DD.2. of this preamble. We are also finalizing as proposed related confidentiality determinations for data elements resulting from the revisions to subpart YY as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart YY

This section summarizes the substantive final amendments to subpart YY. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart YY can be found in this section. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

a. Source Category Definition

In the 2023 Supplemental Proposal, the EPA proposed that the caprolactam, glyoxal, or glyoxylic acid source category, as defined under subpart YY, would include any facility that produces caprolactam, glyoxal, or glyoxylic acid.

Caprolactam is a crystalline solid organic compound with a wide variety of uses, including brush bristles, textile stiffeners, film coatings, synthetic leather, plastics, plasticizers, paint vehicles, cross-linking for polyurethanes, and in the synthesis of lysine. Caprolactam is primarily used in the manufacture of synthetic fibers, especially Nylon 6.

Glyoxal is a solid organic compound with a wide variety of uses, including as a crosslinking agent in various polymers for paper coatings, textile finishes, adhesives, leather tanning, cosmetics, and oil-drilling fluids; as a sulfur scavenger in natural gas sweetening processes; as a biocide in water treatment; to improve moisture resistance in wood treatment; and as a chemical intermediate in the production of pharmaceuticals, dyestuffs, glyoxylic acid, and other chemicals. It is also used as a less toxic substitute for formaldehyde in some applications (*e.g.,* in wood adhesives and embalming fluids).

Glyoxylic acid is a solid organic compound exclusively produced by the oxidation of glyoxal with nitric acid. It is used mainly in the synthesis of vanillin, allantoin, and several antibiotics like amoxicillin, ampicillin, and the fungicide azoxystrobin.

We are finalizing the source category definition to include any facility that produces caprolactam, glyoxal, or glyoxylic acid as proposed. The source category will exclude the production of glyoxal through the LaPorte process (*i.e.,* the gas-phase catalytic oxidation of ethylene glycol with air in the presence of a silver or copper catalyst). As explained in the 2023 Supplemental Proposal, the LaPorte process does not

emit N_2O and there are no methods for estimating CO_2 in available literature.

b. Reporting Threshold

In the 2023 Supplemental Proposal, the EPA proposed no threshold for reporting under subpart YY (*i.e.,* that subpart YY would be an ''all-in'' reporting subpart). The EPA noted that the total process emissions from current production of caprolactam, glyoxal, and glyoxylic acid are estimated at 1.2 million mtCO_2e, largely from two known caprolactam production facilities; although the known universe of facilities that produce caprolactam, glyoxal, and glyoxylic acid in the United States is four to six total facilities. We proposed that adding caprolactam, glyoxal, and glyoxylic acid production as an ''all-in'' subpart (*i.e.,* regardless of the facility emissions profile) is a conservative approach to gather information from as many facilities that produce caprolactam, glyoxal, and glyoxylic acid as possible, especially if production of glyoxal and glyoxylic acid increase in the near future. The EPA is finalizing these requirements as proposed.

c. Calculation Methods

In the 2023 Supplemental Proposal, the EPA reviewed the production processes and available emissions estimation methods for caprolactam, glyoxal, and glyoxylic acid production and proposed that only N_2O emissions would be estimated from these processes. The EPA also proposed to require the reporting of combustion emissions from facilities that produce caprolactam, glyoxal, and glyoxylic acid, including CO_2, CH_4, and N_2O.

The EPA reviewed two methods from the 2006 IPCC Guidelines,[43] including the Tier 2 and Tier 3 methodologies, for calculating N_2O emissions from the production of caprolactam, glyoxal, and glyoxylic acid, and subsequently proposed the IPCC Tier 2 approach to quantify N_2O process emissions. We are finalizing the N_2O calculation requirements as proposed, with minor revisions. Following the Tier 2 approach established by the IPCC, reporters will apply default N_2O generation factors on a site-specific basis. This requires raw material input to be known in addition to a standard N_2O generation factor, which differs for each of the three chemicals. In addition, Tier 2 requires site-specific knowledge of the use of N_2O control technologies. The volume or mass of each product is measured with a flow meter or weigh scales. The process-related N_2O emissions are estimated by multiplying the generation factor by the production and the destruction efficiency of any N_2O control technology. The EPA is revising the final rule to adjust the N_2O generation factors (proposed in table 1 to subpart YY) for glyoxal and glyoxylic acid production to correctly reflect the conversion of the IPCC default emission factors, which were intended to be converted from metric tons N_2O emitted per metric ton of product produced to kg N_2O per metric ton of product produced using a conversion factor of 1,000 kg per metric ton. The final rule corrects the generation factor for glyoxal from 5,200 to 520 and, for glyoxylic acid, from 1,000 to 100. The EPA is finalizing a minor clarification to equation 1 to 40 CFR 98.513(d)(2) (proposed as equation YY–1) to re-order the defined parameters of the equation to follow their order of appearance in the equation. The EPA is also finalizing an additional equation (equation 3 to 40 CFR 98.513(f)) from the proposed rule, which sums the monthly process emissions estimated by equation 2 to 40 CFR 98.513(e) (proposed as equation YY–2) to an annual value. This additional equation clarifies the methodology for reporting annual emissions and does not require the collection of any additional data.

For any stationary combustion units included at the facility, we proposed that facilities would be required to follow the existing requirements in 40 CFR part 98, subpart C to calculate emissions of CO_2, CH_4 and N_2O from stationary combustion. We are finalizing the combustion calculation requirements as proposed.

d. Monitoring, QA/QC, and Verification Requirements

Monitoring is required to comply with the N_2O calculation methodologies for reporters that produce caprolactam, glyoxal, and glyoxylic acid. In the 2023 Supplemental Proposal, the EPA proposed that reporters that produce caprolactam, glyoxal, and glyoxylic acid are to determine the monthly and annual production quantities of each chemical and to determine the N_2O destruction efficiency of any N_2O abatement technologies in use. The EPA is finalizing as proposed the requirement for reporters to either perform direct measurement of production quantities or to use existing plant procedures to determine production quantities. *E.g.,* the production rate can be determined through sales records or by direct measurement using flow meters or weigh scales.

For determination of the N_2O destruction efficiency, we are finalizing as proposed the requirement that reporters estimate the destruction efficiency for each N_2O abatement technology. The destruction efficiency can be determined by using the manufacturer's specific destruction efficiency or estimating the destruction efficiency through process knowledge. Documentation of how process knowledge was used to estimate the destruction efficiency is required. Examples of information that could constitute process knowledge include calculations based on material balances, process stoichiometry, or previous test results provided that the results are still relevant to the current vent stream conditions.

For the caprolactam, glyoxal, and glyoxylic acid production subpart, we are requiring reporters to perform all applicable flow meter calibration and accuracy requirements and maintain documentation as specified in 40 CFR 98.3(i).

e. Procedures for Estimating Missing Data

For caprolactam, glyoxal, and glyoxylic acid production, the EPA is finalizing as proposed the requirement that substitute data for each missing production value is the best available estimate based on all available process data or data used for accounting purposes (such as sales records). For the control device destruction efficiency, assuming that the control device operation is generally consistent from year to year, the substitute data value should be the most recent quality assured value.

f. Data Reporting Requirements

The EPA is finalizing, as proposed, that facilities must report annual N_2O emissions (in metric tons) from each production line. In addition, facilities must submit the following data to facilitate understanding of the emissions data and verify the reasonableness of the reported emissions: number of process lines; annual production capacity; annual production; number of operating hours in the calendar year for each process line; abatement technology used and installation dates (if applicable); abatement utilization factor for each process line; number of times in the reporting year that missing data procedures were followed to measure production quantities of caprolactam, glyoxal, or glyoxylic acid (months); and

[43] IPCC 2006. IPCC Guidelines for National Greenhouse Gas Inventories, Volume 3, Industrial Processes and Product Use. Chapter 3, Chemical Industry Emissions. 2006. *www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/3_Volume3/V3_3_Ch3_Chemical_Industry.pdf.*

overall percent N_2O reduction for each chemical for all process lines.

g. Records That Must Be Retained

The EPA is finalizing as proposed the requirement that facilities maintain records documenting the procedures used to ensure the accuracy of the measurements of all reported parameters, including but not limited to, calibration of weighing equipment, flow meters, and other measurement devices. The estimated accuracy of measurements made with these devices must also be recorded, and the technical basis for these estimates must be provided. We are also requiring, as proposed, that facilities maintain records documenting the estimate of production rate and abatement technology destruction efficiency through accounting procedures and process knowledge, respectively.

Finally, the EPA is also requiring, as proposed, the retention of a record of the file generated by the verification software specified in 40 CFR 98.5(b) including:

- Monthly production quantities of caprolactam from all process lines;
- Monthly production quantities of glyoxal from all process lines; and
- Monthly production quantities of glyoxylic acid from all process lines.

We are revising the final rule to clarify that these monthly production quantities must be supplied in metric tons and for each process line. Additionally, we are adding a requirement that facilities maintain records of the destruction efficiency of the N_2O abatement technology from each process line, consistent with requirements of equation 2 to 40 CFR 98.513(e). Facilities will enter this information into EPA's electronic verification software in order to ensure proper verification of the reported emission values. Following electronic verification, facilities will be required to retain a record of the file generated by the verification software specified in 40 CFR 98.5(b), therefore, no additional burden is anticipated.

2. Summary of Comments and Responses on Subpart YY

The EPA previously requested comment on the addition of a caprolactam, glyoxal, and glyoxylic acid production source category as a new subpart to part 98 in the 2022 Data Quality Improvements Proposal. The EPA received no comments regarding the addition of the proposed source category. Subsequently, the EPA proposed to add new subpart YY for caprolactam, glyoxal, and glyoxylic acid production (see section IV.D. of the preamble to the 2023 Supplemental Proposal). The EPA received no comments regarding proposed subpart YY following the 2023 Supplemental Proposal.

EE. Subpart ZZ—Ceramics Manufacturing

We are finalizing the addition of subpart ZZ of part 98 (Ceramics Manufacturing) with revisions in some cases. Section III.EE.1. of this preamble discusses the final requirements of subpart ZZ. The EPA received a number of comments on the proposed subpart ZZ which are discussed in section III.EE.2. of this preamble. We are also finalizing as proposed related confidentiality determinations for data elements resulting from the addition of subpart ZZ as described in section VI. of this preamble.

1. Summary of Final Amendments to Subpart ZZ

This section summarizes the final amendments to subpart ZZ. Major changes to the final rule as compared to the proposed revisions are identified in this section. The rationale for these and any other changes to 40 CFR part 98, subpart ZZ can be found in section III.EE.2. of this preamble. Additional rationale for these amendments is available in the preamble to the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal.

a. Source Category Definition

In the 2023 Supplemental Proposal, the EPA defined the ceramics manufacturing source category as any facility that uses nonmetallic, inorganic materials, many of which are clay-based, to produce ceramic products such as bricks and roof tiles, wall and floor tiles, table and ornamental ware (household ceramics), sanitary ware, refractory products, vitrified clay pipes, expanded clay products, inorganic bonded abrasives, and technical ceramics (*e.g.,* aerospace, automotive, electronic, or biomedical applications).

The EPA also proposed that the ceramics source category would apply to facilities that annually consume at least 2,000 tons of carbonates or 20,000 tons of clay heated to a temperature sufficient to allow the calcination reaction to occur, and operate a ceramics manufacturing process unit. The proposed definition of ceramics manufacturers as facilities that use at least the minimum quantity of carbonates or clay (2,000 tons/20,000 tons) was considered consistent with subpart U of part 98 (Miscellaneous Uses of Carbonate). This minimum 2,000 tons of carbonate use was added to subpart U in the 2009 Final Rule based on comments received on the April 10, 2009 proposed rule (74 FR 16448), where commenters requested a carbonate use threshold of 2,000 tons in order to exempt small operations and activities which use carbonates in trace quantities. The proposed source category definition for ceramics manufacturing in the 2023 Supplemental Proposal established a minimum production level as a means to exclude and thus reduce the reporting burden for small artisan-level ceramics manufacturing processes. We defined a ceramics manufacturing process unit as a kiln, dryer, or oven used to calcine clay or other carbonate-based materials for the production of a ceramics product.

The EPA is finalizing the definition of the source category with one change. We are revising the minimum production level in the definition from "at least 2,000 tons of carbonates or 20,000 tons of clay which is heated to a temperature sufficient to allow the calcination reaction to occur" to "at least 2,000 tons of carbonates, either as raw materials or as a constituent in clay, which is heated to a temperature sufficient to allow the calcination reaction to occur." These final revisions focus the production level on the carbonates contained within the raw material rather than the total tons of clay; the final revisions will provide a more accurate means of assessing applicability. Facilities will be required to estimate their carbonate usage using available records to determine applicability. For example, facilities that use clay as a raw material input could calculate whether they meet the carbonate use threshold by multiplying the amount of clay they consume (and heat to calcination) annually by the weight fraction of carbonates contained in the clay. These final revisions add two harmonizing edits to 40 CFR 98.523(b)(1) and 98.526(c)(2) to clarify that the carbonate-based raw materials include clay.

b. Reporting Threshold

In the 2023 Supplemental Proposal, the EPA proposed that facilities must report under subpart ZZ if they met the definition of the source category and if their estimated combined emissions (including from stationary combustion and all applicable source categories) exceed a 25,000 $mtCO_2e$ threshold. We are finalizing the threshold as proposed. The final definition of ceramics manufacturers as facilities that use at least the minimum quantity of carbonates (2,000 tons, either as raw materials or as a constituent in clay) and

the 25,000 mtCO_2e threshold are both expected to ensure that small ceramics manufacturers are excluded. It is estimated that over 25 facilities will meet the definition of a ceramics manufacturer and the threshold of 25,000 mtCO_2e for reporting. For a full discussion of this analysis, section IV.E. of the preamble to the 2023 Supplemental Proposal.

c. Calculation Methods

In the 2023 Supplemental Proposal, the EPA reviewed the production processes and available emissions estimation methods for ceramics manufacturing and proposed that only CO_2 emissions would be estimated from these processes. The EPA also proposed to require the reporting of combustion emissions, including CO_2, CH_4, and N_2O from the ceramics manufacturing unit and other combustion sources on site.

In the 2023 Supplemental Proposal, the EPA reviewed the production processes and available emissions estimation methods for ceramics manufacturing including a basic mass balance methodology that assumed a fixed percentage for carbonates consumed (IPCC Tier 1), a carbon balance methodology (IPCC Tier 3) based on carbon content and the mass of materials input, and direct measurement using CEMS (see section IV.C.5. of the preamble to the 2023 Supplemental Proposal). We are finalizing, as proposed, two different methods for quantifying GHG emissions from ceramics manufacturing, depending on current emissions monitoring at the facility. If a qualified CEMS is in place, the CEMS must be used. Otherwise, the facility can elect to either install a CEMS or elect to use the carbon mass balance method.

Direct measurement using CEMS. Facilities with a CEMS that meet the requirements in subpart C of part 98 (General Stationary Fuel Combustion) will be required to use CEMS to estimate the combined process and combustion CO_2 emissions. The CEMS measures CO_2 concentration and total exhaust gas flow rate for the combined process and combustion source emissions. CO_2 mass emissions will be calculated from these measured values using equation C–6 and, if necessary, equation C–7 in 40 CFR 98.33(a)(4). The combined process and combustion CO_2 emissions will be calculated according to the Tier 4 Calculation Methodology specified in 40 CFR 98.33(a)(4). Facilities will be required to use subpart C to estimate emissions of CO_2, CH_4, and N_2O from stationary combustion.

Carbon balance method. For facilities using carbon mass balance method, the carbon content and the mass of carbonaceous materials input to the process must be determined. The facility must measure the consumption of specific process inputs and the amounts of these materials consumed by end-use/product type. Carbon contents of materials must be determined through the analysis of samples of the material or from information provided by the material suppliers. Additionally, the quantities of materials consumed and produced during production must be measured and recorded. CO_2 emissions are estimated by multiplying the carbon content of each raw material by the corresponding mass, by a carbonate emission factor, and by the decimal fraction of calcination achieved for that raw material. We are finalizing the carbonate emission factors provided in table 1 to subpart ZZ of part 98 as proposed. These factors, pulled from table N–1 to subpart N of part 98, and from Table 2.1 of the 2006 IPCC Guidelines,[44] are based on stoichiometric ratios and represent the weighted average of the emission factors for each particular carbonate. Emission factors provided by the carbonate vendor for other minerals not listed in table 1 to subpart ZZ may also be used.

For any stationary combustion units included at the facility, facilities will be required to follow subpart C to estimate emissions of CO_2, CH_4, and N_2O from stationary combustion. Use of facility specific information under the carbon mass balance method is consistent with IPCC Tier 3 methods and is the preferred method for estimating emissions for other GHGRP sectors.

d. Monitoring, QA/QC, and Verification Requirements

The EPA is finalizing, as proposed, two separate monitoring methods: direct measurement and a mass balance emission calculation.

Direct measurement using CEMS. We are finalizing the CEMS monitoring requirements as proposed. In the case of ceramics manufacturing, process and combustion GHG emissions from ceramics process units are typically emitted from the same stack. If facilities use an existing CEMS to meet the monitoring requirements, they will be required to use CEMS to estimate CO_2 emissions. Where the CEMS capture all combustion- and process-related CO_2 emissions, facilities will be required to follow the requirements of subpart C of part 98 to estimate all CO_2 emissions from the industrial source. The CEMS method requires both a continuous CO_2 concentration monitor and a continuous volumetric flow monitor. To qualify as a CEMS, the monitors will be required to be installed, operated, and calibrated according to subpart C of part 98 (40 CFR 98.33(a)(4)), which is consistent with CEMS requirements in other GHGRP subparts.

Carbon balance method. We are finalizing the carbon mass balance method as proposed, with one change. The carbon mass balance method requires monitoring of mass quantities of carbonate-based raw material (*e.g.,* clay) fed to the process, establishing the mass fraction of carbonate-based minerals in the raw material, and an emission factor based on the type of carbonate consumed. The mass quantities of carbonate-based raw materials consumed by each ceramics process unit can be determined using direct weight measurement of plant instruments or techniques used for accounting purposes, such as calibrated scales, weigh hoppers, or weigh belt feeders. The direct weight measurement can then be compared to records of raw material purchases for the year.

For the carbon content of the materials used to calculate process CO_2 emissions, the final rule requires that the owner or operator determine the carbon mass fraction either by using information provided by the raw material supplier, by collecting and sending representative samples of each carbonate-based material consumed to an off-site laboratory for a chemical analysis of the carbonate content (weight fraction), or by choosing to use the default value of 1.0. The use of 1.0 for the mass fraction assumes that the carbonate-based raw material comprises 100 percent of one carbonate-based mineral. We are revising the final rule to also state that where it is determined that the mass fraction of a carbonate-based raw material is below the detection limit of available testing standards, the facility must assume a default of 0.005 for that material.

We are revising the final rule to allow facilities that determine the carbonate-based mineral mass fractions of a carbonate-based material to use additional sampling and chemical analysis methods to provide additional flexibility for facilities. Specifically, we are revising 40 CFR 98.524(b) from requiring sampling and chemical analysis using consensus standards that specify x-ray fluorescence to requiring that facilities use an ''x-ray fluorescence test, x-ray diffraction test, or other enhanced testing method published by an industry consensus standards

[44] IPCC Guidelines for National Greenhouse Gas Inventories, Volume 3, Industrial Processes and Product Use, Mineral Industry Emissions. 2006. *https://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/3_Volume3/V3_2_Ch2_Mineral_Industry.pdf.*

organization'' (*e.g.,* ASTM, American Society of Mechanical Engineers (ASME), American Petroleum Institute (API)). The final rule requires the carbon content be analyzed at least annually to verify the mass fraction data provided by the supplier of the raw material.

For the ceramics manufacturing source category, we are finalizing the QA/QC requirements as proposed. Reporters must calibrate all meters or monitors and maintain documentation of this calibration as documented in subpart A of part 98 (General Provisions). These meters or monitors should be calibrated prior to the first reporting year, using a suitable method published by a consensus standards organization, and will be required to be recalibrated either annually or at the minimum frequency specified by the manufacturer. In addition, any flow rate monitors used for direct measurement will be required to comply with QA/QC procedures for daily calibration drift checks and quarterly or annual accuracy assessments, such as those provided in Appendix F to part 60 or similar QA/QC procedures. We are finalizing these requirements to ensure the quality of the reported GHG emissions and to be consistent with the current requirements for CEMS measurements within subparts A (General Provisions) and C of the GHGRP. For measurements of carbonate content, reporters will assess representativeness of the carbonate content received from suppliers with laboratory analysis.

e. Procedures for Estimating Missing Data

We are finalizing the procedures for estimation of missing data as proposed. The final rule requires the use of substitute data whenever a quality-assured value of a parameter that is used to calculate emissions is unavailable, or ''missing.'' For example, if the CEMS malfunctions during unit operation, the substitute data value would be the average of the quality-assured values of the parameter immediately before and immediately after the missing data period. For missing data on the amounts of carbonate-based raw materials consumed, we are finalizing that reporters must use the best available estimate based on all available process data or data used for accounting purposes, such as purchase records. For missing data on the mass fractions of carbonate-based minerals in the carbonate-based raw materials, reporters will assume that the mass fraction of each carbonate-based mineral is 1.0. The use of 1.0 for the mass fraction assumes that the carbonate-based raw material comprises 100 percent of one carbonate-based mineral. Missing data procedures will be applicable for CEMS measurements, mass measurements of raw material, and carbon content measurements.

f. Data Reporting Requirements

The EPA is finalizing the data reporting requirements for subpart ZZ as proposed, with one minor revision. Each ceramics manufacturing facility must report the annual CO_2 process emissions from each ceramics manufacturing process, as well as any stationary fuel combustion emissions. In addition, facilities must report additional information that forms the basis of the emissions estimates so that we can understand and verify the reported emissions. For ceramic manufacturers, the additional information will include: the total number of ceramics process units at the facility and the total number of units operating; annual production of each ceramics product for each process unit and for all ceramics process units combined; the annual production capacity of each ceramics process unit; and the annual quantity of carbonate-based raw material charged to each ceramics process unit and for all ceramics process units combined. The EPA has revised the final rule to clarify at 40 CFR 98.526(c) that facilities that use the carbon balance method must also report the annual quantity of each carbonate-based raw material (including clay) charged to each ceramics process unit. This change is consistent with the requirements the EPA proposed for facilities conducting direct measurement using CEMS, and is not anticipated to substantively impact the burden to reporters as proposed. For ceramic manufacturers with non-CEMS units, the finalized rules will also require reporting of the following information: the method used for the determination for each carbon-based mineral in each raw material; applicable test results used to verify the carbonate based mineral mass fraction for each carbonate-based raw material charged to a ceramics process unit, including the date of test and test methods used; and the number of times in the reporting year that missing data procedures were used.

g. Records That Must Be Retained

The EPA is finalizing the record retention requirements of subpart ZZ as proposed. All facilities are required to maintain monthly records of the ceramics manufacturing rate for each ceramics process unit and the monthly amount of each carbonate-based raw material charged to each ceramics process unit.

For facilities that use the carbon balance procedure, the final rule requires facilities to also maintain monthly records of the carbonate-based mineral mass fraction for each mineral in each carbonate-based raw material. Additionally, facilities that use the carbon balance procedure will be required to maintain (1) records of the supplier-provided mineral mass fractions for all raw materials consumed annually; (2) results of all analyses used to verify the mineral mass fraction for each raw material (including the mass fraction of each sample, the date of test, test methods and method variations, equipment calibration data, and identifying information for the laboratory conducting the test); and (3) annual operating hours for each unit. If facilities use the CEMS procedure, they are required to maintain the CEMS measurement records.

Procedures for ensuring accuracy of measurement methods, including calibration, must be recorded. The final rule requires records of how measurements are made, including measurements of quantities of materials used or produced and the carbon content of minerals in raw materials.

Finally, the final rule requires the retention of a record of the file generated by the verification software specified in 40 CFR 98.5(b) including:

- Annual average decimal mass fraction of each carbonate-based mineral per carbonate-based raw material for each ceramics process unit (percent by weight expressed as a decimal fraction);
- Annual mass of each carbonate-based raw material charged to each ceramics process unit (tons); and
- The decimal fraction of calcination achieved for each carbonate-based raw material for each ceramics process unit (percent by weight expressed as a decimal fraction).

2. Summary of Comments and Responses on Subpart ZZ

This section summarizes the major comments and responses related to the proposed subpart ZZ. The EPA previously requested comment on the addition of ceramics manufacturing sources category as a new subpart to part 98 in the 2022 Data Quality Improvements Proposal. The EPA received some comments for subpart ZZ on the 2022 Data Quality Improvements Proposal; the majority of these comments were previously addressed in the preamble to the 2023 Supplemental Proposal, wherein the EPA proposed to add new subpart ZZ for ceramics manufacturing (see section III.E. of the

preamble to the 2023 Supplemental Proposal). The EPA received additional comments regarding the proposed subpart ZZ following the 2023 Supplemental Proposal. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to subpart ZZ.

Comments: One commenter objected to the EPA's inclusion of the brick manufacturing industry in proposed subpart ZZ. The commenter asserted that GHG emissions from the brick industry represent only about 0.027 percent of U.S. anthropogenic emissions, stating that any relative improvement in accuracy of emissions would not change the fact that GHG emissions from brick manufacturing are a very small fraction of the national total.

The commenter provided a number of reasons to exclude brick manufacturing from subpart ZZ. First, the commenter contested the EPA's assumption that all ceramics manufacturing use materials with significant carbonate content. The commenter stated that the materials used for the production of brick are low carbonate clay and shale materials that should not be characterized as ''carbonate-based materials,'' and that the various processes used to prepare raw materials and to form and fire brick are such that higher carbonate materials cannot be used. The commenter added that high carbonate materials can result in durability problems of the brick, ranging from cosmetic ''lime pops'' to scenarios where the brick can actually fail in service. The commenter further stated that the majority production of brick in the United States is red bodied brick, and therefore the use of carbonates including limestone are undesirable, due to bleaching of the red color during firing.

The commenter explained that the EPA's proposal assumes a carbonate content of 10–15 percent, whereas tested averages for brick making materials average 0.58 percent. The commenter provided a table of carbonate brick values based on testing from the NBRC (National Brick Research Center at Clemson University). The commenter stated that, as such, the actual brick making carbonate percentages are only about 3.8–5.8 percent (0.58 percent divided by 10 percent and 15 percent, respectively) of the carbonate material percentages in the proposed rule. The commenter estimated that based on this determination, the inclusion of carbonate process emissions would only increase reported emissions from a facility by about 2.10 percent, and few, if any, additional sites not already reporting exceeding the 25,000 mtCO_2e reporting threshold would be required to report. The commenter added that even if facilities do not meet the threshold, the added requirements would impose on all sites additional testing and measurement requirements to determine if they exceed the reporting threshold. The commenter stated that the associated costs do not justify the requirements.

The commenter stated that a limited number of brickmaking sites add small amounts of carbonates to some of their products for various reasons. The commenter explained that some manufacturers add barium carbonate to the brick body mix to prevent soluble salts from forming on the final product. In such cases, the commenter noted that barium carbonate is added typically in the range of 0.05 to 0.1 percent. The commenter also stated that sodium carbonate (added in the range of 0.5 percent) is sometimes used to improve the uptake of water during the brick forming process. The commenter asserted that in such cases, if the additional usages of carbonates are significant, they already would be reported under subpart U.

The commenter noted that the EPA's existing methods for estimating GHG emissions from the brick manufacturing industry are good enough to adequately inform the Agency's policy/regulatory decision making and to satisfy the EPA's desire and obligation to maintain an accurate national GHG emissions inventory. The commenter suggested that the EPA could, in lieu of annual reporting, issue a one-time information collection request.

Response: The EPA has considered the information provided by the commenter and is finalizing the addition of the ceramics category to include the brick industry. Consistent with the other source categories of 40 CFR part 98, requiring annual reporting of data for ceramics facilities is preferred to a one-time information collection request. The collection of annual data will help the EPA to understand changes in industry emissions and trends over time. The snapshot of information provided by a one-time information collection request would not provide the type of ongoing information which could inform potential legislation or EPA policy. Collecting annual data also allows us to incorporate accurate time-series emissions changes for the ceramics industry in the GHG Inventory and other EPA analyses. Further, including brick manufacturing in the ceramics source category is consistent with the 2006 IPCC Guidelines for National Greenhouse Gas Inventories.[45] While the commenter asserts that brick manufacturing is a small percentage of the total national GHG emissions, the ceramics subpart would cover more industries than just brick manufacturing and is anticipated to cover emissions comparable to other existing subparts. We have included both an emissions threshold and a carbonate use threshold in order to exempt small facilities or those with minor emissions.

Rather than exempting the brick industry from the ceramics subpart entirely, we have taken the commenter's concerns into account and are modifying the definition of the source category such that the subpart ''would apply to facilities that annually consume at least 2,000 tons of carbonates, either as raw materials or as a constituent in clay . . .''. This is in contrast to the original proposed definition which included the phrase ''or 20,000 tons of clay.'' This revised carbonate use threshold will exclude and thus avoid the reporting burden for facilities that use low annual quantities of carbonates, such as brick manufacturers that use low-carbonate clay. Facilities could estimate their carbonate usage to determine their applicability for whether they meet this carbonate use threshold by multiplying the annual amount of clay consumed as a raw material (and heated to calcination) by the weight fraction of carbonates contained in the clay.

Comment: One commenter objected to the proposed measurement protocols of subpart ZZ and indicated that the methods are infeasible for brick manufacturing materials. The commenter stated that the proposal cites ''suitable chemical analysis methods include using an x-ray fluorescence standard method.'' The commenter asserted that the use of x-ray fluorescence requires a minimum of at least 2.0 percent of any single carbonate material to speciate and determine an amount, which is higher than the total of all carbonates in brick making material, which the commenter

[45] IPCC Guidelines for National Greenhouse Gas Inventories, Volume 3, Industrial Processes and Product Use, Mineral Industry Emissions. 2006. Prepared by the National Greenhouse Gas Inventories Programme, Eggleston H.S., Buendia L., Miwa K., Ngara T. and Tanabe K. (eds). Published: IGES, Japan. *www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/3_Volume3/V3_2_Ch2_Mineral_Industry.pdf.*

provided as 0.58 percent based on testing.

The commenter stated that for brick manufacturing, an alternate measurement of total carbonates such as ASTM E1915 *Standard Test Methods for Analysis of Metal Bearing Ores and Related Materials for Carbon, Sulfur, and Acid-Base Characteristics* (2020)[46] and CO_2e calculation would be a necessary option. The commenter suggested a simpler option would be to develop a default percentage of carbonate in brickmaking raw materials, or an AP–42, Compilation of Air Pollutant Emissions Factors type metric allowing a direct calculation of CO_2e emissions per product throughput tonnage. The commenter contended that this would still yield sufficiently accurate results and suggested that the historical testing data could be the basis for this option.

Response: Upon careful review and consideration, the EPA has considered the information provided by the commenter and will finalize 40 CFR 98.524(b) to allow for other industry standards (*i.e.,* x-ray fluorescence test, x-ray diffraction test, or other enhanced testing method published by an industry consensus standards organization (*e.g.,* ASTM, ASME, API)) as described in 40 CFR 98.524(d) to allow for the flexibility of using the most appropriate standard test method. Furthermore, following consideration of the commenter's recommendation that the EPA include a default carbonate percentage, we are revising 40 CFR 98.524(b) to include a default value of 0.005 for each carbonate material where it is determined that the mass fraction is below the detection limit of available testing standards. The 0.005 value (0.5 percent) is consistent with the example limestone mass fraction that was provided by the Brick Industry Association.[47] Furthermore, the EPA's research into carbonate testing standards revealed that 0.01 (1 percent) is an example detection limit for existing standards (*e.g.,* ASTM F3419–22, *Standard Test Method for Mineral Characterization of Equine Surface Materials by X-Ray Diffraction (XRD) Techniques* (2022)[48]). In scientific settings, it is a common practice to assume that a value of one half the detection limit when concentrations are too low to accurately measure.

Comment: One commenter stated that the proposed rule requirements to report on a unit-by-unit basis instead of facility wide reporting would impose unnecessary burdens on the brick industry. The commenter asserted that most activities (natural gas billing, clay hauling deliveries, material preparation logs, etc.) are done on a per-site basis. The commenter added that there is no benefit to requiring reporting to be done on a per unit basis, and a per site basis should be adequate for determining if emissions exceed the 25,000 metric ton CO_2e reporting threshold.

Response: The EPA routinely collects unit-level capacity data for process equipment in 40 CFR part 98. These unit-level data are essential for quantifying actual GHG emissions from the facility (*e.g.,* the carbon balance method for estimating emissions relies on the actual quantities of carbonate-based raw materials charged to the ceramics process units, not just those delivered to the facility). Furthermore, we use these data to perform statistical analyses as part of our verification process, which allows us to develop ranges of expected emissions by emission source type and successfully identify outliers in the reported data. We disagree that there will be no benefit to reporting on a unit-level basis, as this information will improve the EPA's verification of reported emissions and will provide a more accurate facility-level and national-level emissions profile for the industry.

IV. Final Revisions to 40 CFR Part 9

The EPA is finalizing the proposed amendment to 40 CFR part 9 to include the OMB control number issued under the PRA for the ICR for the GHGRP. The EPA is amending the table in 40 CFR part 9 to list the OMB approval number (OMB No. 2060–0629) under which the ICR for activities in the existing part 98 regulations that were previously approved by OMB have been consolidated. The EPA received no comments on the proposed amendments to 40 CFR part 9 and is finalizing the change as proposed. This codification in the CFR satisfies the display requirements of the PRA and OMB's implementing regulations at 5 CFR part 1320.

V. Effective Date of the Final Amendments

As proposed in the 2023 Supplemental Proposal, the final amendments will become effective on January 1, 2025. As provided under the existing regulations at 40 CFR 98.3(k), the GWP amendments to table A–1 to subpart A will apply to reports submitted by current reporters that are submitted in calendar year 2025 and subsequent years (*i.e.,* starting with reports submitted for RY2024 on or before March 31, 2025). The revisions to GWPs do not affect the data collection, monitoring, or calculation methodologies used by these existing reporters. All other final revisions, which apply to both existing and new reporters, will be implemented for reports prepared for RY2025 and submitted March 31, 2026. Reporters who are newly subject to the rule (facilities that have not previously reported to the GHGRP), either due to final revisions that change what facilities must report under the rule (*e.g.,* newly subject to subparts I or P or subparts WW, XX, YY, or ZZ), or due to the revisions to GWPs in table A–1 to subpart A, will be required to implement all requirements to collect data, including any required monitoring and recordkeeping, on January 1, 2025.

This final rule includes new and revised requirements for numerous provisions under various aspects of GHGRP, including revisions to applicability and updates to reporting, recordkeeping, and monitoring requirements. Further, as explained in section I.B. and this section of this preamble, it amends numerous sections of part 98 for various specific reasons. Therefore, this final rule is a multifaceted rule that addresses many separate things for independent reasons, as detailed in each respective section of this preamble. We intended each portion of this rule to be severable from each other, though we took the approach of including all the parts in one rulemaking rather than promulgating multiple rules to amend each part of the GHGRP. For example, the following portions of this rulemaking are mutually severable from each other, as numbered: (1) revisions to General Provisions, including updates to GWPs in table A–1 to subpart A of part 98 in section III.A.1. of this preamble, (2) revisions to applicability to subparts G (Ammonia Manufacturing), P (Hydrogen Production), and Y (Petroleum Refineries) to address non-merchant hydrogen production in sections III.E., III.I., and III.M.; (3) revisions to applicability to subparts Y and WW (Coke Calciners) to address stand-alone coke calcining operations; (4) revisions to subparts PP (Carbon Dioxide Suppliers) and new subpart VV (Geologic Sequestration of Carbon Dioxide with Enhanced Oil Recovery Using ISO 27916) in sections III.V. and III.Z.; (5) revisions to applicability in subparts UU (Injection of Carbon Dioxide) and subpart VV in sections

[46] Available at *https://www.astm.org/e1915-20.html.* Accessed January 9, 2024.

[47] See Docket ID. No. EPA–HQ–OAR–2019–0424–0332 at *www.regulations.gov.*

[48] Available at *https://www.astm.org/f3419-22.html.* Accessed January 9, 2024.

III.Z. and III.AA., (6) other regulatory amendments discussed in section III. and IV. of this preamble, and (7) confidentiality determinations as discussed in section VI. of this preamble. Each of the regulatory amendments in section III. is severable from all the other regulatory amendments in that section, and each of the confidentiality determinations in section VI. is also severable from all the other determinations in that section. If any of the above portions is set aside by a reviewing court, then we intend the remainder of this action to remain effective, and the remaining portions will be able to function absent any of the identified portions that have been set aside. Moreover, this list is not intended to be exhaustive, and should not be viewed as an intention by the EPA to consider other parts of the rule not explicitly listed here as not severable from other parts of the rule.

VI. Final Confidentiality Determinations

This section provides a summary of the EPA's final confidentiality determinations and emission data designations for new and substantially revised data elements included in these final amendments, certain existing part 98 data elements for which no determination has been previously established, certain existing part 98 data elements for which the EPA is amending or clarifying the existing confidentiality determination, and the EPA's final reporting determinations for inputs to equations included in the final amendments. This section also summarizes the major comments and responses related to the proposed confidentiality determinations, emission data designations, and reporting determinations for these data elements.

The EPA is not taking final action on any requirements for subpart W (Petroleum and Natural Gas Systems) in this final rule, therefore, we are not taking any action on confidentiality determinations or reporting determinations proposed for data elements in subpart W of part 98 in the 2022 Data Quality Improvements Proposal. See section I.C. of this preamble for a discussion of the EPA's actions regarding subpart W. Additionally, we are not taking any final action on proposed subpart B (Energy Consumption) in this final rule; therefore we are not taking any action on confidentiality determinations proposed in the 2023 Supplemental Proposal for subpart B. See section III.B. of this preamble for additional information on subpart B.

For all remaining data elements included in the 2022 Data Quality Improvements Proposal or 2023 Supplemental Proposal, this section identifies any changes to the proposed confidentiality determinations, emissions data designations, or reporting determinations in the final rule.

A. EPA's Approach To Assess Data Elements

In the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal, the EPA proposed to assess data elements for eligibility of confidential treatment using a revised approach, in response to *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356 (2019) (hereafter referred to as *Argus Leader*).[49] The EPA proposed that the *Argus Leader* decision did not affect our approach to designating data elements as ''inputs to emission equations'' or our previous approach for designating new and revised reporting requirements as ''emission data.'' We proposed to continue identifying new and revised reporting elements that qualify as ''emission data'' (*i.e.,* data necessary to determine the identity, amount, frequency, or concentration of the emission emitted by the reporting facilities) by evaluating the data for assignment to one of the four data categories designated by the 2011 Final CBI Rule (76 FR 30782, May 26, 2011) to meet the CAA definition of ''emission data'' in 40 CFR 2.301(a)(2)(i) (hereafter referred to as ''emission data categories''). Refer to section II.B. of the July 7, 2010 proposal (75 FR 39094) for descriptions of each of these data categories and the EPA's rationale for designating each data category as ''emission data.'' For data elements designated as ''inputs to emission equations,'' the EPA maintained the two subcategories, data elements entered into e-GGRT's Inputs Verification Tool (IVT) and those directly reported to the EPA. Refer to section VI.C. of the preamble of the 2022 Data Quality Improvements Proposal for further discussion of ''inputs to emission equations.''

In the 2022 Data Quality Improvements Proposal, for new or revised data elements that the EPA did not propose to designate as ''emission data'' or ''inputs to emission equations,'' the EPA proposed a revised approach for assessing data confidentiality. We proposed to assess each individual reporting element according to the new *Argus Leader* standard. So, we evaluated each data element individually to determine whether the information is customarily and actually treated as private by the reporter and proposed a confidentiality determination based on that evaluation.

[49] Available in the docket for this rulemaking (Docket ID. No. EPA–HQ–OAR–2019–0424).

The EPA received several comments on its proposed approach in the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal. The commenters' concerns and the EPA's responses thereto are provided in the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424. Following consideration of the comments received, the EPA is not revising this approach and is continuing to assess data elements for confidentiality determinations as described in the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal. We are also finalizing the specific confidentiality determinations and reporting determinations as described in section VI.B. and VI.C. of this preamble.

B. Final Confidentiality Determinations and Emissions Data Designations

1. Summary of Final Confidentiality Determinations

a. Final Confidentiality Determinations for New and Revised Data Elements

The EPA is making final confidentiality determinations and emission data designations for new and substantially revised data elements included in these final amendments. Substantially revised data elements include those data elements where the EPA is, in this final action, substantially revising the data elements as compared to the existing requirements. Please refer to the preamble to the 2022 Data Quality Improvements Proposal or the 2023 Supplemental Proposal for additional information regarding the proposed confidentiality determinations for these data elements.

For subparts A (General Provisions), C (General Stationary Fuel Combustion), F (Aluminum Production), G (Ammonia Manufacturing), H (Cement Production), P (Hydrogen Production), S (Lime Manufacturing), HH (Municipal Solid Waste Landfills), OO (Suppliers of Industrial Greenhouse Gases), and QQ (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams), the EPA is not finalizing the proposed confidentiality determinations for certain data elements because the

EPA is not taking final action on the requirements to report these data elements at this time (see section III. of this preamble for additional information). These data elements are listed in table 5 of the memorandum ''Confidentiality Determinations and Emission Data Designations for Data Elements in the 2024 Final Revisions to the Greenhouse Gas Reporting Rule,'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424.

For subparts C (General Stationary Fuel Combustion) and PP (Suppliers of Carbon Dioxide), the EPA has revised its final confidentiality determinations or emissions data designations for certain data elements from proposal. For subpart PP, following consideration of public comments, the EPA has revised its final confidentiality determination for eight data elements that were proposed as ''Not Eligible'' to ''Eligible for Confidential Treatment.'' See section VI.B.2. of this preamble for a summary of the related comments and the EPA's response. For subpart C, we identified two revised data elements where the EPA had inadvertently proposed to place the revised version of the data elements into a different emissions data category than the existing version of the data elements (*i.e.,* proposed moving the data elements from one category of emissions data into a different category of emissions data). The EPA has corrected the placement of these data elements from ''Facility and Unit Identifier Information'' to ''Emissions.'' Table 6 of this preamble lists the data elements where the EPA has revised its final confidentiality determinations or emissions data designations as compared to the 2022 Data Quality Improvements Proposal.

TABLE 6—DATA ELEMENTS FOR WHICH THE EPA IS REVISING THE FINAL CONFIDENTIALITY DETERMINATIONS OR EMISSION DATA DESIGNATIONS

Subpart	Citation in 40 CFR part 98	Data element description
C [1]	98.36(c)(1)(vi)	When reporting using aggregation of units, if any of the stationary fuel combustion units burn biomass, the annual CO_2 emissions from combustion of all biomass fuels combined (metric tons).
C [1]	98.36(c)(3)(vi)	When reporting using the common pipe configuration, if any of the stationary fuel combustion units burn biomass, the annual CO_2 emissions from combustion of all biomass fuels combined (metric tons).
PP [2]	98.426(i)(1)	If you capture a CO_2 stream at a facility with a direct air capture (DAC) process unit and electricity (excluding combined heat and power (CHP)) is provided to a dedicated meter for the DAC process unit: annual quantity of electricity (generated on-site or off-site) consumed for the DAC process unit (MWh).
PP [2]	98.426(i)(1)(i)(C)	If you capture a CO_2 stream at a facility with a DAC process unit and electricity (excluding CHP) is provided to a dedicated meter for the DAC process unit: if the electricity is sourced from a grid connection, the name of the electric utility company that supplied the electricity as shown on the last monthly bill issued by the utility company during the reporting period.
PP [2]	98.426(i)(1)(i)(D)	If you capture a CO_2 stream at a facility with a DAC process unit and electricity (excluding CHP) is provided to a dedicated meter for the DAC process unit: if the electricity is sourced from a grid connection, the name of the electric utility company that delivered the electricity.
PP [2]	98.426(i)(1)(i)(E)	If you capture a CO_2 stream at a facility with a DAC process unit and electricity (excluding CHP) is provided to a dedicated meter for the DAC process unit: if the electricity is sourced from a grid connection, the annual quantity of electricity consumed for the DAC process unit (MWh).
PP [2]	98.426(i)(1)(ii)	If you capture a CO_2 stream at a facility with a DAC process unit and electricity (excluding CHP) is provided to a dedicated meter for the DAC process unit: if electricity is sourced from on-site or through a contractual mechanism for dedicated off-site generation, the annual quantity of electricity consumed per applicable source (MWh), if known.
PP [2]	98.426(i)(2)	If you capture a CO_2 stream at a facility with a DAC process unit and you use heat, steam, or other forms of thermal energy (excluding CHP) for the DAC process unit: the annual quantity of heat, steam, or other forms of thermal energy sourced from on-site or through a contractual mechanism for dedicated off-site generation per applicable energy source (MJ), if known.
PP [2]	98.426(i)(3)(i)	If you capture a CO_2 stream at a facility with a DAC process unit and electricity from CHP is sourced from on-site or through a contractual mechanism for dedicated off-site generation: the annual quantity of electricity consumed for the DAC process unit per applicable energy source (MWh), if known.
PP [2]	98.426(i)(3)(ii)	If you capture a CO_2 stream at a facility with a DAC process unit and you use heat from CHP for the DAC process unit: the annual quantity of heat, steam, or other forms of thermal energy from CHP sourced from on-site or through a contractual mechanism for dedicated off-site generation per applicable energy source (MJ), if known.

[1] In the May 26, 2011, final rule (76 FR 30782), this data element was assigned to the ''Emissions Data'' data category and determined to be ''Emissions Data.'' In the 2022 Data Quality Improvements Proposal, the data element was significantly revised, and the EPA proposed that the revised data element would be assigned to the data category ''Facility and Unit Identifier'' and would have a determination of ''Emissions Data.'' We have subsequently determined that the revisions to the data element (revising the language ''if any units burn both fossil fuels and biomass'' with ''if any of the units burn biomass'') is a clarifying change and that the data element was incorrectly assigned to a new data category. Therefore we are finalizing the revised data element in the ''Emissions Data'' data category and determining that it is ''Emissions Data.''

[2] Revised from ''Not Eligible'' to ''Eligible for Confidential Treatment''; see section VI.B.2. of this preamble.

For subparts I (Electronics Manufacturing), P (Hydrogen Production), and ZZ (Ceramics Manufacturing), the EPA is finalizing revisions that include new data elements for which the EPA did not propose a determination. These data elements are listed in table 7 of this preamble and table 6 of the memorandum, ''Confidentiality Determinations and Emission Data Designations for Data Elements in the 2024 Final Revisions to the Greenhouse Gas Reporting Rule,'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424. Because the EPA has not proposed or solicited public comment on a determination for

these data elements, we are not finalizing confidentiality determinations for these data elements at this time.

TABLE 7—NEW DATA ELEMENTS FROM PROPOSAL TO FINAL FOR WHICH THE EPA IS NOT FINALIZING CONFIDENTIALITY DETERMINATIONS OR EMISSION DATA DESIGNATIONS

Subpart	Citation in 40 CFR part 98	Data element description
I	98.96(y)(2)(iv)	For electronics manufacturing facilities, for the technology assessment report required under 40 CFR 98.96(y), for any destruction or removal efficiency data submitted, if you choose to use an additional alternative calculation methodology to calculate and report the input gas emission factors and by-product formation rates: a complete, mathematical description of the alternative method used (including the equation used to calculate each reported utilization and by-product formation rate).
P	98.166(d)(10)	For each hydrogen production process unit, an indication (yes or no) if best available monitoring methods used in accordance with 40 CFR 98.164(c) to determine fuel flow for each stationary combustion unit directly associated with hydrogen production (*e.g.,* reforming furnace and hydrogen production process unit heater).
P	98.166(d)(10)(i)	For each hydrogen production process unit, if best available monitoring methods were used in accordance with 40 CFR 98.164(c) to determine fuel flow for each stationary combustion unit directly associated with hydrogen production, the beginning date of using best available monitoring methods.
P	98.166(d)(10)(ii)	For each hydrogen production process unit, if best available monitoring methods were used in accordance with 40 CFR 98.164(c) to determine fuel flow for each stationary combustion unit directly associated with hydrogen production, the anticipated or actual end date of using best available monitoring methods.
ZZ	98.526(c)(2)	For a facility containing a ceramics manufacturing process, for each ceramics manufacturing process unit, if process CO_2 emissions are calculated according to the procedures specified in 40 CFR 98.523(b), annual quantity of each carbonate-based raw material (including clay) charged (tons) (no CEMS).

In a handful of cases, the EPA has made minor revisions to data elements in this final action as compared to the proposed data element included in either the 2022 Data Quality Improvements Proposal or the 2023 Supplemental Proposal. For certain proposed data elements, we have revised the citations from proposal to final. In other cases, the minor revisions include clarifications to the text. The EPA evaluated these data elements and how they have been clarified in the final rule to verify that the information collected has not substantially changed since proposal. These data elements are listed in table 7 of the memorandum ''Confidentiality Determinations and Emission Data Designations for Data Elements in the 2024 Final Revisions to the Greenhouse Gas Reporting Rule,'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424. Because the information to be collected has not substantially changed since proposal, we are finalizing the confidentiality determinations or emission data designations for these data elements as proposed. For additional information on the rationales for the confidentiality determinations for these data elements, see the preamble to the 2022 Data Quality Improvements Proposal or the 2023 Supplemental Proposal and the memoranda ''Proposed Confidentiality Determinations and Emission Data Designations for Data Elements in Proposed Revisions to the Greenhouse Gas Reporting Rule'' and ''Proposed Confidentiality Determinations and Emission Data Designations for Data Elements in Proposed Supplemental Revisions to the Greenhouse Gas Reporting Rule,'' available in the docket for this rulemaking (Docket ID. No. EPA–HQ–OAR–2019–0424).

For all other confidentiality determinations for the new or substantially revised data reporting elements for these subparts, the EPA is finalizing the confidentiality determinations as they were proposed. Please refer to the preamble to the 2022 Data Quality Improvements Proposal or the 2023 Supplemental Proposal for additional information regarding these confidentiality determinations.

b. Final Confidentiality Determinations and Emission Data Designations for Existing Data Elements for Which EPA Did Not Previously Finalize a Confidentiality Determination or Emission Data Designation

The EPA is finalizing all confidentiality determinations as they were proposed for other part 98 data reporting elements for which no determination has been previously established. The EPA received no comments on the proposed determinations. Please refer to the preamble to the 2022 Data Quality Improvements Proposal or the 2023 Supplemental Proposal for additional information regarding the proposed confidentiality determinations.

c. Final Confidentiality Determinations for Existing Data Elements for Which the EPA is Amending or Clarifying the Existing Confidentiality Determination

The EPA is finalizing as proposed all confidentiality determinations for other part 98 data reporting elements for which the EPA proposed to amend or clarify the existing confidentiality determinations. The EPA received no comments on the proposed determinations. Please refer to the preamble to the 2022 Data Quality Improvements Proposal for additional information regarding the proposed confidentiality determinations.

2. Summary and Response to Public Comments on Proposed Confidentiality Determinations

The EPA received several comments related to the proposed confidentiality determinations. The EPA received minimal comments on the proposed confidentiality determinations for all new or substantially revised data elements, except certain data elements in subparts PP (Suppliers of Carbon Dioxide) and VV (Geologic Sequestration of Carbon Dioxide With Enhanced Oil Recovery Using ISO 27916) as described in this section. Additional comments may be found in the EPA's comment response document in Docket ID. No. EPA–HQ–OAR–2019–

0424. For subparts PP and VV, we received comments questioning the proposed confidentiality determination of certain new and substantially revised data elements in each subpart, including requests that the data elements be treated as confidential. Summaries of the major comments and the EPA's responses thereto are provided below. Additional comments and the EPA's responses may be found in the comment response document noted above.

Comment: One commenter contended that public disclosure of the annual quantity of electricity consumed to power the DAC process unit and natural gas used for thermal energy could undermine the commercial deployment of DAC. The commenter stated that this information should be kept as confidential. The commenter explained that power in a DAC facility is one of the main operating expenses and power consumption is directly related to power cost. The commenter stated that a comprehensive understanding of a DAC unit's power demand, coupled with a basic understanding of the clean power markets in the region where the DAC facility is located, could be used to estimate the DAC power cost. The commenter contended that this knowledge, if available to a competitor or provider of clean power, would affect business-to-business contract negotiations, allow for speculation on potential profit margins on captured CO_2 volumes, and negatively impact the ability of a DAC operator to procure clean power at competitive rates.

The commenter added that many carbon capture technologies will utilize natural gas to provide the thermal energy needed to drive the CO_2 capture process, including DAC facilities. The commenter explained contract negotiations for the supply of natural gas for DAC facilities are competitive and a major operating cost for a DAC facility and information on the annual amount of natural gas consumed by a DAC facility, if available to a competitor or natural gas supplier, will affect the ability of a DAC operator to contract for responsibly sourced natural gas supply at a competitive cost. The commenter requested that natural gas consumption be declared CBI. The commenter added that they still supported the requirement to report on whether flue gas is also captured by the DAC process unit as this requirement allows for a clear distinction of CO_2 captured from the process versus CO_2 captured from the air, increasing public trust in reported CO_2 volumes.

Response: The EPA proposed that 12 new subpart PP data elements in 40 CFR 98.426(i) specific to DAC facilities would not be eligible for confidential treatment. These data elements included: the annual quantities of on-site and off-site electricity consumed for the DAC process unit; the annual quantities of heat, steam, other forms of thermal energy, and combined heat and power (CHP) consumed by the DAC process unit; the state and county where the facility with the DAC process unit is located; the name of the electric utility company that supplied and delivered the electricity if electricity is sourced from a grid connection; the annual quantity of electricity consumed by the DAC process unit supported by billing statements; the annual quantity of electricity, heat, and CHP consumed for the DAC process unit by each applicable source; and whether flue gas is also captured by the DAC process unit when electricity or CHP is generated on-site from natural gas, coal, or oil.

The EPA's proposed determinations were based on research that indicated the proposed data elements are not customarily and actually treated as private by the reporter. We note that this, rather than competitive harm, is now the standard for treating reported data elements as ''Eligible for Confidential Treatment'' or ''Not Eligible'' based on the decision in *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356 (2019). While the commenter explains that there may be competitive harm from releasing electricity and natural gas consumption data in 40 CFR 98.426, they do not clearly demonstrate whether such data are customarily and actually treated as confidential. Following receipt of public comment, the EPA conducted additional research on the public availability of energy use data for DAC and other facilities, and determined that, with the exception of the state and county where the DAC facility is located, the other proposed data elements are not consistently available to the public at this time. As DAC is a nascent field, there are not yet many examples of such facilities to support a determination as to whether the other proposed data elements are typically and actually held confidential. The EPA, therefore, partially agrees with the commenter that certain data elements for DAC process unit energy requirements in 40 CFR 98.426(i) may be treated as confidential by certain facilities. The EPA is, therefore, making a determination of ''Eligible for Confidential Treatment'' for certain data elements. Specifically, the EPA is finalizing the rule with all new data elements in 40 CFR 98.426(i) having the categorical determination of ''Eligible for Confidential Treatment'' except for proposed 40 CFR 98.426(i)(1)(i)(A) and (B), the state and county where the DAC process unit is located, and certain information reported under 40 CFR 98.426(i)(1) through (3), which requires the reporter to indicate each applicable energy source type (*e.g.,* natural gas, oil, coal, nuclear) and provide an indication of whether flue gas is captured (proposed 40 CFR 98.426(i)(1)), respectively. The rule is being finalized with the determination that these four data elements are not eligible for confidential treatment. The requirements to report the state and county are similar to data required to be reported under 40 CFR 98.3(c)(1) that was designated as ''emission data,'' which under CAA section 114 is not entitled to confidential treatment (76 FR 30782, May 26, 2011; CBI Memo, April 29, 2011). Furthermore, the EPA has previously determined that indication of source is not confidential (77 FR 48072, August 13, 2012). Regarding reporting whether flue gas is captured, the EPA has previously determined that an indication of flue gas is ''Not Eligible'' (76 FR 30782, May 26, 2011). While the source of energy would be ''Not Eligible'' for confidential treatment, the actual quantities of energy reported under 40 CFR 98.426(i)(1) through (3) would be ''Eligible for Confidential Treatment.'' The EPA will consider revising the confidentiality status of the energy consumption data elements in the future, as more DAC facilities begin operating and we have a better understanding of how these data are customarily treated. For example, if DAC facilities begin customarily sharing their energy consumption information to advertise their energy efficiency, we may consider revising the confidentiality status to ''No Determination'' or ''Not Eligible for Confidential treatment.''

Comment: The EPA received several comments regarding the confidential treatment of the proposed EOR OMP at 40 CFR 98.488. Several commenters strongly supported the publishing of non-confidential data related to anthropogenic CO_2 volumes permanently stored in in CO_2–EOR operations, including the EOR OMP. Commenters compared the EOR OMP to the MRV plan issued or required under subpart RR, noting that the plans serve very similar purposes and include a geologic characterization of the storage location, information about wells within the storage site area, operations history, monitoring programs, and calculation and quantification methods used to determine the total amount of CO_2

stored in the storage site. One commenter strongly objected to the public disclosure of the OMP. The commenter stated that, unlike an MRV which must receive approval by the EPA under subpart RR, there is no such approval required for an OMP under subpart VV, which is appropriate given the differences in the subpart methodologies. The commenter added that reporting entities are currently free to exercise discretion to publicly disclose their OMPs.

Response: The EPA disagrees with the commenter. The EPA's review and approval of a document does not determine whether the document is eligible for confidential treatment. The EPA proposed that the OMP is not eligible for confidential treatment because it does not consider the data elements in the OMP to be customarily and actually treated as confidential. We note that this, rather than whether the EPA reviews and approves a submission, is the standard for confidentiality of reported data elements based on the *Argus Leader* decision. For example, the OMP shall include geologic characterization of the EOR complex, a description of the facilities within the CO_2–EOR project, a description of all wells and other engineered features in the CO_2–EOR project, the operations history of the project reservoir, descriptions of containment assurance and the monitoring plan, mass of CO_2 previously injected and other information required in the CSA/ANSI ISO 27916:19 standard. This information is normally available to the public through geologic records, construction and operating permitting files, well permits, tax records, and other public records. Furthermore, such information is available in EPA-approved subpart RR MRV plans which have been determined to be not-confidential and are consistently made publicly available on the EPA's website. That the EPA does not have a role in approving the OMP does not mean that the content itself is typically and actually held confidential.

C. Final Reporting Determinations for Inputs to Emission Equations

In the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal, the EPA proposed to assign several data elements to the ''Inputs to Emission Equation'' data category. As discussed in section VI.B.1. of the preamble to the 2022 Data Quality Improvements Proposal, the EPA determined that the *Argus Leader* decision does not affect our approach for handling of data elements assigned to the ''Inputs to Emission Equations'' data category. Data assigned to the ''Inputs to Emission Equations'' data category are assigned to one of two subcategories, including ''inputs to emission equations'' that must be directly reported to the EPA, and ''inputs to emission equations'' that are not reported but are entered into the EPA's Inputs Verification Tool (IVT). The EPA received no comments specific to the proposed reporting determinations for inputs to emission equations in the proposed rules. Additional information regarding these reporting determinations may be found in section VI.C. of the preamble to the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal.

The EPA is finalizing the reporting determinations for data elements that the EPA proposed to assign to the ''Inputs to the Emission Equation'' data category as they were proposed for all subparts with the exception of certain records proposed for subparts G (Ammonia Production), P (Hydrogen Production), S (Lime Production), and HH (Municipal Solid Waste Landfills). For subparts G, P, and S, the new and substantially revised data elements were not proposed to be included in the reporting section of those subparts but were instead to be retained as records to be input into the EPA's IVT, and the EPA did not evaluate these data elements further. The EPA is not taking final action on these inputs into IVT because the EPA is not taking final action on the requirement to retain these data elements as records (see section III. of this preamble for additional information.) For subpart HH, the EPA is not finalizing the proposed reporting determinations for certain data elements because the EPA is not taking final action on the requirements to report these data elements at this time (see section III. of this preamble for additional information). These data elements are listed in table 3 of the memorandum ''Reporting Determinations for Data Elements Assigned to the Inputs to Emission Equations Data Category in the 2024 Final Revisions to the Greenhouse Gas Reporting Rule,'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424.

In a handful of cases, the EPA has made minor revisions to data elements assigned to the ''Inputs to Emissions Equations'' data category in this final action as compared to the proposed data element included in the 2022 Data Quality Improvements Proposal or the 2023 Supplemental Proposal. For certain proposed data elements, we have revised the citations from proposal to final. In other cases, the minor revisions include clarifications to the text. The EPA evaluated these inputs to emissions equations and how they have been clarified in the final rule to verify that the data element has not substantially changed since proposal. These data elements and how they have been clarified in the final rule are listed in table 4 of the memorandum ''Reporting Determinations for Data Elements Assigned to the Inputs to Emission Equations Data Category in the 2024 Final Revisions to the Greenhouse Gas Reporting Rule,'' available in the docket to this rulemaking, Docket ID. No. EPA–HQ–OAR–2019–0424. Because the input has not substantially changed since proposal, we are finalizing the proposed reporting determinations for these data elements as proposed. For additional information on the rationale for the reporting determinations for the data elements, see the preamble to the 2022 Data Quality Improvements Proposal or the 2023 Supplemental Proposal and the memorandums ''Proposed Reporting Determinations for Data Elements Assigned to the Inputs to Emission Equations Data Category in Proposed Revisions to the Greenhouse Gas Reporting Rule'' and ''Proposed Reporting Determinations for Data Elements Assigned to the Inputs to Emission Equations Data Category in Proposed Supplemental Revisions to the Greenhouse Gas Reporting Rule,'' available in the docket for this rulemaking (Docket ID. No. EPA–HQ–OAR–2019–0424).

For all other reporting determinations for the data elements assigned to the ''Inputs to Emission Equations'' data category, the EPA is finalizing the reporting determinations as they were proposed. Please refer to the preamble to the 2022 Data Quality Improvements Proposal or the 2023 Supplemental Proposal for additional information.

VII. Impacts and Benefits of the Final Amendments

This section of the preamble examines the costs and economic impacts of the final rule and the estimated impacts of the rule on affected entities, in addition to the benefits of the final rule. The revisions in this final rule are anticipated to increase burden in cases where the amendments expand the applicability, monitoring, or reporting requirements of part 98. In some cases, the final amendments are anticipated to decrease burden where we streamlined the rule to remove notification or reporting requirements or simplify monitoring and reporting requirements. The final rule consolidates amendments

from the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal that revise 32 subparts that directly affect 30 industries—including revisions to update the GWPs in table A–1 to subpart A of part 98 that affect the number of facilities required to report under part 98; revisions to implement five new source categories or to expand existing source categories that may require facilities to newly report or to report under new provisions; and revisions to add new reporting requirements to a number of subparts that will improve the quality of the data collected under part 98. The bulk of costs associated with the final rule includes those costs to facilities that would be required to newly report under part 98 (subparts I, P, W, DD, HH, II, OO, TT, WW, XX, YY, and ZZ). However, the majority of subparts affected will reflect a modest increase in burden to individual reporters. As discussed in the preamble to the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal, in several cases the final rule amendments are anticipated to result in a decrease in burden. In some cases we have quantified where the final rule would result in a decrease in burden for certain reporters, but in other cases we were unable to quantify this decrease. The final revisions also include minor amendments, corrections, and clarifications, including simple revisions of requirements such as clarifying changes to definitions, calculation methodologies, monitoring and quality assurance requirements, and reporting requirements. These revisions clarify part 98 to better reflect the EPA's intent, and do not present any additional burden on reporters. The impacts of the final rule generally reflect an increase in burden for most subparts.

The EPA received a number of comments on the proposed revisions and the impacts of the proposed revisions in both the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal. See the document ''Summary of Public Comments and Responses for 2024 Final Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule'' in Docket ID. No. EPA–HQ–OAR–2019–0424 for a complete listing of all comments and responses related to the impacts of the proposed rules. Following consideration of these comments, the EPA has, in some cases, revised the final rule requirements and updated the impacts analysis to reflect these changes.

As noted in section I.C. of this preamble, although the EPA proposed amendments to subpart W (Petroleum and Natural Gas Systems) in the 2022 Data Quality Improvements Proposal, this final rule does not address implementation of these revisions to subpart W, which the EPA is reviewing in concurrent rulemakings. Additionally, as stated in section III.B. of this preamble, the EPA is not taking final action on its proposed amendments to add a source category for collection of data on energy consumption (subpart B) at this time. Accordingly, the impacts of the final rule do not reflect the costs for these proposed revisions.

For some subparts, we are not taking final action on revisions to calculation, monitoring, or reporting requirements that would have required reporters to collect or submit additional data. For example, for subpart C (General Stationary Fuel Combustion), we are not taking final action on proposed revisions to (1) add new reporting for the unit type, maximum rated heat input capacity, and an estimate of the fraction of the total annual heat input from each unit in either an aggregation of units or common pipe configuration (excluding units less than 10 mmBtu/hour); and (2) add new reporting to identify whether any unit in the configuration (individual units, aggregation of units, common stack, or common pipe) is an EGU, and, for multi-unit configurations, an estimated decimal fraction of total emissions from the group that are attributable to EGU(s) included in the group. For subparts G (Ammonia Production), P (Hydrogen Production), S (Lime Production), and HH (Municipal Solid Waste Landfills) we are not taking final action on certain revisions to the calculation methodologies that would have revised how data is collected and reported in e-GGRT. Similarly, we are not taking final action on certain data elements that were proposed to be added to subparts A (General Provisions), F (Aluminum Production), G (Ammonia Production), H (Cement Production), P, S (Lime Production), HH, OO (Suppliers of Industrial Greenhouse Gases), and QQ (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment and Closed-Cell Foams). Therefore, the final burden for these subparts has been revised to reflect only those requirements that are being finalized, and is lower than proposed.

In a few cases, the EPA has adjusted the burden of the final rule to account for additional costs associated with the final rule. In these cases, we have made minor adjustments to the reporting and recordkeeping requirements in the final rule. Specifically, we are finalizing changes from the proposed rule that would add 8 new data elements to subparts I, P, DD, and ZZ (see section III. of this preamble for additional information). The final rule burden estimate has been adjusted to include additional time and labor for these activities, which the EPA estimates is minimal for the reasons described in section III. of this preamble. Finally, the burden for the activities in the final rule has been adjusted to reflect updates to the estimated number of affected reporters based on a review of data from RY2022 reporting.

As discussed in section V. of this preamble, the final rule will be implemented on January 1, 2025, and will apply to RY2025 reports. Costs have been estimated over the three years following the year of implementation. One-time implementation costs are incorporated into first year costs, while subsequent year costs represent the annual burden that will be incurred in total by all affected reporters. The incremental implementation labor costs for all subparts include $2,684,681 in RY2025, and $2,671,831 in each subsequent year (RY2026 and RY2027). The incremental implementation labor costs over the next three years (RY2025 through RY2027) total $8,028,343. There is an additional incremental burden of $2,733,937 for capital and O&M costs in RY2025 and in each subsequent year (RY2026 and RY2027), which reflects changes to applicability and monitoring for subparts I, P, W, V, Y, DD, HH, II, OO, TT, UU and new subparts VV, WW, XX, YY, and ZZ. The incremental non-labor costs for RY2025 through RY2027 total $8,201,812 over the next three years. The incremental burden is summarized by subpart for the rule changes that are finalized for initial and subsequent years in table 8 of this preamble. Note that subparts A, U, FF, and RR only include revisions that are clarifications or harmonizing changes that would not result in any changes to burden, and are not included in table 8 of this preamble.

TABLE 8—ANNUAL INCREMENTAL BURDEN OF THE FINAL RULE, BY SUBPART

Subpart	Number of affected facilities	Labor costs		Capital and O&M
		Initial year	Subsequent years	
C—General Stationary Fuel Combustion Sources [a]				
Facilities Reporting only to Subpart C	133	($1,446)	($1,446)	
Facilities Reporting to Subpart C plus another subpart	177	(979)	(979)	
G—Ammonia Manufacturing	29	119	119	
H—Cement Production	94	1,999	1,999	
I—Electronics Manufacturing [b c]	48	19,651	18,023	$62
N—Glass Production	101	2,074	2,074	
P—Hydrogen Production [b]	114	7,497	7,497	2,561
Q—Iron and Steel Production	121	1,485	1,485	
S—Lime Manufacturing	71	1,186	1,186	
V—Nitric Acid Production [d e]	1	(2,680)	(2,680)	(11,085)
W—Petroleum and Natural Gas Systems [d]	188	2,433,058	2,433,058	2,717,864
X—Petrochemical Production	31	618	618	
Y—Petroleum Refineries [f]	57	(6,133)	(6,133)	(3,930)
AA—Pulp and Paper Manufacturing	1	104	104	
BB—Silicon Carbide Production	1	20	20	
DD—Electrical Transmission [b]	95	15,278	15,278	3,119
GG—Zinc Production	5	20	20	
HH—Municipal Solid Waste Landfills [b]	1,129	84,651	81,793	374
II—Industrial Wastewater Treatment [d]	2	5,288	4,713	3,077
OO—Suppliers of Industrial Greenhouse Gases [a]	121	6,884	6,884	62
PP—Suppliers of Carbon Dioxide	22	872	872	
QQ—Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams	33	249	249	
SS—Electrical Equipment Manufacture or Refurbishment	5	358	358	
TT—Industrial Waste Landfills [b d]	1	4,853	3,934	62
UU—Injection of Carbon Dioxide [g]	2	(1,886)	(1,886)	(125)
VV—Geologic Sequestration of Carbon Dioxide with Enhanced Oil Recovery Using ISO 27916 [g]	2	1,882	3,443	250
WW—Coke Calciners	15	37,847	34,525	19,649
XX—Calcium Carbide Production	1	2,849	2,627	62
YY—Caprolactam, Glyoxal, and Glyoxylic Acid Production	6	12,285	11,089	374
ZZ—Ceramics Manufacturing	25	56,678	52,987	1,559
Total		2,684,681	2,671,831	2,733,937

[a] Reflects reduced burden due to revisions to simplify calculation methods and remove reporting requirements.
[b] Applies to reporters that may currently report under existing subparts of part 98 and that are newly subject to reporting under part 98.
[c] Average subsequent year costs for subpart I. Subpart I subsequent year costs include $17,794 in Year 2 and $18,252 in Year 3.
[d] Reflects burden to reporters estimated to be affected due to revisions to table A–1 to subpart A only.
[e] Reflects changes to the number of reporters able to off-ramp from reporting under the part 98 source category.
[f] Reflects changes to the number of reporters with coke calciners reporting under subpart Y that would be required to report under proposed subpart WW.
[g] Reflects changes to the number of reporters reporting under subpart UU who will begin submitting reports under new subpart VV in each year.

Additional details on the EPA's review of the impacts may be found in the memorandum, ''Assessment of Burden Impacts for Final Revisions to the Greenhouse Gas Reporting Rule,'' available in Docket ID. No. EPA–HQ–OAR–2019–0424.

The implementation of the final rule will provide numerous benefits for stakeholders, the Agency, industry, and the general public. The final revisions include improvements to the calculation, monitoring, and reporting requirements, incorporate new data and reflect updated scientific knowledge; provide coverage of new emissions sources and additional sectors; improve analysis and verification of collected data; provide additional data to complement or inform other EPA programs; and streamline calculation, monitoring, or reporting to provide flexibility or increase the efficiency of data collection. The revisions will maintain the quality of the data collected under part 98 where continued collection of information assists in evaluation and support of EPA programs and policies under provisions of the CAA. In some cases, the amendments improve the EPA's ability to assess compliance by revising or adding recordkeeping or reporting elements that will allow the EPA to more thoroughly verify GHG data and advance the ability of the GHGRP to provide access to quality data on greenhouse gas emissions by adding or updating emission factors, revising or adding calculation methodologies, or adding key data elements to improve the usefulness of the data.

Because part 98 is a reporting rule, the EPA did not quantify estimated emission reductions or monetize the benefits from such reductions that could be associated with the final rule. The benefits of the final rule are based on its relevance to policy making, transparency, and market efficiency. The improvements to the GHGRP will benefit the EPA, other policymakers, and the public by increasing the completeness and accuracy of facility emissions data. Public data on emissions allows for accountability of emitters to the public. Improved facility-specific emissions data will aid local, state, and national policymakers as they evaluate and consider future climate change policy decisions and other policy decisions for criteria pollutants, ambient air quality standards, and toxic

air emissions. For example, GHGRP data on petroleum and natural gas systems (subpart W of part 98) were previously analyzed to inform targeted improvements to the 2016 NSPS for the oil and gas industry and to update emission factor and activity data used for that proposal and the final NSPS, as updated in the Inventory (83 FR 52056; October 15, 2018). Similarly, GHGRP data on municipal solid waste landfills (subpart HH of part 98) were previously used to inform the development of the 2016 NSPS and EG for landfills; the EPA was able to update its internal landfills data set and consider the technical attributes of over 1,200 landfills based on data reported under subpart HH. The benefits of improved reporting also include enhancing existing voluntary programs, such as the Landfill Methane Outreach Program (LMOP), which uses GHGRP data to supplement the LMOP Landfill and Landfill Gas Energy Project Database and includes data collected from LMOP Partners about landfill gas energy projects or potential for project development.

The final rule would additionally benefit states by providing improved facility-specific emissions data. Several states use GHGRP data to inform their own policymaking. For example, the state of Hawaii uses GHGRP data to establish an emissions baseline for each facility subject to their GHG Reduction Plan and to assess whether facilities meet their targets in future years.

GHGRP data are also used to improve estimates of GHG emissions internationally. Data collected through the GHGRP complements the Inventory and are used to significantly improve our understanding of key emissions sources by allowing the EPA to better reflect changing technologies and emissions from a wide range of industrial facilities. Specifically, GHGRP data have been used to inform several of the updates to emission estimation methods included in the 2019 Refinement.

Benefits to industry of improved GHG emissions monitoring and reporting from the amendments include the value of having standardized emissions data to present to the public to demonstrate appropriate environmental stewardship, and a better understanding of their emission levels and sources to identify opportunities to reduce emissions. For example, the final rule updates the global warming potential values used under the GHGRP to reflect values from the IPCC AR5 and AR6, which are consistent with the values used under several voluntary standards and frameworks such as the GHG Protocol and Sustainability Accounting Standards Board (SASB), and will provide consistency for company reporting. Businesses and other innovators can use the data to determine and track their GHG footprints, find cost-saving efficiencies that reduce GHG emissions and save product, foster technologies to protect public health and the environment, and to reduce costs associated with fugitive emissions. The final rule will continue to allow for facilities to benchmark themselves against similar facilities to understand better their relative standing within their industry and achieve and disseminate information about their environmental performance.

In addition, transparent, standardized public data on emissions allows for accountability of polluters to the public who bear the cost of the pollution. The GHGRP serves as a powerful data resource and provides a critical tool for communities to identify nearby sources of GHGs and provide information to state and local governments. As discussed in section II. of this preamble, GHGRP data are easily accessible to the public via the EPA's FLIGHT, which allows users to view and sort GHG data by location, industrial sector, and type of GHG emitted, and includes demographic data. Although the emissions reported to the EPA by reporting facilities are global pollutants, many of these facilities also release pollutants that have a more direct and local impact in the surrounding communities. Citizens, community groups, and labor unions have made use of public pollutant release data to negotiate directly with emitters to lower emissions, avoiding the need for additional regulatory action. The final rule would improve the quality and transparency of this reported data to affected communities.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and 14094: Modernizing Regulatory Review

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

B. Paperwork Reduction Act

The information collection activities in this rule have been submitted for approval to the OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned OMB number 2060–0748, EPA ICR number 2773.02. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The EPA has estimated that the final rule will result in an increase in burden, specifically in cases where the amendments expand the applicability, monitoring, or reporting requirements of part 98. In some cases, the final amendments are anticipated to decrease burden where we streamlined the rule to remove notification or reporting requirements or simplify monitoring and reporting requirements. The final rule consolidates amendments from the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal that revise 31 subparts that directly affect 30 industries—including revisions to update the GWPs in table A–1 to subpart A of part 98 that affect the number of facilities required to report under part 98; revisions to implement five new source categories or to expand existing source categories that may require facilities to newly report; and revisions to add new reporting requirements that will improve the quality of the data collected under part 98. The costs associated with the final rule largely reflect the costs to facilities that would be required to newly report under part 98. However, the majority of subparts affected will reflect a modest increase in burden to existing individual reporters.

Further information on the EPA's assessment on the impact on burden can be found in the memorandum ''Assessment of Burden Impacts for Final Revisions for the Greenhouse Gas Reporting Rule,'' available in the docket for this rulemaking (Docket ID. No. EPA–HQ–OAR–2019–0424).

Respondents/affected entities: Owners and operators of facilities that must report their GHG emissions and other data to the EPA to comply with 40 CFR part 98.

Respondent's obligation to respond: The respondent's obligation to respond is mandatory and the requirements in this rule are under the authority provided in CAA section 114.

Estimated number of respondents: 2,701.

Frequency of response: Initially, annually.

Total estimated burden: 25,647 hours (annual average per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $5,410,000 (annual average per year), includes $2,734,000 annualized capital or operation and maintenance costs.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this final action will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities subject to the requirements of this action are small businesses across all sectors encompassed by the rule, small governmental jurisdictions, and small non-profits. In the development of 40 CFR part 98, the EPA determined that some small entities are affected because their production processes emit GHGs that must be reported, because they have stationary combustion units on site that emit GHGs that must be reported, or because they have fuel supplier operations for which supply quantities and GHG data must be reported. Small governments and small non-profits are generally affected because they have regulated landfills or stationary combustion units on site, or because they own a local distribution company (LDC).

The EPA previously conducted screening analyses to identify impacts to small entities during the development of the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal. The EPA conducted small entity analyses that assessed the costs and impacts to small entities in three areas, including: (1) amendments that revise the number or types of facilities required to report (*i.e.,* updates of the GHGRP's applicability to certain sources), (2) changes to refine existing monitoring or calculation methodologies that require collection of additional data, and (3) revisions to reporting and recordkeeping requirements for data provided to the program. The analyses provided the subparts affected, the number of small entities affected, and the estimated impact to these entities based on the total annualized reporting costs of the proposed rules. Details of these analyses are presented in the memoranda, *Assessment of Burden Impacts for Proposed Revisions for the Greenhouse Gas Reporting Rule* (May 2022) and *Assessment of Burden Impacts for Proposed Supplemental Revisions for the Greenhouse Gas Reporting Rule* (April 2023), available in the docket for this rulemaking (Docket ID. No. EPA–HQ–OAR–2019–0424). Based on the results of these analyses, we concluded that the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal will have no significant regulatory burden for any directly regulated small entities and thus would not have a significant economic impact on a substantial number of small entities.

As discussed in sections III. and VII. of this preamble, this action finalizes revisions to part 98 as proposed in the 2022 Data Quality Improvements Proposal and the 2023 Supplemental Proposal, or with minor revisions, and we have revised the cost impacts to reflect the final rule requirements and more recent data. For example, we have updated the impacts to better reflect the number of affected reporters that would be subject to the final requirements, based on a review of RY2022 data. These updates also predominantly include removing or adjusting costs where the EPA is not taking final action on specific proposed revisions, including costs associated with the addition of proposed subpart B (Energy Consumption), certain costs associated with proposed revisions to subpart W (Petroleum and Natural Gas Systems) included in the 2022 Data Quality Improvements Proposal,[50] and costs associated with certain revisions to calculations, monitoring, or reporting requirements for subparts A (General Provisions), C (General Stationary Fuel Combustion), F (Aluminum Production), G (Ammonia Production), H (Cement Production), S (Lime Production), HH (Municipal Waste Landfills), OO (Suppliers of Industrial Greenhouse Gases), and QQ (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment and Closed-Cell Foams). Accordingly, the burden of the final rule is reduced, as compared to the proposals, for facilities that may report for these source categories, including all direct emitting facilities previously proposed to report under subpart B.

The EPA has also adjusted the burden to account for additional costs from changes adopted in the final rule. Specifically, we have adjusted the reporting and recordkeeping requirements for subparts I (Electronics Manufacturing), P (Hydrogen Production), DD (Electrical Transmission and Distribution Equipment Use), HH (Municipal Solid Waste Landfills), and ZZ (Ceramics Manufacturing) to add new data elements for annual reporting across these subparts. The estimated costs associated with the revisions to these subparts for regulated entities are minimal (less than $100 annually), and would not result in costs exceeding more than one percent of sales in any firm size category. Details of this analysis are presented in the memorandum ''Assessment of Burden Impacts for Final Revisions for the Greenhouse Gas Reporting Rule,'' available in Docket ID. No. EPA–HQ–OAR–2019–0424.

The remaining revisions to the final rule include minor clarifications or adjustments to the proposed requirements that are not anticipated to increase the burdens estimated for the 2022 Data Quality Improvements Proposal and 2023 Supplemental Proposal which we previously determined would not have a significant impact on a significant number of small businesses. For these reasons, we have determined that these final revisions are consistent with our prior small entity analyses, and would impose no significant regulatory burden on any directly regulated small entities, and thus would not have a significant economic impact on a substantial number of small entities.

Refer to the memorandum ''Assessment of Burden Impacts for Final Revisions for the Greenhouse Gas Reporting Rule,'' available in Docket ID. No. EPA–HQ–OAR–2019–0424 for further discussion. The EPA continues to conduct significant outreach on the GHGRP and maintains an ''open door'' policy for stakeholders to help inform the EPA's understanding of key issues for the industries.

D. Unfunded Mandates Reform Act (UMRA)

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

E. Executive Order 13132: Federalism

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

[50] The EPA is not taking final action on any revisions to requirements for subpart W (Petroleum and Natural Gas Systems) in this final rule. See sections I.C. and VII. of this preamble for additional information regarding the EPA's actions regarding subpart W and the impacts included in this final rule.

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

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This regulation will apply directly to facilities emitting and supplying GHGs that may be owned by tribal governments that emit GHGs. However, it will only have tribal implications where the tribal entity owns a facility that directly emits GHGs above threshold levels; therefore, relatively few (approximately 10) tribal facilities will be affected. This regulation is not anticipated to impact facilities or suppliers of additional sectors owned by tribal governments.

In evaluating the potential implications for tribal entities, we first assessed whether tribes would be affected by any final revisions that expanded the universe of facilities that would report GHG data to the EPA. The final rule amendments will implement requirements to collect additional data to understand new source categories, new sources of GHG emissions or supply for specific sectors; improve the existing emissions estimation methodologies; and improve the EPA's understanding of the sector-specific processes or other factors that influence GHG emission rates and improve verification of collected data. Of the 254 facilities that we anticipate will be newly required to report under the final revisions, we do not anticipate that there are any tribally owned facilities. As discussed in section VII. of this preamble, we expect the final revisions to table A–1 to part 98 to result in a change to the number of facilities required to report under subparts W (Petroleum and Natural Gas Systems), V (Nitric Acid Production), DD (Electrical Transmission and Distribution Equipment Use), HH (MSW Landfills), II (Industrial Wastewater Treatment), OO (Suppliers of Industrial GHGs), and TT (Industrial Waste Landfills). However, we did not identify any potential sources in these source categories that are owned by tribal entities not already reporting to the GHGRP. Similarly, although we are finalizing amendments that will require some facilities in select source categories not currently subject to the GHGRP to begin implementing requirements under the program, we have not identified, and do not anticipate that any of these affected facilities are owned by tribal governments.

As a second step to evaluate potential tribal implications, we evaluated whether there were any tribally owned facilities that are currently reporting under the GHGRP that will be affected by the final revisions. Tribally owned facilities currently subject to part 98 will only be subject to changes that are improvements or clarifications of requirements and that, for the most part, do not significantly change the existing requirements or result in substantial new activities because they do not require new equipment, sampling, or monitoring. Rather, tribally owned facilities would only be subject to new requirements where reporters would provide data that is readily available from company records. As such, the final revisions will not substantially increase reporter burden, impose significant direct compliance costs for tribal facilities, or preempt tribal law.

Specifically, we identified ten facilities currently reporting to part 98 that are owned by six tribal parent companies. For these six parent companies, we identified facilities in the stationary fuel combustion (subpart C), cement production (subpart H), petroleum and natural gas (subpart W), electrical transmission and distribution equipment use (subpart DD), and MSW landfill (subpart HH) source categories that may be affected by the final revisions.

For stationary fuel combustion, the EPA is not taking final action on proposed revisions to add reporting requirements to subpart C, but is retaining revisions that would remove certain reporting requirements. Therefore, the costs for any tribally-owned facilities currently reporting to subpart C are anticipated to decrease and no facilities are anticipated to be negatively impacted. For petroleum and natural gas facilities, the EPA is not including any revisions to subpart W in this final rule (see section I.C. of this document); therefore, any tribally-owned facilities currently reporting to subpart W are not anticipated to be impacted. Three parent companies include existing facilities that report only under subparts C or W, which are not anticipated to have significant impacts under this rule for the reasons discussed in this section. Therefore, the remaining facilities that could be affected by the final revisions are those that report to subparts H, DD, and HH. For the remaining three parent companies, we reviewed publicly available sales and revenue data to assess whether the costs of the final rule would be significant. Under the final rule, the costs for facilities currently reporting under subparts H, DD, or HH are anticipated to increase by less than $100 per year per subpart. Therefore, we were able to confirm that the costs of the final revisions would not have a significant impact for these sources. Further, based on our review of our small entity analyses (discussed in VIII.C. of this preamble), we do not anticipate the final revisions to subparts H, DD, or HH will impose substantial direct compliance costs on the remaining tribally owned entities.

Although few facilities subject to part 98 are likely to be owned by tribal governments, the EPA previously sought opportunities to provide information to tribal governments and representatives during the development of the proposed and final rules for part 98 subparts that were promulgated on October 30, 2009 (74 FR 52620), July 12, 2010 (75 FR 39736), November 30, 2010 (75 FR 74458), and December 1, 2010 (75 FR 74774 and 75 FR 75076). Consistent with the 2011 EPA Policy on Consultation and Coordination with Indian Tribes,[51] the EPA previously consulted with tribal officials early in the process of developing part 98 regulations to permit them to have meaningful and timely input into its development and to provide input on the key regulatory requirements established for these facilities. A summary of these consultations is provided in section VIII.F. of the preamble to the final rule published on October 30, 2009 (74 FR 52620), section V.F. of the preamble to the final rule published on July 12, 2010 (75 FR 39736), section IV.F. of the preamble to the re-proposal of subpart W (Petroleum and Natural Gas Systems) published on April 12, 2010 (75 FR 18608), and section IV.F. of the preambles to the final rules published on December 1, 2010 (75 FR 74774 and 75 FR 75076). As described in this section, the final rule does not significantly revise the established regulatory requirements and will not substantially change the equipment, monitoring, or reporting activities conducted by these facilities, or result in other substantial impacts for tribal facilities.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory

[51] EPA Policy on Consultation and Coordination with Indian Tribes, May 4, 2011. Available at: *www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.*

action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

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

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

This action involves technical standards. The EPA has decided to incorporate by reference several standards in establishing monitoring requirements in these final amendments.

The EPA currently allows for the use of the *Protocol for Measuring Destruction or Removal Efficiency (DRE) of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing, Version 1,* EPA–430–R–10–003, March 2010 (EPA 430–R–10–003) in other sections of part 98, including subpart I (Electronics Manufacturing). The EPA is adding the use of EPA 430–R–10–003 to subpart I for use for measurement of DREs from abatement systems, including HC fuel CECS, purchased and installed on or after January 1, 2025. EPA 430–R–10–003 provides methods for measuring abatement system inlet and outlet mass or volume flows for single or multi-chamber process tools, accounting for dilution. Anyone may access EPA 430–R–10–003 at *https://www.epa.gov/sites/default/files/2016-02/documents/dre_protocol.pdf.* This standard is available to everyone at no cost; therefore, the method is reasonably available for reporters.

The EPA is allowing the use of an alternate method, ASTM E415–17, *Standard Test Method for Analysis of Carbon and Low-Alloy Steel by Spark Atomic Emission Spectrometry* (2017), for the purposes of subpart Q (Iron and Steel Production) monitoring and reporting. The EPA currently allows for the use of ASTM E415–17 in other sections of part 98, including under 40 CFR 98.144(b) where it can be used to determine the composition of coal, coke, and solid residues from combustion processes by glass production facilities. Therefore, the EPA is allowing ASTM E415–17 to be used in subpart Q. ASTM E415–17 uses spark atomic emission vacuum spectrometry to determine 21 alloying and residual elements in carbon and low-alloy steels. The method is designed for chill-cast, rolled, and forged specimens. (See the end of section VIII.I. of this preamble for availability information.)

The EPA is adding new subpart VV to part 98 for certain EOR operations that choose to use the co-published ISO/CSA standard designated as CSA/ANSI ISO 27916:19, *Carbon dioxide capture, transportation and geological storage—Carbon dioxide storage using enhanced oil recovery (CO_2–EOR),* as a means of quantifying geologic sequestration. The EPA is also clarifying in subpart UU at 40 CFR 98.470(c) and subpart VV at 40 CFR 98.481 that CO_2–EOR projects previously reporting under subpart UU that begin using CSA/ANSI ISO 27916:19 part-way through a reporting year must report under subpart UU for the portion of the year before CSA/ANSI ISO 27916:19 was used and report under subpart VV for the portion of the year once CSA/ANSI ISO 27916:19 began to be used and thereafter. CSA/ANSI ISO 27916:19 identifies and quantifies CO_2 losses (including fugitive emissions) and quantifies the amount of CO_2 stored in association with the CO_2-EOR project. It also shows how allocation rations can be used to account for the anthropogenic portion of the stored CO_2. Anyone may access the standard on the CSA group website (*www.csagroup.org/store*) for additional information. The standard is available to everyone at a cost determined by CSA Group ($225). CSA Group also offers memberships or subscriptions for reduced costs. Because the use of the standard is optional, the cost of obtaining this standard is not a significant financial burden.

The EPA is adding new subpart WW to part 98 (Coke Calciners) and is allowing the use of any one of the following standards for coke calcining facilities: (1) ASTM D3176–15 *Standard Practice for Ultimate Analysis of Coal and Coke,* (2) ASTM D5291–16 *Standard Test Methods for Instrumental Determination of Carbon, Hydrogen, and Nitrogen in Petroleum Products and Lubricants,* and (3) ASTM D5373–21 *Standard Test Methods for Determination of Carbon, Hydrogen, and Nitrogen in Analysis Samples of Coal and Carbon in Analysis Samples of Coal and Coke.* These methods are used to determine the carbon content of petroleum coke. The EPA currently allows for the use of an earlier version of these standard methods for the instrumental determination of carbon content in laboratory samples of petroleum coke in other sections of part 98, including the use of ASTM D3176–89, ASTM D5291–02, and ASTM D5373–08 in 40 CFR 98.244(b) (subpart X—Petrochemical Production) and 40 CFR 98.254(i) (subpart Y—Petroleum Refineries). The EPA is allowing the use of the updated versions of these standards (ASTM D3176–15, ASTM D5291–16, and ASTM D5373–21) to determine the carbon content of petroleum coke for subpart WW (Coke Calciners). ASTM D3176–15 provides direction for a convenient and uniform system of analysis of the ash content and the content of organic constituents in coal and coke; this method references the appropriate ASTM methods for sample collection, preparation, content determination, and provides consistency measures for calculation and reporting of results. ASTM D5291–16 provides a series of test methods for the simultaneous instrumental determination of carbon, hydrogen, and nitrogen in petroleum products and lubricants such as crude oils, fuel oils, additives, and residues; the method allows for a variety of instrumental components and configurations for measurement and calculation of concentrations of carbon, hydrogen, and nitrogen. ASTM D5373–21 provides a methodology for the determination of carbon, hydrogen, and nitrogen content in coal or carbon in coke using furnace combustion and instrument detection systems; the method addresses the determination of carbon in the range of 54.9 percent m/m to 84.7 percent m/m, hydrogen in the range of 3.26 percent m/m to 5.08 percent m/m, and nitrogen in the range of 0.57 percent m/m to 1.76 percent m/m in the analysis sample of coal. (See the end of section VIII.I. of this preamble for availability information.)

We are allowing the use of the following standard for coke calciners subject to subpart WW: NIST HB 44–2023, NIST Handbook 44: *Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices,* 2023 edition. The EPA currently allows for the use of an earlier version of the proposed standard method, *Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices, NIST Handbook 44* (2009), for the calibration and maintenance of instruments used for weighing of mass of samples of petroleum coke in other sections of part 98, including 40 CFR 98.244(b) (subpart X). The EPA is allowing the use of the updated version of this standard, NIST HB 44–2023: *Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices,* 2023 edition, for performing mass measurements of petroleum coke for subpart WW (Coke Calciners). This

standard includes specifications on design of equipment, tolerances to limit the allowable error, sensitivity requirements, and other technical requirements for weighing and measuring devices. Anyone may access the standards on the NIST website (*www.nist.gov/index.html*) for additional information. These standards are available to everyone at no cost; therefore the methods are reasonably available for reporters.

The EPA is adding new subpart XX to part 98 (Calcium Carbide Production) and is allowing the use of one of the following standards for calcium carbide production facilities: (1) ASTM D5373–08 *Standard Test Methods for Instrumental Determination of Carbon, Hydrogen, and Nitrogen in Laboratory Samples of Coal,* or (2) ASTM C25–06, *Standard Test Methods for Chemical Analysis of Limestone, Quicklime, and Hydrated Lime.* ASTM D5373–08 addresses the determination of carbon in the range of 54.9 percent m/m to 84.7 percent m/m, hydrogen in the range of 3.25 percent m/m to 5.10 percent m/m, and nitrogen in the range of 0.57 percent m/m to 1.80 percent m/m in the analysis sample of coal. The EPA currently allows for the use of ASTM D5373–08 in other sections of part 98, including in 40 CFR 98.244(b) (subpart X—Petrochemical Production), 40 CFR 98.284(c) (subpart BB—Silicon Carbide Production), and 40 CFR 98.314(c) (subpart EE—Titanium Production) for the instrumental determination of carbon content in laboratory samples. Therefore, we are allowing the use of ASTM D5373–08 for determination of carbon content of materials consumed, used, or produced at calcium carbide facilities.

The EPA currently allows for the use of ASTM C25–06 in other sections of part 98, including in 40 CFR 98.194(c) (subpart S—Lime Production) for chemical composition analysis of lime products and calcined byproducts and in 40 CFR 98.184(b) (subpart R—Lead Production) for analysis of flux materials such as limestone or dolomite. ASTM C25–06 addresses the chemical analysis of high-calcium and dolomitic limestone, quicklime, and hydrated lime. We are allowing the use of ASTM C25–06 for determination of carbon content of materials consumed, used, or produced at calcium carbide facilities, including analysis of materials such as limestone or dolomite.

Anyone may access the standards on the ASTM website (*www.astm.org/*) for additional information. These standards are available to everyone at a cost determined by the ASTM (between $48 and $92 per standard). The ASTM also offers memberships or subscriptions that allow unlimited access to their methods. The cost of obtaining these methods is not a significant financial burden, making the methods reasonably available for reporters.

The EPA will also make a copy of these documents available in hard copy at the appropriate EPA office (see the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information) for review purposes only. The EPA is not requiring the use of specific consensus standards for new subparts YY (Caprolactam, Glyoxal, and Glyoxylic Acid Production) or ZZ (Ceramics Manufacturing), or for other amendments to part 98.

The following standards appear in the amendatory text of this document and were previously approved for the locations in which they appear:

- ASTM D3176–89 (Reapproved 2002) Standard Practice for Ultimate Analysis of Coal and Coke;
- ASTM D5291–02 (Reapproved 2007) Standard Test Methods for Instrumental Determination of Carbon, Hydrogen, and Nitrogen in Petroleum Products and Lubricants;
- ASTM E1019–08 Standard Test Methods for Determination of Carbon, Sulfur, Nitrogen, and Oxygen in Steel, Iron, Nickel, and Cobalt Alloys by Various Combustion and Fusion Techniques;
- Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices, NIST Handbook 44 (2009);
- ASTM D6866–16 Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis).
- ASTM D7459–08 Standard Practice for Collection of Integrated Samples for the Speciation of Biomass (Biogenic) and Fossil-Derived Carbon Dioxide Emitted from Stationary Emissions Sources.
- ASTM D2505–88 (Reapproved 2004)e1 Standard Test Method for Ethylene, Other Hydrocarbons, and Carbon Dioxide in High-Purity Ethylene by Gas Chromatography.
- T650 om–05 Solids Content of Black Liquor, TAPPI.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this type of action does not directly concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on communities with environmental justice concerns. This action does not affect the level of protection provided to human health or the environment, but instead, addresses information collection and reporting procedures. Although this action does not concern human health or environmental conditions, the EPA identified and addressed environmental justice concerns by promoting meaningful engagement from communities in developing the action, and in developing requirements that improve the quality of data available to communities. The EPA provided multiple public comment periods on the proposed 2022 Data Quality Improvements Proposal (from June 21, 2022 to October 6, 2022) and the 2023 Supplemental Proposal (May 22, 2023 to July 21, 2023), and provided opportunities for virtual public hearing(s) for members of the public to share information or concerns and participate in the decision-making process. Further, the EPA has developed improvements to the GHGRP that benefit the public by increasing the completeness and accuracy of facility emissions data. The data collected through this action will provide an important data resource for communities and the public to understand GHG emissions, including requiring reporting of GHG data from additional emission sources and providing more comprehensive coverage of U.S. GHG emissions. Transparent, standardized public data on emissions allows for accountability of polluters to the public who bear the cost of the pollution. Although the emissions reported to the EPA by reporting facilities are global pollutants, many of these facilities also release pollutants that have a more direct and local impact in the surrounding communities. GHGRP data are easily accessible to the public via the EPA's online data publication tool (FLIGHT), which allows users to view and sort GHG data from over 8,000 entities in a variety of ways including by location, industrial sector, type of GHG emitted, and provides supplementary demographic data that may be useful to communities with environmental justice concerns. As described further in sections II. and III. of this preamble, the final rule improves the quality and transparency of this reported data to affected communities and enables members of the public to have access to and improve their understanding of GHG emissions and pollutants that may impact them.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the 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).

L. Judicial Review

Under CAA section 307(b)(1), any petition for review of this final rule must be filed in the U.S. Court of Appeals for the District of Columbia Circuit by June 24, 2024. This final rule establishes requirements applicable to owners and operators of facilities and suppliers in many industry source categories located across the United States that are subject to 40 CFR part 98 and therefore is ''nationally applicable'' within the meaning of CAA section 307(b)(1).

Further, pursuant to CAA section 307(d)(1)(V), the Administrator has determined that this rule is subject to the provisions of CAA section 307(d). See CAA section 307(d)(1)(V) (the provisions of section 307(d) apply to ''such other actions as the Administrator may determine''). Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. CAA section 307(d)(7)(B) also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, William Jefferson Clinton Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with an electronic copy to the person listed in FOR FURTHER INFORMATION CONTACT, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20004. Note that under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements.

List of Subjects

40 CFR Part 9

Environmental protection, Administrative practice and procedure, Reporting and recordkeeping requirements.

40 CFR Part 98

Environmental protection, Greenhouse gases, Incorporation by reference, Reporting and recordkeeping requirements, Suppliers.

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency amends title 40, chapter I, of the Code of Federal Regulations as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345(d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. Amend § 9.1 by adding an undesignated center heading and an entry for ''98.1–98.528'' in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * *	* *
Mandatory Greenhouse Gas Reporting	
98.1–98.528	2060–0629
* * *	* *

PART 98—MANDATORY GREENHOUSE GAS REPORTING

■ 3. The authority citation for part 98 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart A—General Provision

■ 4. Amend § 98.2 by:
■ a. Revising paragraphs (f)(1) and (i)(1) and (2); and
■ b. Adding paragraph (k).

The revisions and addition read as follows:

§ 98.2 Who must report?

* * * * *

(f) * * *

(1) Calculate the mass in metric tons per year of CO_2, N_2O, each fluorinated GHG, and each fluorinated heat transfer fluid that is imported and the mass in metric tons per year of CO_2, N_2O, each fluorinated GHG, and each fluorinated heat transfer fluid that is exported during the year.

* * * * *

(i) * * *

(1) If reported CO_2e emissions, calculated in accordance with § 98.3(c)(4)(i), are less than 25,000 metric tons per year for five consecutive years, then the owner or operator may discontinue complying with this part provided that the owner or operator submits a notification to the Administrator that announces the cessation of reporting and explains the reasons for the reduction in emissions. The notification shall be submitted no later than March 31 of the year immediately following the fifth consecutive year of emissions less than 25,000 tons CO_2e per year. The owner or operator must maintain the corresponding records required under § 98.3(g) for each of the five consecutive years prior to notification of discontinuation of reporting and retain such records for three years following the year that reporting was discontinued. The owner or operator must resume reporting if annual CO_2e emissions, calculated in accordance with paragraph (b)(4) of this section, in any future calendar year increase to 25,000 metric tons per year or more.

(2) If reported CO_2e emissions, calculated in accordance with § 98.3(c)(4)(i), were less than 15,000 metric tons per year for three consecutive years, then the owner or operator may discontinue complying with this part provided that the owner or operator submits a notification to the Administrator that announces the cessation of reporting and explains the reasons for the reduction in emissions. The notification shall be submitted no later than March 31 of the year immediately following the third consecutive year of emissions less than 15,000 tons CO_2e per year. The owner or operator must maintain the corresponding records required under § 98.3(g) for each of the three consecutive years and retain such records for three years prior to notification of discontinuation of reporting following the year that reporting was discontinued. The owner

or operator must resume reporting if annual CO_2e emissions, calculated in accordance with paragraph (b)(4) of this section, in any future calendar year increase to 25,000 metric tons per year or more.

* * * * *

(k) To calculate GHG quantities for comparison to the 25,000 metric ton CO_2e per year threshold under paragraph (a)(4) of this section for facilities that destroy fluorinated GHGs or fluorinated heat transfer fluids, the owner or operator shall calculate the mass in metric tons per year of CO_2e destroyed as described in paragraphs (k)(1) through (3) of this section.

(1) Calculate the mass in metric tons per year of each fluorinated GHG or fluorinated heat transfer fluid that is destroyed during the year.

(2) Convert the mass of each destroyed fluorinated GHG or fluorinated heat transfer fluid from paragraph (k)(1) of this section to metric tons of CO_2e using equation A–1 to this section.

(3) Sum the total annual metric tons of CO_2e in paragraph (k)(2) of this section for all destroyed fluorinated GHGs and destroyed fluorinated heat transfer fluids.

■ 5. Amend § 98.3 by:

■ a. Revising paragraphs (b)(2), (h)(4), and (k)(1) through (3); and

■ b. Revising and republishing paragraph (l).

The revisions and republication read as follows:

§ 98.3 What are the general monitoring, reporting, recordkeeping and verification requirements of this part?

* * * * *

(b) * * *

(2) For a new facility or supplier that begins operation on or after January 1, 2010 and becomes subject to the rule in the year that it becomes operational, report emissions starting the first operating month and ending on December 31 of that year. Each subsequent annual report must cover emissions for the calendar year, beginning on January 1 and ending on December 31.

* * * * *

(h) * * *

(4) Notwithstanding paragraphs (h)(1) and (2) of this section, upon request by the owner or operator, the Administrator may provide reasonable extensions of the 45-day period for submission of the revised report or information under paragraphs (h)(1) and (2) of this section. If the Administrator receives a request for extension of the 45-day period, by email to an address prescribed by the Administrator prior to the expiration of the 45-day period, the extension request is deemed to be automatically granted for 30 days. The Administrator may grant an additional extension beyond the automatic 30-day extension if the owner or operator submits a request for an additional extension and the request is received by the Administrator prior to the expiration of the automatic 30-day extension, provided the request demonstrates that it is not practicable to submit a revised report or information under paragraphs (h)(1) and (2) of this section within 75 days. The Administrator will approve the extension request if the request demonstrates to the Administrator's satisfaction that it is not practicable to collect and process the data needed to resolve potential reporting errors identified pursuant to paragraph (h)(1) or (2) of this section within 75 days. The Administrator will only approve an extension request for a total of 180 days after the initial notification of a substantive error.

* * * * *

(k) * * *

(1) A facility or supplier that first becomes subject to part 98 due to a change in the GWP for one or more compounds in table A–1 to this subpart, Global Warming Potentials, is not required to submit an annual GHG report for the reporting year during which the change in GWPs is published in the **Federal Register** as a final rulemaking.

(2) A facility or supplier that was already subject to one or more subparts of this part but becomes subject to one or more additional subparts due to a change in the GWP for one or more compounds in table A–1 to this subpart, is not required to include those subparts to which the facility is subject only due to the change in the GWP in the annual GHG report submitted for the reporting year during which the change in GWPs is published in the **Federal Register** as a final rulemaking.

(3) Starting on January 1 of the year after the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking, facilities or suppliers identified in paragraph (k)(1) or (2) of this section must start monitoring and collecting GHG data in compliance with the applicable subparts of part 98 to which the facility is subject due to the change in the GWP for the annual greenhouse gas report for that reporting year, which is due by March 31 of the following calendar year.

* * * * *

(l) *Special provision for best available monitoring methods in 2014 and subsequent years.* This paragraph (l) applies to owners or operators of facilities or suppliers that first become subject to any subpart of this part due to an amendment to table A–1 to this subpart, Global Warming Potentials.

(1) *Best available monitoring methods.* From January 1 to March 31 of the year after the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking, owners or operators subject to this paragraph (l) may use best available monitoring methods for any parameter (*e.g.,* fuel use, feedstock rates) that cannot reasonably be measured according to the monitoring and QA/QC requirements of a relevant subpart. The owner or operator must use the calculation methodologies and equations in the ''Calculating GHG Emissions'' sections of each relevant subpart, but may use the best available monitoring method for any parameter for which it is not reasonably feasible to acquire, install, and operate a required piece of monitoring equipment by January 1 of the year after the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking. Starting no later than April 1 of the year after the year during which the change in GWPs is published, the owner or operator must discontinue using best available methods and begin following all applicable monitoring and QA/QC requirements of this part, except as provided in paragraph (l)(2) of this section. Best available monitoring methods means any of the following methods:

(i) Monitoring methods currently used by the facility that do not meet the specifications of a relevant subpart.

(ii) Supplier data.

(iii) Engineering calculations.

(iv) Other company records.

(2) *Requests for extension of the use of best available monitoring methods.* The owner or operator may submit a request to the Administrator to use one or more best available monitoring methods beyond March 31 of the year after the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking.

(i) *Timing of request.* The extension request must be submitted to EPA no later than January 31 of the year after the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking.

(ii) *Content of request.* Requests must contain the following information:

(A) A list of specific items of monitoring instrumentation for which the request is being made and the locations where each piece of

monitoring instrumentation will be installed.

(B) Identification of the specific rule requirements (by rule subpart, section, and paragraph numbers) for which the instrumentation is needed.

(C) A description of the reasons that the needed equipment could not be obtained and installed before April 1 of the year after the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking.

(D) If the reason for the extension is that the equipment cannot be purchased and delivered by April 1 of the year after the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking, include supporting documentation such as the date the monitoring equipment was ordered, investigation of alternative suppliers and the dates by which alternative vendors promised delivery, backorder notices or unexpected delays, descriptions of actions taken to expedite delivery, and the current expected date of delivery.

(E) If the reason for the extension is that the equipment cannot be installed without a process unit shutdown, include supporting documentation demonstrating that it is not practicable to isolate the equipment and install the monitoring instrument without a full process unit shutdown. Include the date of the most recent process unit shutdown, the frequency of shutdowns for this process unit, and the date of the next planned shutdown during which the monitoring equipment can be installed. If there has been a shutdown or if there is a planned process unit shutdown between November 29 of the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking and April 1 of the year after the year during which the change in GWPs is published, include a justification of why the equipment could not be obtained and installed during that shutdown.

(F) A description of the specific actions the facility will take to obtain and install the equipment as soon as reasonably feasible and the expected date by which the equipment will be installed and operating.

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that it is not reasonably feasible to acquire, install, and operate a required piece of monitoring equipment by April 1 of the year after the year during which the change in GWPs is published in the **Federal Register** as a final rulemaking. The use of best available methods under this paragraph (l) will not be approved beyond December 31 of the year after the year during which the change in GWPs is published.

■ 6. Amend § 98.5 by revising paragraph (b) to read as follows:

§ 98.5 How is the report submitted?

* * * * *

(b) For reporting year 2014 and thereafter, unless a later year is specified in the applicable recordkeeping section, you must enter into verification software specified by the Administrator the data specified as verification software records in each applicable recordkeeping section. For each data element entered into the verification software, if the software produces a warning message for the data value and you elect not to revise the data value, you may provide an explanation in the verification software of why the data value is not being revised.

■ 7. Amend § 98.6 by:

■ a. Revising the definitions ''ASTM'', ''Bulk'', and ''Carbon dioxide stream'';

■ b. Adding the definitions ''Cyclic'' and ''Direct air capture (DAC)'' in alphabetical order;

■ c. Removing the definition ''Fluorinated greenhouse gas'';

■ d. Adding the definition ''Fluorinated greenhouse gas (GHG)'' in alphabetical order;

■ e. Revising the definition ''Fluorinated greenhouse gas (GHG) group'';

■ f. Adding the definition ''Fluorinated heat transfer fluids'' in alphabetic order;

■ g. Revising the definition ''Greenhouse gas or GHG'';

■ h. Removing the definition ''Other fluorinated GHGs'';

■ i. Revising the definition ''Process vent''; and

■ j. Adding definitions ''Remaining fluorinated GHGs'', ''Saturated chlorofluorocarbons (CFCs)'', ''Unsaturated bromochlorofluorocarbons (BCFCs)'', ''Unsaturated bromofluorocarbons (BFCs)'', ''Unsaturated chlorofluorocarbons (CFCs)'', ''Unsaturated hydrobromochlorofluorocarbons (HBCFCs)'', and ''Unsaturated hydrobromofluorocarbons (HBFCs)'' in alphabetic order.

The revisions and additions read as follows:

§ 98.6 Definitions.

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ASTM means ASTM, International.

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Bulk, with respect to industrial GHG suppliers and CO_2 suppliers, means a transfer of gas in any amount that is in a container for the transportation or storage of that substance such as cylinders, drums, ISO tanks, and small cans. An industrial gas or CO_2 that must first be transferred from a container to another container, vessel, or piece of equipment in order to realize its intended use is a bulk substance. An industrial GHG or CO_2 that is contained in a manufactured product such as electrical equipment, appliances, aerosol cans, or foams is not a bulk substance.

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Carbon dioxide stream means carbon dioxide that has been captured from an emission source (*e.g.,* a power plant or other industrial facility), captured from ambient air (*e.g.,* direct air capture), or extracted from a carbon dioxide production well plus incidental associated substances either derived from the source materials and the capture process or extracted with the carbon dioxide.

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Cyclic, in the context of fluorinated GHGs, means a fluorinated GHG in which three or more carbon atoms are connected to form a ring.

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Direct air capture (DAC), with respect to a facility, technology, or system, means that the facility, technology, or system uses carbon capture equipment to capture carbon dioxide directly from the air. Direct air capture does not include any facility, technology, or system that captures carbon dioxide:

(1) That is deliberately released from a naturally occurring subsurface spring; or

(2) Using natural photosynthesis.

* * * * *

Fluorinated greenhouse gas (GHG) means sulfur hexafluoride (SF_6), nitrogen trifluoride (NF3), and any fluorocarbon except for controlled substances as defined at part 82, subpart A of this subchapter and substances with vapor pressures of less than 1 mm of Hg absolute at 25 degrees C. With these exceptions, ''fluorinated GHG'' includes but is not limited to any hydrofluorocarbon, any perfluorocarbon, any fully fluorinated linear, branched or cyclic alkane, ether, tertiary amine or aminoether, any perfluoropolyether, and any hydrofluoropolyether.

Fluorinated greenhouse gas (GHG) group means one of the following sets of fluorinated GHGs:

(1) Fully fluorinated GHGs;

(2) Saturated hydrofluorocarbons with two or fewer carbon-hydrogen bonds;

(3) Saturated hydrofluorocarbons with three or more carbon-hydrogen bonds;

(4) Saturated hydrofluoroethers and hydrochlorofluoroethers with one carbon-hydrogen bond;

(5) Saturated hydrofluoroethers and hydrochlorofluoroethers with two carbon-hydrogen bonds;

(6) Saturated hydrofluoroethers and hydrochlorofluoroethers with three or more carbon-hydrogen bonds;

(7) Saturated chlorofluorocarbons (CFCs);

(8) Fluorinated formates;

(9) Cyclic forms of the following: unsaturated perfluorocarbons (PFCs), unsaturated HFCs, unsaturated CFCs, unsaturated hydrochlorofluorocarbons (HCFCs), unsaturated bromofluorocarbons (BFCs), unsaturated bromochlorofluorocarbons (BCFCs), unsaturated hydrobromofluorocarbons (HBFCs), unsaturated hydrobromochlorofluorocarbons (HBCFCs), unsaturated halogenated ethers, and unsaturated halogenated esters;

(10) Fluorinated acetates, carbonofluoridates, and fluorinated alcohols other than fluorotelomer alcohols;

(11) Fluorinated aldehydes, fluorinated ketones and non-cyclic forms of the following: unsaturated PFCs, unsaturated HFCs, unsaturated CFCs, unsaturated HCFCs, unsaturated BFCs, unsaturated BCFCs, unsaturated HBFCs, unsaturated HBCFCs, unsaturated halogenated ethers, and unsaturated halogenated esters;

(12) Fluorotelomer alcohols;

(13) Fluorinated GHGs with carbon-iodine bonds; or

(14) Remaining fluorinated GHGs.

Fluorinated heat transfer fluids means fluorinated GHGs used for temperature control, device testing, cleaning substrate surfaces and other parts, other solvent applications, and soldering in certain types of electronics manufacturing production processes and in other industries. Fluorinated heat transfer fluids do not include fluorinated GHGs used as lubricants or surfactants in electronics manufacturing. For fluorinated heat transfer fluids, the lower vapor pressure limit of 1 mm Hg in absolute at 25 °C in the definition of ''fluorinated greenhouse gas'' in this section shall not apply. Fluorinated heat transfer fluids include, but are not limited to, perfluoropolyethers (including PFPMIE), perfluoroalkylamines, perfluoroalkylmorpholines, perfluoroalkanes, perfluoroethers, perfluorocyclic ethers, and hydrofluoroethers. Fluorinated heat transfer fluids include HFC–43–10meee but do not include other hydrofluorocarbons.

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Greenhouse gas or *GHG* means carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and fluorinated greenhouse gases (GHGs) as defined in this section.

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Process vent means a gas stream that: Is discharged through a conveyance to the atmosphere either directly or after passing through a control device; originates from a unit operation, including but not limited to reactors (including reformers, crackers, and furnaces, and separation equipment for products and recovered byproducts); and contains or has the potential to contain GHG that is generated in the process. Process vent does not include safety device discharges, equipment leaks, gas streams routed to a fuel gas system or to a flare, discharges from storage tanks.

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Remaining fluorinated GHGs means fluorinated GHGs that are none of the following:

(1) Fully fluorinated GHGs;

(2) Saturated hydrofluorocarbons with two or fewer carbon-hydrogen bonds;

(3) Saturated hydrofluorocarbons with three or more carbon-hydrogen bonds;

(4) Saturated hydrofluoroethers and hydrochlorofluoroethers with one carbon-hydrogen bond;

(5) Saturated hydrofluoroethers and hydrochlorofluoroethers with two carbon-hydrogen bonds;

(6) Saturated hydrofluoroethers and hydrochlorofluoroethers with three or more carbon-hydrogen bonds;

(7) Saturated chlorofluorocarbons (CFCs);

(8) Fluorinated formates;

(9) Cyclic forms of the following: unsaturated perfluorocarbons (PFCs), unsaturated HFCs, unsaturated CFCs, unsaturated hydrochlorofluorocarbons (HCFCs), unsaturated bromofluorocarbons (BFCs), unsaturated bromochlorofluorocarbons (BCFCs), unsaturated hydrobromofluorocarbons (HBFCs), unsaturated hydrobromochlorofluorocarbons (HBCFCs), unsaturated halogenated ethers, and unsaturated halogenated esters;

(10) Fluorinated acetates, carbonofluoridates, and fluorinated alcohols other than fluorotelomer alcohols;

(11) Fluorinated aldehydes, fluorinated ketones and non-cyclic forms of the following: unsaturated PFCs, unsaturated HFCs, unsaturated CFCs, unsaturated HCFCs, unsaturated BFCs, unsaturated BCFCs, unsaturated HBFCs, unsaturated HBCFCs, unsaturated halogenated ethers, and unsaturated halogenated esters;

(12) Fluorotelomer alcohols; or

(13) fluorinated GHGs with carbon-iodine bonds.

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Saturated chlorofluorocarbons (CFCs) means fluorinated GHGs that contain only chlorine, fluorine, and carbon and that contain only single bonds.

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Unsaturated bromochlorofluorocarbons (BCFCs) means fluorinated GHGs that contain only bromine, chlorine, fluorine, and carbon and that contain one or more bonds that are not single bonds.

Unsaturated bromofluorocarbons (BFCs) means fluorinated GHGs that contain only bromine, fluorine, and carbon and that contain one or more bonds that are not single bonds.

Unsaturated chlorofluorocarbons (CFCs) means fluorinated GHGs that contain only chlorine, fluorine, and carbon and that contain one or more bonds that are not single bonds.

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Unsaturated hydrobromochlorofluorocarbons (HBCFCs) means fluorinated GHGs that contain only hydrogen, bromine, chlorine, fluorine, and carbon and that contain one or more bonds that are not single bonds.

Unsaturated hydrobromofluorocarbons (HBFCs) means fluorinated GHGs that contain only hydrogen, bromine, fluorine, and carbon and that contain one or more bonds that are not single bonds.

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■ 8. Amend § 98.7 by:

■ a. Revising the introductory text;

■ b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d);

■ c. Revising newly redesignated paragraph (d);

■ d. Adding new paragraph (e); and

■ e. Revising paragraphs (i) and (m)(3).

The revisions and addition read as follows:

§ 98.7 What standardized methods are incorporated by reference into this part?

Certain material is incorporated by reference into this part with the approval of the Director of the **Federal Register** under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the EPA must publish a document in the **Federal Register** and the material must be available to the public. All approved incorporation by reference (IBR) material is available for inspection at the EPA and at the National Archives

and Records Administration (NARA). Contact EPA at: EPA Docket Center, Public Reading Room, EPA WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC; phone: 202–566–1744; email: *Docket-customerservice@epa.gov;* website: *www.epa.gov/dockets/epa-docket-center-reading-room.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.* The material may be obtained from the following sources:

* * * * *

(d) ASTM International (ASTM), 100 Barr Harbor Drive, P.O. Box CB700, West Conshohocken, Pennsylvania 19428–B2959; (800) 262–1373; *www.astm.org.*

(1) ASTM C25–06, Standard Test Method for Chemical Analysis of Limestone, Quicklime, and Hydrated Lime, approved February 15, 2006; IBR approved for §§ 98.114(b); 98.174(b); 98.184(b); 98.194(c); 98.334(b); and 98.504(b).

(2) ASTM C114–09, Standard Test Methods for Chemical Analysis of Hydraulic Cement; IBR approved for § 98.84(a) through (c).

(3) ASTM D235–02 (Reapproved 2007), Standard Specification for Mineral Spirits (Petroleum Spirits) (Hydrocarbon Dry Cleaning Solvent); IBR approved for § 98.6.

(4) ASTM D240–02 (Reapproved 2007), Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuels by Bomb Calorimeter; IBR approved for § 98.254(e).

(5) ASTM D388–05, Standard Classification of Coals by Rank; IBR approved for § 98.6.

(6) ASTM D910–07a, Standard Specification for Aviation Gasolines; IBR approved for § 98.6.

(7) ASTM D1826–94 (Reapproved 2003), Standard Test Method for Calorific (Heating) Value of Gases in Natural Gas Range by Continuous Recording Calorimeter; IBR approved for § 98.254(e).

(8) ASTM D1836–07, Standard Specification for Commercial Hexanes; IBR approved for § 98.6.

(9) ASTM D1941–91 (Reapproved 2007), Standard Test Method for Open Channel Flow Measurement of Water with the Parshall Flume, approved June 15, 2007; IBR approved for § 98.354(d).

(10) ASTM D1945–03, Standard Test Method for Analysis of Natural Gas by Gas Chromatography; IBR approved for §§ 98.74(c); 98.164(b); 98.244(b); 98.254(d); 98.324(d); 98.344(b); 98.354(g).

(11) ASTM D1946–90 (Reapproved 2006), Standard Practice for Analysis of Reformed Gas by Gas Chromatography; IBR approved for §§ 98.74(c); 98.164(b); 98.254(d); 98.324(d); 98.344(b); 98.354(g); 98.364(c).

(12) ASTM D2013–07, Standard Practice for Preparing Coal Samples for Analysis; IBR approved for § 98.164(b).

(13) ASTM D2234/D2234M–07, Standard Practice for Collection of a Gross Sample of Coal; IBR approved for § 98.164(b).

(14) ASTM D2502–04, Standard Test Method for Estimation of Mean Relative Molecular Mass of Petroleum Oils From Viscosity Measurements; IBR approved for § 98.74(c).

(15) ASTM D2503–92 (Reapproved 2007), Standard Test Method for Relative Molecular Mass (Molecular Weight) of Hydrocarbons by Thermoelectric Measurement of Vapor Pressure; IBR approved for §§ 98.74(c); 98.254(d)(6).

(16) ASTM D2505–88 (Reapproved 2004)e1, Standard Test Method for Ethylene, Other Hydrocarbons, and Carbon Dioxide in High-Purity Ethylene by Gas Chromatography; IBR approved for § 98.244(b).

(17) ASTM D2593–93 (Reapproved 2009), Standard Test Method for Butadiene Purity and Hydrocarbon Impurities by Gas Chromatography, approved July 1, 2009; IBR approved for § 98.244(b).

(18) ASTM D2597–94 (Reapproved 2004), Standard Test Method for Analysis of Demethanized Hydrocarbon Liquid Mixtures Containing Nitrogen and Carbon Dioxide by Gas Chromatography; IBR approved for § 98.164(b).

(19) ASTM D2879–97 (Reapproved 2007), Standard Test Method for Vapor Pressure-Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope (ASTM D2879), approved May 1, 2007; IBR approved for § 98.128.

(20) ASTM D3176–15, Standard Practice for Ultimate Analysis of Coal and Coke, approved January 1, 2015; IBR approved for § 98.494(c).

(21) ASTM D3176–89 (Reapproved 2002), Standard Practice for Ultimate Analysis of Coal and Coke; IBR approved for §§ 98.74(c); 98.164(b); 98.244(b); 98.284(c) and (d); 98.314(c), (d), and (f).

(22) ASTM D3238–95 (Reapproved 2005), Standard Test Method for Calculation of Carbon Distribution and Structural Group Analysis of Petroleum Oils by the n-d-M Method; IBR approved for §§ 98.74(c); 98.164(b).

(23) ASTM D3588–98 (Reapproved 2003), Standard Practice for Calculating Heat Value, Compressibility Factor, and Relative Density of Gaseous Fuels; IBR approved for § 98.254(e).

(24) ASTM D3682–01 (Reapproved 2006), Standard Test Method for Major and Minor Elements in Combustion Residues from Coal Utilization Processes; IBR approved for § 98.144(b).

(25) ASTM D4057–06, Standard Practice for Manual Sampling of Petroleum and Petroleum Products; IBR approved for § 98.164(b).

(26) ASTM D4177–95 (Reapproved 2005), Standard Practice for Automatic Sampling of Petroleum and Petroleum Products; IBR approved for § 98.164(b).

(27) ASTM D4809–06, Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuels by Bomb Calorimeter (Precision Method); IBR approved for § 98.254(e).

(28) ASTM D4891–89 (Reapproved 2006), Standard Test Method for Heating Value of Gases in Natural Gas Range by Stoichiometric Combustion; IBR approved for §§ 98.254(e); 98.324(d).

(29) ASTM D5291–02 (Reapproved 2007), Standard Test Methods for Instrumental Determination of Carbon, Hydrogen, and Nitrogen in Petroleum Products and Lubricants; IBR approved for §§ 98.74(c); 98.164(b); 98.244(b).

(30) ASTM D5291–16, Standard Test Methods for Instrumental Determination of Carbon, Hydrogen, and Nitrogen in Petroleum Products and Lubricants, approved October 1, 2016; IBR approved for § 98.494(c).

(31) ASTM D5373–08, Standard Test Methods for Instrumental Determination of Carbon, Hydrogen, and Nitrogen in Laboratory Samples of Coal, approved February 1, 2008; IBR approved for §§ 98.74(c); 98.114(b); 98.164(b); 98.174(b); 98.184(b); 98.244(b); 98.274(b); 98.284(c) and (d); 98.314(c), (d), and (f); 98.334(b); 98.504(b).

(32) ASTM D5373–21, Standard Test Methods for Determination of Carbon, Hydrogen, and Nitrogen in Analysis Samples of Coal and Carbon in Analysis Samples of Coal and Coke, approved April 1, 2021; IBR approved for § 98.494(c).

(33) ASTM D5614–94 (Reapproved 2008), Standard Test Method for Open Channel Flow Measurement of Water with Broad-Crested Weirs, approved October 1, 2008; IBR approved for § 98.354(d).

(34) ASTM D6060–96 (Reapproved 2001), Standard Practice for Sampling of Process Vents With a Portable Gas Chromatograph; IBR approved for § 98.244(b).

(35) ASTM D6348–03, Standard Test Method for Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform Infrared

(FTIR) Spectroscopy; IBR approved for § 98.54(b); table I–9 to subpart I of this part; §§ 98.224(b); 98.414(n).

(36) ASTM D6349–09, Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry; IBR approved for § 98.144(b).

(37) ASTM D6609–08, Standard Guide for Part-Stream Sampling of Coal; IBR approved for § 98.164(b).

(38) ASTM D6751–08, Standard Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels; IBR approved for § 98.6.

(39) ASTM D6866–16, Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis, approved June 1, 2016; IBR approved for §§ 98.34(d) and (e); 98.36(e).

(40) ASTM D6883–04, Standard Practice for Manual Sampling of Stationary Coal from Railroad Cars, Barges, Trucks, or Stockpiles; IBR approved for § 98.164(b).

(41) ASTM D7359–08, Standard Test Method for Total Fluorine, Chlorine and Sulfur in Aromatic Hydrocarbons and Their Mixtures by Oxidative Pyrohydrolytic Combustion followed by Ion Chromatography Detection (Combustion Ion Chromatography-CIC) (ASTM D7359), approved October 15, 2008; IBR approved for § 98.124(e)(2).

(42) ASTM D7430–08ae1, Standard Practice for Mechanical Sampling of Coal; IBR approved for § 98.164(b).

(43) ASTM D7459–08, Standard Practice for Collection of Integrated Samples for the Speciation of Biomass (Biogenic) and Fossil-Derived Carbon Dioxide Emitted from Stationary Emissions Sources; IBR approved for §§ 98.34(d) and (e); 98.36(e).

(44) ASTM D7633–10, Standard Test Method for Carbon Black—Carbon Content, approved May 15, 2010; IBR approved for § 98.244(b).

(45) ASTM E359–00 (Reapproved 2005)e1, Standard Test Methods for Analysis of Soda Ash (Sodium Carbonate); IBR approved for § 98.294(a) and (b).

(46) ASTM E415–17, Standard Test Method for Analysis of Carbon and Low-Alloy Steel by Spark Atomic Emission Spectrometry, approved May 15, 2017; IBR approved for § 98.174(b).

(47) ASTM E1019–08, Standard Test Methods for Determination of Carbon, Sulfur, Nitrogen, and Oxygen in Steel, Iron, Nickel, and Cobalt Alloys by Various Combustion and Fusion Techniques; IBR approved for § 98.174(b).

(48) ASTM E1915–07a, Standard Test Methods for Analysis of Metal Bearing Ores and Related Materials by Combustion Infrared-Absorption Spectrometry; IBR approved for § 98.174(b).

(49) ASTM E1941–04, Standard Test Method for Determination of Carbon in Refractory and Reactive Metals and Their Alloys; IBR approved for §§ 98.114(b); 98.184(b); 98.334(b).

(50) ASTM UOP539–97, Refinery Gas Analysis by Gas Chromatography; IBR approved for §§ 98.164(b); 98.244(b); 98.254(d); 98.324(d); 98.344(b); 98.354(g).

(e) CSA Group (CSA), 178 Rexdale Boulevard, Toronto, Ontario Canada M9W 183; (800) 463–6727; *https://shop.csa.ca.*

(1) CSA/ANSI ISO 27916:19, Carbon dioxide capture, transportation and geological storage—Carbon dioxide storage using enhanced oil recovery (CO_2–EOR), approved August 30, 2019; IBR approved for §§ 98.470(c); 98.480(a); 98.481(a) through (c); 98.482; 98.483; 98.484; 98.485; 98.486(g); 98.487; 98.488(a)(5); 98.489.

Note 1 to paragraph (e)(1): This standard is also available from ISO as ISO 27916:2019(E).

(2) [Reserved]

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(i) National Institute of Standards and Technology (NIST), 100 Bureau Drive, Stop 1070, Gaithersburg, MD 20899–1070, (800) 877–8339, *www.nist.gov/.*

(1) NIST HB 44–2023: Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices, 2023 edition, approved November 18, 2022; IBR approved for § 98.494(b).

(2) Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices, NIST Handbook 44 (2009); IBR approved for §§ 98.244(b); 98.344(a).

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(m) * * *

(3) Protocol for Measuring Destruction or Removal Efficiency (DRE) of Fluorinated Greenhouse Gas Abatement Equipment in Electronics Manufacturing, Version 1, EPA–430–R–10–003, March 2010 (EPA 430–R–10–003), approved March 2010; IBR approved for §§ 98.94(e); 98.94(f) and (g); 98.97(b) and (d); 98.98; appendix A to subpart I of this part; §§ 98.124(e); 98.414(n). (Also available from: *www.epa.gov/sites/default/files/2016-02/documents/dre_protocol.pdf.*)

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■ 9. Revise table A–1 to subpart A to read as follows:

TABLE A–1 TO SUBPART A OF PART 98—GLOBAL WARMING POTENTIALS, 100-YEAR TIME HORIZON

Name	CAS No.	Chemical formula	Global warming potential (100 yr.)
Chemical-Specific GWPs			
Carbon dioxide	124–38–9	CO_2	1
Methane	74–82–8	CH_4	[a d] 28
Nitrous oxide	10024–97–2	N_2O	[a d] 265
Fully Fluorinated GHGs			
Sulfur hexafluoride	2551–62–4	SF_6	[a d] 23,500
Trifluoromethyl sulphur pentafluoride	373–80–8	SF_5CF_3	[d] 17,400
Nitrogen trifluoride	7783–54–2	NF_3	[d] 16,100
PFC–14 (Perfluoromethane)	75–73–0	CF_4	[a d] 6,630
PFC–116 (Perfluoroethane)	76–16–4	C_2F_6	[a d] 11,100
PFC–218 (Perfluoropropane)	76–19–7	C_3F_8	[a d] 8,900
Perfluorocyclopropane	931–91–9	c-C_3F_6	[d] 9,200
PFC–3–1–10 (Perfluorobutane)	355–25–9	C_4F_{10}	[a d] 9,200
PFC–318 (Perfluorocyclobutane)	115–25–3	c-C_4F_8	[a d] 9,540

TABLE A–1 TO SUBPART A OF PART 98—GLOBAL WARMING POTENTIALS, 100-YEAR TIME HORIZON—Continued

Name	CAS No.	Chemical formula	Global warming potential (100 yr.)
Perfluorotetrahydrofuran	773–14–8	c-C_4F_8O	[e] 13,900
PFC–4–1–12 (Perfluoropentane)	678–26–2	C_5F_{12}	[a,d] 8,550
PFC–5–1–14 (Perfluorohexane, FC–72)	355–42–0	C_6F_{14}	[a,d] 7,910
PFC–6–1–12	335–57–9	C_7F_{16}; $CF_3(CF_2)_5CF_3$	[b] 7,820
PFC–7–1–18	307–34–6	C_8F_{18}; $CF_3(CF_2)_6CF_3$	[b] 7,620
PFC–9–1–18	306–94–5	$C_{10}F_{18}$	[d] 7,190
PFPMIE (HT–70)	NA	$CF_3OCF(CF_3)CF_2OCF_2OCF_3$	[d] 9,710
Perfluorodecalin (cis)	60433–11–6	Z-$C_{10}F_{18}$	[b,d] 7,240
Perfluorodecalin (trans)	60433–12–7	E-$C_{10}F_{18}$	[b,d] 6,290
Perfluorotriethylamine	359–70–6	$N(C_2F_5)_3$	[e] 10,300
Perfluorotripropylamine	338–83–0	$N(CF_2CF_2CF_3)_3$	[e] 9,030
Perfluorotributylamine	311–89–7	$N(CF_2CF_2CF_2CF_3)_3$	[e] 8,490
Perfluorotripentylamine	338–84–1	$N(CF_2CF_2CF_2CF_2CF_3)_3$	[e] 7,260
Saturated Hydrofluorocarbons (HFCs) With Two or Fewer Carbon-Hydrogen Bonds			
(4s,5s)-1,1,2,2,3,3,4,5-octafluorocyclopentane	158389–18–5	trans-cyc (-CF2CF2CF2CHFCHF-)	[e] 258
HFC–23	75–46–7	CHF_3	[a,d] 12,400
HFC–32	75–10–5	CH_2F_2	[a,d] 677
HFC–125	354–33–6	C_2HF_5	[a,d] 3,170
HFC–134	359–35–3	$C_2H_2F_4$	[a,d] 1,120
HFC–134a	811–97–2	CH_2FCF_3	[a,d] 1,300
HFC–227ca	2252–84–8	$CF_3CF_2CHF_2$	[b] 2,640
HFC–227ea	431–89–0	C_3HF_7	[a,d] 3,350
HFC–236cb	677–56–5	$CH_2FCF_2CF_3$	[d] 1,210
HFC–236ea	431–63–0	CHF_2CHFCF_3	[d] 1,330
HFC–236fa	690–39–1	$C_3H_2F_6$	[a,d] 8,060
HFC–329p	375–17–7	$CHF_2CF_2CF_2CF_3$	[b] 2360
HFC–43–10mee	138495–42–8	$CF_3CFHCFHCF_2CF_3$	[a,d] 1,650
Saturated Hydrofluorocarbons (HFCs) With Three or More Carbon-Hydrogen Bonds			
1,1,2,2,3,3-hexafluorocyclopentane	123768–18–3	cyc (-$CF_2CF_2CF_2CH_2CH_2$-)	[e] 120
1,1,2,2,3,3,4-heptafluorocyclopentane	15290–77–4	cyc (-$CF_2CF_2CF_2CHFCH_2$-)	[e] 231
HFC–41	593–53–3	CH_3F	[a,d] 116
HFC–143	430–66–0	$C_2H_3F_3$	[a,d] 328
HFC–143a	420–46–2	$C_2H_3F_3$	[a,d] 4,800
HFC–152	624–72–6	CH_2FCH_2F	[d] 16
HFC–152a	75–37–6	CH_3CHF_2	[a,d] 138
HFC–161	353–36–6	CH_3CH_2F	[d] 4
HFC–245ca	679–86–7	$C_3H_3F_5$	[a,d] 716
HFC–245cb	1814–88–6	$CF_3CF_2CH_3$	[b] 4,620
HFC–245ea	24270–66–4	$CHF_2CHFCHF_2$	[b] 235
HFC–245eb	431–31–2	$CH_2FCHFCF_3$	[b] 290
HFC–245fa	460–73–1	$CHF_2CH_2CF_3$	[d] 858
HFC–263fb	421–07–8	$CH_3CH_2CF_3$	[b] 76
HFC–272ca	420–45–1	$CH_3CF_2CH_3$	[b] 144
HFC–365mfc	406–58–6	$CH_3CF_2CH_2CF_3$	[d] 804
Saturated Hydrofluoroethers (HFEs) and Hydrochlorofluoroethers (HCFEs) With One Carbon-Hydrogen Bond			
HFE–125	3822–68–2	CHF_2OCF_3	[d] 12,400
HFE–227ea	2356–62–9	$CF_3CHFOCF_3$	[d] 6,450
HFE–329mcc2	134769–21–4	$CF_3CF_2OCF_2CHF_2$	[d] 3,070
HFE–329me3	428454–68–6	$CF_3CFHCF_2OCF_3$	[b] 4,550
1,1,1,2,2,3,3-Heptafluoro-3-(1,2,2,2-tetrafluoroethoxy)-propane.	3330–15–2	$CF_3CF_2CF_2OCHFCF_3$	[b] 6,490
Saturated HFEs and HCFEs With Two Carbon-Hydrogen Bonds			
HFE–134 (HG–00)	1691–17–4	CHF_2OCHF_2	[d] 5,560
HFE–236ca	32778–11–3	$CHF_2OCF_2CHF_2$	[b] 4,240
HFE–236ca12 (HG–10)	78522–47–1	$CHF_2OCF_2OCHF_2$	[d] 5,350
HFE–236ea2 (Desflurane)	57041–67–5	$CHF_2OCHFCF_3$	[d] 1,790
HFE–236fa	20193–67–3	$CF_3CH_2OCF_3$	[d] 979
HFE–338mcf2	156053–88–2	$CF_3CF_2OCH_2CF_3$	[d] 929
HFE–338mmz1	26103–08–2	$CHF_2OCH(CF_3)_2$	[d] 2,620
HFE–338pcc13 (HG–01)	188690–78–0	$CHF_2OCF_2CF_2OCHF_2$	[d] 2,910
HFE–43–10pccc (H-Galden 1040x, HG–11)	E1730133	$CHF_2OCF_2OC_2F_4OCHF_2$	[d] 2,820
HCFE–235ca2 (Enflurane)	13838–16–9	CHF_2OCF_2CHFCl	[b] 583

TABLE A–1 TO SUBPART A OF PART 98—GLOBAL WARMING POTENTIALS, 100-YEAR TIME HORIZON—Continued

Name	CAS No.	Chemical formula	Global warming potential (100 yr.)
HCFE–235da2 (Isoflurane)	26675–46–7	$CHF_2OCHClCF_3$	[d] 491
HG–02	205367–61–9	$HF_2C\text{-}(OCF_2CF_2)_2\text{-}OCF_2H$	[b d] 2,730
HG–03	173350–37–3	$HF_2C\text{-}(OCF_2CF_2)_3\text{-}OCF_2H$	[b d] 2,850
HG–20	249932–25–0	$HF_2C\text{-}(OCF_2)_2\text{-}OCF_2H$	[b] 5,300
HG–21	249932–26–1	$HF_2C\text{-}OCF_2CF_2OCF_2OCF_2O\text{-}CF_2H$	[b] 3,890
HG–30	188690–77–9	$HF_2C\text{-}(OCF_2)_3\text{-}OCF_2H$	[b] 7,330
1,1,3,3,4,4,6,6,7,7,9,9,10,10,12,12,13,13,15,15-eicosafluoro-2,5,8,11,14-Pentaoxapentadecane.	173350–38–4	$HCF_2O(CF_2CF_2O)_4CF_2H$	[b] 3,630
1,1,2-Trifluoro-2-(trifluoromethoxy)-ethane	84011–06–3	$CHF_2CHFOCF_3$	[b] 1,240
Trifluoro(fluoromethoxy)methane	2261–01–0	CH_2FOCF_3	[b] 751
Saturated HFEs and HCFEs With Three or More Carbon-Hydrogen Bonds			
HFE–143a	421–14–7	CH_3OCF_3	[d] 523
HFE–245cb2	22410–44–2	$CH_3OCF_2CF_3$	[d] 654
HFE–245fa1	84011–15–4	$CHF_2CH_2OCF_3$	[d] 828
HFE–245fa2	1885–48–9	$CHF_2OCH_2CF_3$	[d] 812
HFE–254cb1	425–88–7	$CH_3OCF_2CHF_2$	[d] 301
HFE–263fb2	460–43–5	$CF_3CH_2OCH_3$	[d] 1
HFE–263m1; R–E–143a	690–22–2	$CF_3OCH_2CH_3$	[b] 29
HFE–347mcc3 (HFE–7000)	375–03–1	$CH_3OCF_2CF_2CF_3$	[d] 530
HFE–347mcf2	171182–95–9	$CF_3CF_2OCH_2CHF_2$	[d] 854
HFE–347mmy1	22052–84–2	$CH_3OCF(CF_3)_2$	[d] 363
HFE–347mmz1 (Sevoflurane)	28523–86–6	$(CF_3)_2CHOCH_2F$	[c] 216
HFE–347pcf2	406–78–0	$CHF_2CF_2OCH_2CF_3$	[d] 889
HFE–356mec3	382–34–3	$CH_3OCF_2CHFCF_3$	[d] 387
HFE–356mff2	333–36–8	$CF_3CH_2OCH_2CF_3$	[b] 17
HFE–356mmz1	13171–18–1	$(CF_3)_2CHOCH_3$	[d] 14
HFE–356pcc3	160620–20–2	$CH_3OCF_2CF_2CHF_2$	[d] 413
HFE–356pcf2	50807–77–7	$CHF_2CH_2OCF_2CHF_2$	[d] 719
HFE–356pcf3	35042–99–0	$CHF_2OCH_2CF_2CHF_2$	[d] 446
HFE–365mcf2	22052–81–9	$CF_3CF_2OCH_2CH_3$	[b] 58
HFE–365mcf3	378–16–5	$CF_3CF_2CH_2OCH_3$	[d] 0.99
HFE–374pc2	512–51–6	$CH_3CH_2OCF_2CHF_2$	[d] 627
HFE–449s1 (HFE–7100) Chemical blend	163702–07–6	$C_4F_9OCH_3$	[d] 421
	163702–08–7	$(CF_3)_2CFCF_2OCH_3$	
HFE–569sf2 (HFE–7200) Chemical blend	163702–05–4	$C_4F_9OC_2H_5$	[d] 57
	163702–06–5	$(CF_3)_2CFCF_2OC_2H_5$	
HFE–7300	132182–92–4	$(CF_3)_2CFCFOC_2H_5CF_2CF_2CF_3$	[e] 405
HFE–7500	297730–93–9	$n\text{-}C_3F_7CFOC_2H_5CF(CF_3)_2$	[e] 13
HG′-01	73287–23–7	$CH_3OCF_2CF_2OCH_3$	[b] 222
HG′-02	485399–46–0	$CH_3O(CF_2CF_2O)_2CH_3$	[b] 236
HG′-03	485399–48–2	$CH_3O(CF_2CF_2O)_3CH_3$	[b] 221
Difluoro(methoxy)methane	359–15–9	CH_3OCHF_2	[b] 144
2-Chloro-1,1,2-trifluoro-1-methoxyethane	425–87–6	CH_3OCF_2CHFCl	[b] 122
1-Ethoxy-1,1,2,2,3,3,3-heptafluoropropane	22052–86–4	$CF_3CF_2CF_2OCH_2CH_3$	[b] 61
2-Ethoxy-3,3,4,4,5-pentafluorotetrahydro-2,5-bis[1,2,2,2-tetrafluoro-1-(trifluoromethyl)ethyl]-furan.	920979–28–8	$C_{12}H_5F_{19}O_2$	[b] 56
1-Ethoxy-1,1,2,3,3,3-hexafluoropropane	380–34–7	$CF_3CHFCF_2OCH_2CH_3$	[b] 23
Fluoro(methoxy)methane	460–22–0	CH_3OCH_2F	[b] 13
1,1,2,2-Tetrafluoro-3-methoxy-propane; Methyl 2,2,3,3-tetrafluoropropyl ether.	60598–17–6	$CHF_2CF_2CH_2OCH_3$	[b d] 0.49
1,1,2,2-Tetrafluoro-1-(fluoromethoxy)ethane	37031–31–5	$CH_2FOCF_2CF_2H$	[b] 871
Difluoro(fluoromethoxy)methane	461–63–2	CH_2FOCHF_2	[b] 617
Fluoro(fluoromethoxy)methane	462–51–1	CH_2FOCH_2F	[b] 130
Saturated Chlorofluorocarbons (CFCs)			
E–R316c	3832–15–3	trans-cyc ($\text{-}CClFCF_2CF_2CClF\text{-}$)	[e] 4,230
Z–R316c	3934–26–7	cis-cyc ($\text{-}CClFCF_2CF_2CClF\text{-}$)	[e] 5,660
Fluorinated Formates			
Trifluoromethyl formate	85358–65–2	$HCOOCF_3$	[b] 588
Perfluoroethyl formate	313064–40–3	$HCOOCF_2CF_3$	[b] 580
1,2,2,2-Tetrafluoroethyl formate	481631–19–0	$HCOOCHFCF_3$	[b] 470
Perfluorobutyl formate	197218–56–7	$HCOOCF_2CF_2CF_2CF_3$	[b] 392
Perfluoropropyl formate	271257–42–2	$HCOOCF_2CF_2CF_3$	[b] 376
1,1,1,3,3,3-Hexafluoropropan-2-yl formate	856766–70–6	$HCOOCH(CF_3)_2$	[b] 333
2,2,2-Trifluoroethyl formate	32042–38–9	$HCOOCH_2CF_3$	[b] 33

TABLE A–1 TO SUBPART A OF PART 98—GLOBAL WARMING POTENTIALS, 100-YEAR TIME HORIZON—Continued

Name	CAS No.	Chemical formula	Global warming potential (100 yr.)
3,3,3-Trifluoropropyl formate	1344118–09–7	$HCOOCH_2CH_2CF_3$	[b] 17
Fluorinated Acetates			
Methyl 2,2,2-trifluoroacetate	431–47–0	CF_3COOCH_3	[b] 52
1,1-Difluoroethyl 2,2,2-trifluoroacetate	1344118–13–3	$CF_3COOCF_2CH_3$	[b] 31
Difluoromethyl 2,2,2-trifluoroacetate	2024–86–4	$CF_3COOCHF_2$	[b] 27
2,2,2-Trifluoroethyl 2,2,2-trifluoroacetate	407–38–5	$CF_3COOCH_2CF_3$	[b] 7
Methyl 2,2-difluoroacetate	433–53–4	HCF_2COOCH_3	[b] 3
Perfluoroethyl acetate	343269–97–6	$CH_3COOCF_2CF_3$	[b d] 2
Trifluoromethyl acetate	74123–20–9	CH_3COOCF_3	[b d] 2
Perfluoropropyl acetate	1344118–10–0	$CH_3COOCF_2CF_2CF_3$	[b d] 2
Perfluorobutyl acetate	209597–28–4	$CH_3COOCF_2CF_2CF_2CF_3$	[b d] 2
Ethyl 2,2,2-trifluoroacetate	383–63–1	$CF_3COOCH_2CH_3$	[b d] 1
Carbonofluoridates			
Methyl carbonofluoridate	1538–06–3	$FCOOCH_3$	[b] 95
1,1-Difluoroethyl carbonofluoridate	1344118–11–1	$FCOOCF_2CH_3$	[b] 27
Fluorinated Alcohols Other Than Fluorotelomer Alcohols			
Bis(trifluoromethyl)-methanol	920–66–1	$(CF_3)_2CHOH$	[d] 182
2,2,3,3,4,4,5,5-Octafluorocyclopentanol	16621–87–7	cyc $(-(CF_2)_4CH(OH)-)$	[d] 13
2,2,3,3,3-Pentafluoropropanol	422–05–9	$CF_3CF_2CH_2OH$	[d] 19
2,2,3,3,4,4,4-Heptafluorobutan-1-ol	375–01–9	C_3F_7CH2OH	[b d] 34
2,2,2-Trifluoroethanol	75–89–8	CF_3CH_2OH	[b] 20
2,2,3,4,4,4-Hexafluoro-1-butanol	382–31–0	$CF_3CHFCF_2CH_2OH$	[b] 17
2,2,3,3-Tetrafluoro-1-propanol	76–37–9	$CHF_2CF_2CH_2OH$	[b] 13
2,2-Difluoroethanol	359–13–7	CHF_2CH2OH	[b] 3
2-Fluoroethanol	371–62–0	CH_2FCH_2OH	[b] 1.1
4,4,4-Trifluorobutan-1-ol	461–18–7	$CF_3(CH_2)_2CH_2OH$	[b] 0.05
Non-Cyclic, Unsaturated Perfluorocarbons (PFCs)			
PFC–1114; TFE	116–14–3	$CF_2 = CF_2$; C_2F_4	[b] 0.004
PFC–1216; Dyneon HFP	116–15–4	C_3F_6; $CF_3CF = CF_2$	[b] 0.05
Perfluorobut-2-ene	360–89–4	$CF_3CF = CFCF_3$	[b] 1.82
Perfluorobut-1-ene	357–26–6	$CF_3CF_2CF = CF_2$	[b] 0.10
Perfluorobuta-1,3-diene	685–63–2	$CF_2 = CFCF = CF_2$	[b] 0.003
Non-Cyclic, Unsaturated Hydrofluorocarbons (HFCs) and Hydrochlorofluorocarbons (HCFCs)			
HFC–1132a; VF2	75–38–7	$C_2H_2F_2$, $CF_2 = CH_2$	[b] 0.04
HFC–1141; VF	75–02–5	C_2H_3F, $CH_2 = CHF$	[b] 0.02
(E)-HFC–1225ye	5595–10–8	$CF_3CF = CHF(E)$	[b] 0.06
(Z)-HFC–1225ye	5528–43–8	$CF_3CF = CHF(Z)$	[b] 0.22
Solstice 1233zd(E)	102687–65–0	$C_3H_2ClF_3$; $CHCl = CHCF_3$	[b] 1.34
HCFO–1233zd(Z)	99728–16–2	(Z)-$CF_3CH = CHCl$	[e] 0.45
HFC–1234yf; HFO–1234yf	754–12–1	$C_3H_2F_4$; $CF_3CF = CH_2$	[b] 0.31
HFC–1234ze(E)	1645–83–6	$C_3H_2F_4$; trans-$CF_3CH = CHF$	[b] 0.97
HFC–1234ze(Z)	29118–25–0	$C_3H_2F_4$; cis-$CF_3CH = CHF$; $CF_3CH = CHF$	[b] 0.29
HFC–1243zf; TFP	677–21–4	$C_3H_3F_3$, $CF_3CH = CH_2$	[b] 0.12
(Z)-HFC–1336	692–49–9	$CF_3CH = CHCF_3(Z)$	[b] 1.58
HFO–1336mzz(E)	66711–86–2	(E)-$CF_3CH = CHCF_3$	[e] 18
HFC–1345zfc	374–27–6	$C_2F_5CH = CH_2$	[b] 0.09
HFO–1123	359–11–5	$CHF=CF_2$	[e] 0.005
HFO–1438ezy(E)	14149–41–8	(E)-$(CF_3)_2CFCH = CHF$	[e] 8.2
HFO–1447fz	355–08–8	$CF_3(CF_2)_2CH = CH_2$	[e] 0.24
Capstone 42–U	19430–93–4	$C_6H_3F_9$, $CF_3(CF_2)_3CH = CH_2$	[b] 0.16
Capstone 62–U	25291–17–2	$C_8H_3F_{13}$, $CF_3(CF_2)_5CH = CH_2$	[b] 0.11
Capstone 82–U	21652–58–4	$C_{10}H_3F_{17}$, $CF_3(CF_2)_7CH = CH_2$	[b] 0.09
(e)-1-chloro-2-fluoroethene	460–16–2	(E)-$CHCl = CHF$	[e] 0.004
3,3,3-trifluoro-2-(trifluoromethyl)prop-1-ene	382–10–5	$(CF_3)_2C = CH_2$	[e] 0.38
Non-Cyclic, Unsaturated CFCs			
CFC–1112	598–88–9	$CClF=CClF$	[e] 0.13
CFC–1112a	79–35–6	$CCl_2=CF_2$	[e] 0.021

TABLE A–1 TO SUBPART A OF PART 98—GLOBAL WARMING POTENTIALS, 100-YEAR TIME HORIZON—Continued

Name	CAS No.	Chemical formula	Global warming potential (100 yr.)
Non-Cyclic, Unsaturated Halogenated Ethers			
PMVE; HFE–216	1187–93–5	$CF_3OCF = CF_2$	[b] 0.17
Fluoroxene	406–90–6	$CF_3CH_2OCH = CH_2$	[b] 0.05
Methyl-perfluoroheptene-ethers	N/A	$CH_3OC_7F_{13}$	[e] 15
Non-Cyclic, Unsaturated Halogenated Esters			
Ethenyl 2,2,2-trifluoroacetate	433–28–3	$CF_3COOCH=CH_2$	[e] 0.008
Prop-2-enyl 2,2,2-trifluoroacetate	383–67–5	$CF_3COOCH_2CH=CH_2$	[e] 0.007
Cyclic, Unsaturated HFCs and PFCs			
PFC C–1418	559–40–0	c-C_5F_8	[d] 2
Hexafluorocyclobutene	697–11–0	cyc (-$CF=CFCF_2CF_2$-)	[e] 126
1,3,3,4,4,5,5-heptafluorocyclopentene	1892–03–1	cyc (-$CF_2CF_2CF_2CF=CH$-)	[e] 45
1,3,3,4,4-pentafluorocyclobutene	374–31–2	cyc (-$CH=CFCF_2CF_2$-)	[e] 92
3,3,4,4-tetrafluorocyclobutene	2714–38–7	cyc (-$CH=CHCF_2CF_2$-)	[e] 26
Fluorinated Aldehydes			
3,3,3-Trifluoro-propanal	460–40–2	CF_3CH_2CHO	[b] 0.01
Fluorinated Ketones			
Novec 1230 (perfluoro (2-methyl-3-pentanone))	756–13–8	$CF_3CF_2C(O)CF\ (CF3)_2$	[b] 0.1
1,1,1-trifluoropropan-2-one	421–50–1	CF_3COCH_3	[e] 0.09
1,1,1-trifluorobutan-2-one	381–88–4	$CF_3COCH_2CH_3$	[e] 0.095
Fluorotelomer Alcohols			
3,3,4,4,5,5,6,6,7,7,7-Undecafluoroheptan-1-ol	185689–57–0	$CF_3(CF_2)_4CH_2CH_2OH$	[b] 0.43
3,3,3-Trifluoropropan-1-ol	2240–88–2	$CF_3CH_2CH_2OH$	[b] 0.35
3,3,4,4,5,5,6,6,7,7,8,8,9,9,9-Pentadecafluorononan-1-ol	755–02–2	$CF_3(CF_2)_6CH_2CH_2OH$	[b] 0.33
3,3,4,4,5,5,6,6,7,7,8,8,9,9,10,10,11,11,11-Nonadecafluoroundecan-1-ol.	87017–97–8	$CF_3(CF_2)_8CH_2CH_2OH$	[b] 0.19
Fluorinated GHGs With Carbon-Iodine Bond(s)			
Trifluoroiodomethane	2314–97–8	CF_3I	[b] 0.4
Remaining Fluorinated GHGs with Chemical-Specific GWPs			
Dibromodifluoromethane (Halon 1202)	75–61–6	CBr_2F_2	[b] 231
2-Bromo-2-chloro-1,1,1-trifluoroethane (Halon-2311/ Halothane).	151–67–7	$CHBrClCF_3$	[b] 41
Heptafluoroisobutyronitrile	42532–60–5	$(CF_3)_2CFCN$	[e] 2,750
Carbonyl fluoride	353–50–4	COF_2	[e] 0.14

Fluorinated GHG group [f]	Global warming potential (100 yr.)
Default GWPs for Compounds for Which Chemical-Specific GWPs Are Not Listed Above	
Fully fluorinated GHGs [g]	9,200
Saturated hydrofluorocarbons (HFCs) with 2 or fewer carbon-hydrogen bonds [g]	3,000
Saturated HFCs with 3 or more carbon-hydrogen bonds [g]	840
Saturated hydrofluoroethers (HFEs) and hydrochlorofluoroethers (HCFEs) with 1 carbon-hydrogen bond [g]	6,600
Saturated HFEs and HCFEs with 2 carbon-hydrogen bonds [g]	2,900
Saturated HFEs and HCFEs with 3 or more carbon-hydrogen bonds [g]	320
Saturated chlorofluorocarbons (CFCs) [g]	4,900
Fluorinated formates	350
Cyclic forms of the following: unsaturated perfluorocarbons (PFCs), unsaturated HFCs, unsaturated CFCs, unsaturated hydrochlorofluorocarbons (HCFCs), unsaturated bromofluorocarbons (BFCs), unsaturated bromochlorofluorocarbons (BCFCs), unsaturated hydrobromofluorocarbons (HBFCs), unsaturated hydrobromochlorofluorocarbons (HBCFCs), unsaturated halogenated ethers, and unsaturated halogenated esters [g]	58
Fluorinated acetates, carbonofluoridates, and fluorinated alcohols other than fluorotelomer alcohols [g]	25

Fluorinated GHG group [f]	Global warming potential (100 yr.)
Fluorinated aldehydes, fluorinated ketones, and non-cyclic forms of the following: unsaturated perfluorocarbons (PFCs), unsaturated HFCs, unsaturated CFCs, unsaturated HCFCs, unsaturated BFCs, unsaturated BCFCs, unsaturated HBFCs, unsaturated HBCFCs, unsaturated halogenated ethers and unsaturated halogenated esters [g]	1
Fluorotelomer alcohols [g]	1
Fluorinated GHGs with carbon-iodine bond(s) [g]	1
Other fluorinated GHGs [g]	1,800

[a] The GWP for this compound was updated in the final rule published on November 29, 2013 [78 FR 71904] and effective on January 1, 2014.
[b] This compound was added to table A–1 in the final rule published on December 11, 2014, and effective on January 1, 2015.
[c] The GWP for this compound was updated in the final rule published on December 11, 2014, and effective on January 1, 2015.
[d] The GWP for this compound was updated in the final rule published on April 25, 2024 and effective on January 1, 2025.
[e] The GWP for this compound was added to table A–1 in the final rule published on April 25, 2024 and effective on January 1, 2025.
[f] For electronics manufacturing (as defined in § 98.90), the term "fluorinated GHGs" in the definition of each fluorinated GHG group in § 98.6 shall include fluorinated heat transfer fluids (as defined in § 98.6), whether or not they are also fluorinated GHGs.
[g] The GWP for this fluorinated GHG group was updated in the final rule published on April 25, 2024 and effective on January 1, 2025.

■ 10. Revise and republish table A–3 to subpart A to read as follows:

TABLE A–3 TO SUBPART A OF PART 98—SOURCE CATEGORY LIST FOR § 98.2(a)(1)

Source Categories [a] Applicable in Reporting Year 2010 and Future Years:
- Electricity generation units that report CO_2 mass emissions year round through 40 CFR part 75 (subpart D).
- Adipic acid production (subpart E of this part).
- Aluminum production (subpart F of this part).
- Ammonia manufacturing (subpart G of this part).
- Cement production (subpart H of this part).
- HCFC–22 production (subpart O of this part).
- HFC–23 destruction processes that are not collocated with a HCFC–22 production facility and that destroy more than 2.14 metric tons of HFC–23 per year (subpart O of this part).
- Lime manufacturing (subpart S of this part).
- Nitric acid production (subpart V of this part).
- Petrochemical production (subpart X of this part).
- Petroleum refineries (subpart Y of this part).
- Phosphoric acid production (subpart Z of this part).
- Silicon carbide production (subpart BB of this part).
- Soda ash production (subpart CC of this part).
- Titanium dioxide production (subpart EE of this part).
- Municipal solid waste landfills that generate CH_4 in amounts equivalent to 25,000 metric tons CO_2e or more per year, as determined according to subpart HH of this part.
- Manure management systems with combined CH_4 and N_2O emissions in amounts equivalent to 25,000 metric tons CO_2e or more per year, as determined according to subpart JJ of this part.

Additional Source Categories [a] Applicable in Reporting Year 2011 and Future Years:
- Electrical transmission and distribution equipment use at facilities where the total estimated emissions from fluorinated GHGs, as determined under § 98.301 (subpart DD of this part), are equivalent to 25,000 metric tons CO_2e or more per year.
- Underground coal mines liberating 36,500,000 actual cubic feet of CH_4 or more per year (subpart FF of this part).
- Geologic sequestration of carbon dioxide (subpart RR of this part).
- Injection of carbon dioxide (subpart UU of this part).

Additional Source Categories [a] Applicable in Reporting Year 2025 and Future Years:
- Geologic sequestration of carbon dioxide with enhanced oil recovery using ISO 27916 (subpart VV of this part).
- Coke calciners (subpart WW of this part).
- Calcium carbide production (subpart XX of this part).
- Caprolactam, glyoxal, and glyoxylic acid production (subpart YY of this part).

[a] Source categories are defined in each applicable subpart of this part.

■ 11. Revise and republish table A–4 to subpart A to read as follows:

TABLE A–4 TO SUBPART A OF PART 98—SOURCE CATEGORY LIST FOR § 98.2(a)(2)

Source Categories [a] Applicable in Reporting Year 2010 and Future Years:
- Ferroalloy production (subpart K of this part).
- Glass production (subpart N of this part).
- Hydrogen production (subpart P of this part).
- Iron and steel production (subpart Q of this part).
- Lead production (subpart R of this part).
- Pulp and paper manufacturing (subpart AA of this part).
- Zinc production (subpart GG of this part).

Additional Source Categories [a] Applicable in Reporting Year 2011 and Future Years:

TABLE A–4 TO SUBPART A OF PART 98—SOURCE CATEGORY LIST FOR § 98.2(a)(2)—Continued

Electronics manufacturing (subpart I of this part).
Fluorinated gas production (subpart L of this part).
Magnesium production (subpart T of this part).
Petroleum and Natural Gas Systems (subpart W of this part).
Industrial wastewater treatment (subpart II of this part).
Electrical transmission and distribution equipment manufacture or refurbishment, as determined under § 98.451 (subpart SS of this part).
Industrial waste landfills (subpart TT of this part).
Additional Source Categories [a] Applicable in Reporting Year 2025 and Future Years:
Ceramics manufacturing facilities, as determined under § 98.520 (subpart ZZ of this part).

[a] Source categories are defined in each applicable subpart.

Subpart C—General Stationary Fuel Combustion Sources

■ 12. Amend § 98.33 by:

■ a. Revising and republishing paragraph (a)(3)(iii);

■ b. Revising paragraph (b)(1)(vii);

■ c. Revising parameter ''EF'' of equation C–10 in paragraph (c)(4) introductory text;

■ d. Revising and republishing paragraph (c)(6);

■ e. Revising parameter ''R'' of equation C–11 in paragraph (d)(1); and

■ f. Revising the introductory text of paragraphs (e), (e)(1) and (3), and paragraph (e)(3)(iv).

The revisions read as follows:

§ 98.33 Calculating GHG emissions.

* * * * *

(a) * * *

(3) * * *

(iii) For a gaseous fuel, use equation C–5 to this section.

$$CO_2 = \frac{44}{12} * \text{Fuel} * \text{CC} * \frac{\text{MW}}{\text{MVC}} * 0.001$$

(Eq. C–5)

Where:

CO_2 = Annual CO_2 mass emissions from combustion of the specific gaseous fuel (metric tons).

Fuel = Annual volume of the gaseous fuel combusted (scf). The volume of fuel combusted must be measured directly, using fuel flow meters calibrated according to § 98.3(i). Fuel billing meters may be used for this purpose.

CC = Annual average carbon content of the gaseous fuel (kg C per kg of fuel). The annual average carbon content shall be determined using the procedures specified in paragraphs (a)(3)(iii)(A)(*1*) and (*2*) of this section.

MW = Annual average molecular weight of the gaseous fuel (kg per kg-mole). The annual average molecular weight shall be determined using the procedures specified in paragraphs (a)(3)(iii)(B)(*1*) and (*2*) of this section.

MVC = Molar volume conversion factor at standard conditions, as defined in § 98.6. Use 849.5 scf per kg mole if you select 68 °F as standard temperature and 836.6 scf per kg mole if you select 60 °F as standard temperature.

44/12 = Ratio of molecular weights, CO_2 to carbon.

0.001 = Conversion factor from kg to metric tons.

(A) The minimum required sampling frequency for determining the annual average carbon content (*e.g.,* monthly, quarterly, semi-annually, or by lot) is specified in § 98.34. The method for computing the annual average carbon content for equation C–5 to this section is a function of unit size and how frequently you perform or receive from the fuel supplier the results of fuel sampling for carbon content. The methods are specified in paragraphs (a)(3)(iii)(A)(*1*) and (*2*) of this section, as applicable.

(*1*) If the results of fuel sampling are received monthly or more frequently, then for each unit with a maximum rated heat input capacity greater than or equal to 100 mmBtu/hr (or for a group of units that includes at least one unit of that size), the annual average carbon content for equation C–5 shall be calculated using equation C–5A to this section. If multiple carbon content determinations are made in any month, average the values for the month arithmetically.

$$(\text{CC})_{\text{annual}} = \frac{\sum_{i=1}^{n} (\text{CC})_i * (\text{Fuel})_i * (\text{MW})_i / \text{MWC}}{\sum_{i=1}^{n} (\text{Fuel})_i * (\text{MW})_i / \text{MVC}}$$

(Eq. C–5A)

Where:

$(CC)_{annual}$ = Weighted annual average carbon content of the fuel (kg C per kg of fuel).

$(CC)_i$ = Measured carbon content of the fuel, for sample period ''i'' (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (kg C per kg of fuel).

$(Fuel)_i$ = Volume of the fuel (scf) combusted during the sample period ''i'' (*e.g.,* monthly, quarterly, semi-annually, or by lot) from company records.

$(MW)_i$ = Measured molecular weight of the fuel, for sample period ''i'' (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (kg per kg-mole).

MVC = Molar volume conversion factor at standard conditions, as defined in § 98.6. Use 849.5 scf per kg-mole if you select 68 °F as standard temperature and 836.6

scf per kg-mole if you select 60 °F as standard temperature.

n = Number of sample periods in the year.

(*2*) If the results of fuel sampling are received less frequently than monthly, or, for a unit with a maximum rated heat input capacity less than 100 mmBtu/hr (or a group of such units) regardless of the carbon content sampling frequency, the annual average carbon content for equation C–5 shall either be computed according to paragraph (a)(3)(iii)(A)(*1*) of this section or as the arithmetic average carbon content for all values for the year (including valid samples and substitute data values under § 98.35).

(B) The minimum required sampling frequency for determining the annual average molecular weight (*e.g.,* monthly, quarterly, semi-annually, or by lot) is specified in § 98.34. The method for computing the annual average molecular weight for equation C–5 is a function of unit size and how frequently you perform or receive from the fuel supplier the results of fuel sampling for molecular weight. The methods are specified in paragraphs (a)(3)(iii)(B)(*1*) and (*2*) of this section, as applicable.

(*1*) If the results of fuel sampling are received monthly or more frequently, then for each unit with a maximum rated heat input capacity greater than or equal to 100 mmBtu/hr (or for a group of units that includes at least one unit of that size), the annual average molecular weight for equation C–5 shall be calculated using equation C–5B to this section. If multiple molecular weight determinations are made in any month, average the values for the month arithmetically.

$$(MW)_{annual} = \frac{\sum_{i=1}^{n}(MW)_i * (Fuel)_i/MVC}{\sum_{i=1}^{n}(Fuel)_i/MVC}$$

(Eq. C–5B)

Where:

$(MW)_{annual}$ = Weighted annual average molecular weight of the fuel (kg per kg-mole).

$(MW)_i$ = Measured molecular weight of the fuel, for sample period ''i'' (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (kg per kg-mole).

$(Fuel)_i$ = Volume of the fuel (scf) combusted during the sample period ''i'' (*e.g.,* monthly, quarterly, semi-annually, or by lot) from company records.

MVC = Molar volume conversion factor at standard conditions, as defined in § 98.6. Use 849.5 scf per kg-mole if you select 68 °F as standard temperature and 836.6 scf per kg-mole if you select 60 °F as standard temperature.

n = Number of sample periods in the year.

(*2*) If the results of fuel sampling are received less frequently than monthly, or, for a unit with a maximum rated heat input capacity less than 100 mmBtu/hr (or a group of such units) regardless of the molecular weight sampling frequency, the annual average molecular weight for equation C–5 shall either be computed according to paragraph (a)(3)(iii)(B)(*1*) of this section or as the arithmetic average molecular weight for all values for the year (including valid samples and substitute data values under § 98.35).

* * * * *

(b) * * *

(1) * * *

(vii) May be used for the combustion of MSW and/or tires in a unit, provided that no more than 10 percent of the unit's annual heat input is derived from those fuels, combined.

* * * * *

(c) * * *

(4) * * *

EF = Fuel-specific emission factor for CH_4 or N_2O, from table C–2 to this subpart (kg CH_4 or N_2O per mmBtu).

* * * * *

(6) Calculate the annual CH_4 and N_2O mass emissions from the combustion of blended fuels as follows:

(i) If the mass, volume, or heat input of each component fuel in the blend is determined before the fuels are mixed and combusted, calculate and report CH_4 and N_2O emissions separately for each component fuel, using the applicable procedures in this paragraph (c).

(ii) If the mass, volume, or heat input of each component fuel in the blend is not determined before the fuels are mixed and combusted, a reasonable estimate of the percentage composition of the blend, based on best available information, is required. Perform the following calculations for each component fuel ''i'' that is listed in table C–2 to this subpart:

(A) Multiply (% Fuel)i, the estimated mass, volume, or heat input percentage of component fuel ''i'' (expressed as a decimal fraction), by the total annual mass, volume, or heat input of the blended fuel combusted during the reporting year, to obtain an estimate of the annual value for component ''i'';

(B) [Reserved]

(C) Calculate the annual CH_4 and N_2O emissions from component ''i'', using equation C–8 (fuel mass or volume) to this section, C–8a (fuel heat input) to this section, C–8b (fuel heat input) to this section, C–9a (fuel mass or volume) to this section, or C–10 (fuel heat input) to this section, as applicable;

(D) Sum the annual CH_4 emissions across all component fuels to obtain the annual CH_4 emissions for the blend. Similarly sum the annual N_2O emissions across all component fuels to obtain the annual N_2O emissions for the blend. Report these annual emissions totals.

(d) * * *

(1) * * *

R = The number of moles of CO_2 released per mole of sorbent used (R = 1.00 when the sorbent is $CaCO_3$ and the targeted acid gas species is SO_2).

* * * * *

(e) *Biogenic CO_2 emissions from combustion of biomass with other fuels.* Use the applicable procedures of this paragraph (e) to estimate biogenic CO_2 emissions from units that combust a combination of biomass and fossil fuels (*i.e.,* either co-fired or blended fuels). Separate reporting of biogenic CO_2 emissions from the combined combustion of biomass and fossil fuels is required for those biomass fuels listed in table C–1 to this subpart, MSW, and tires. In addition, when a biomass fuel that is not listed in table C–1 to this subpart is combusted in a unit that has a maximum rated heat input greater than 250 mmBtu/hr, if the biomass fuel accounts for 10% or more of the annual heat input to the unit, and if the unit does not use CEMS to quantify its annual CO_2 mass emissions, then, pursuant to paragraph (b)(3)(iii) of this section, Tier 3 must be used to determine the carbon content of the biomass fuel and to calculate the biogenic CO_2 emissions from combustion of the fuel. Notwithstanding these requirements, in accordance with § 98.3(c)(12), separate reporting of biogenic CO_2 emissions is optional for the 2010 reporting year for units subject to subpart D of this part and for units

that use the CO_2 mass emissions calculation methodologies in part 75 of this chapter, pursuant to paragraph (a)(5) of this section. However, if the owner or operator opts to report biogenic CO_2 emissions separately for these units, the appropriate method(s) in this paragraph (e) shall be used.

(1) You may use equation C–1 to this section to calculate the annual CO_2 mass emissions from the combustion of the biomass fuels listed in table C–1 to this subpart, in a unit of any size, including units equipped with a CO_2 CEMS, except when the use of Tier 2 is required as specified in paragraph (b)(1)(iv) of this section. Determine the quantity of biomass combusted using one of the following procedures in this paragraph (e)(1), as appropriate, and document the selected procedures in the Monitoring Plan under § 98.3(g):

* * * * *

(3) You must use the procedures in paragraphs (e)(3)(i) through (iii) of this section to determine the annual biogenic CO_2 emissions from the combustion of MSW, except as otherwise provided in paragraph (e)(3)(iv) of this section. These procedures also may be used for any unit that co-fires biomass and fossil fuels, including units equipped with a CO_2 CEMS.

* * * * *

(iv) In lieu of following the procedures in paragraphs (e)(3)(i) through (iii) of this section, the procedures of this paragraph (e)(3)(iv) may be used for the combustion of tires regardless of the percent of the annual heat input provided by tires. The calculation procedure in this paragraph (e)(3)(iv) may be used for the combustion of MSW if the combustion of MSW provides no more than 10 percent of the annual heat input to the unit or if a small, batch incinerator combusts no more than 1,000 tons per year of MSW.

(A) Calculate the total annual CO_2 emissions from combustion of MSW and/or tires in the unit, using the applicable methodology in paragraphs (a)(1) through (3) of this section for units using Tier 1, Tier 2, or Tier 3; otherwise use the Tier 1 calculation methodology in paragraph (a)(1) of this section for units using either the Tier 4 or Alternative Part 75 calculation methodologies to calculate total CO_2 emissions.

(B) Multiply the result from paragraph (e)(3)(iv)(A) of this section by the appropriate default factor to determine the annual biogenic CO_2 emissions, in metric tons. For MSW, use a default factor of 0.60 and for tires, use a default factor of 0.24.

* * * * *

■ 13. Amend § 98.34 by revising paragraphs (c)(6), (d) and (e) to read as follows:

§ 98.34 Monitoring and QA/QC requirements.

* * * * *

(c) * * *

(6) For applications where CO_2 concentrations in process and/or combustion flue gasses are lower or higher than the typical CO_2 span value for coal-based fuels (*e.g.,* 20 percent CO_2 for a coal fired boiler), cylinder gas audits of the CO_2 monitor under appendix F to part 60 of this chapter may be performed at 40–60 percent and 80–100 percent of CO_2 span, in lieu of the prescribed calibration levels of 5–8 percent and 10–14 percent CO_2 by volume.

* * * * *

(d) Except as otherwise provided in § 98.33(e)(3)(iv), when municipal solid waste (MSW) is either the primary fuel combusted in a unit or the only fuel with a biogenic component combusted in the unit, determine the biogenic portion of the CO_2 emissions using ASTM D6866–16 and ASTM D7459–08 (both incorporated by reference, see § 98.7). Perform the ASTM D7459–08 sampling and the ASTM D6866–16 analysis at least once in every calendar quarter in which MSW is combusted in the unit. Collect each gas sample during normal unit operating conditions for at least 24 total (not necessarily consecutive) hours, or longer if the facility deems it necessary to obtain a representative sample. Notwithstanding this requirement, if the types of fuels combusted and their relative proportions are consistent throughout the year, the minimum required sampling time may be reduced to 8 hours if at least two 8-hour samples and one 24-hour sample are collected under normal operating conditions, and arithmetic average of the biogenic fraction of the flue gas from the 8-hour samples (expressed as a decimal) is within ±5 percent of the biogenic fraction from the 24-hour test. There must be no overlapping of the 8-hour and 24-hour test periods. Document the results of the demonstration in the unit's monitoring plan. If the types of fuels and their relative proportions are not consistent throughout the year, an optional sampling approach that facilities may wish to consider to obtain a more representative sample is to collect an integrated sample by extracting a small amount of flue gas (*e.g.,* 1 to 5 cc) in each unit operating hour during the quarter. Separate the total annual CO_2 emissions into the biogenic and non-biogenic fractions using the average proportion of biogenic emissions of all samples analyzed during the reporting year. Express the results as a decimal fraction (*e.g.,* 0.30, if 30 percent of the CO_2 is biogenic). When MSW is the primary fuel for multiple units at the facility, and the units are fed from a common fuel source, testing at only one of the units is sufficient.

(e) For other units that combust combinations of biomass fuel(s) (or heterogeneous fuels that have a biomass component, *e.g.,* tires) and fossil (or other non-biogenic) fuel(s), in any proportions, ASTM D6866–16 and ASTM D7459–08 (both incorporated by reference, see § 98.7) may be used to determine the biogenic portion of the CO_2 emissions in every calendar quarter in which biomass and non-biogenic fuels are co-fired in the unit. Follow the procedures in paragraph (d) of this section. If multiple units at the facility are fed from a common fuel source, testing at only one of the units is sufficient.

* * * * *

■ 14. Amend § 98.36 by revising paragraphs (c)(1)(vi), (c)(3)(vi), (e)(2)(ii)(C) and (e)(2)(xi) to read as follows:

§ 98.36 Data reporting requirements.

* * * * *

(c) * * *

(1) * * *

(vi) Annual CO_2 mass emissions and annual CH_4, and N_2O mass emissions, aggregated for each type of fuel combusted in the group of units during the report year, expressed in metric tons of each gas and in metric tons of CO_2e. If any of the units burn biomass, report also the annual CO_2 emissions from combustion of all biomass fuels combined, expressed in metric tons.

* * * * *

(3) * * *

(vi) If any of the units burns biomass, the annual CO_2 emissions from combustion of all biomass fuels from the units served by the common pipe, expressed in metric tons.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(C) The annual average, and, where applicable, monthly high heat values used in the CO_2 emissions calculations for each type of fuel combusted during the reporting year, in mmBtu per short ton for solid fuels, mmBtu per gallon for

liquid fuels, and mmBtu per scf for gaseous fuels. Report an HHV value for each calendar month in which HHV determination is required. If multiple values are obtained in a given month, report the arithmetic average value for the month.

* * * * *

(xi) When ASTM methods D7459–08 and D6866–16 (both incorporated by reference, see § 98.7) are used in accordance with § 98.34(e) to determine the biogenic portion of the annual CO_2 emissions from a unit that co-fires biogenic fuels (or partly-biogenic fuels, including tires) and non-biogenic fuels, you shall report the results of each quarterly sample analysis, expressed as a decimal fraction (*e.g.,* if the biogenic fraction of the CO_2 emissions is 30 percent, report 0.30).

* * * * *

■ 15. Amend § 98.37 by revising and republishing paragraph (b) to read as follows:

§ 98.37 Records that must be retained.

* * * * *

(b) The applicable verification software records as identified in this paragraph (b). For each stationary fuel combustion source that elects to use the verification software specified in § 98.5(b) rather than report data specified in paragraphs (b)(9)(iii), (c)(2)(ix), (e)(2)(i), (e)(2)(ii)(A), (C), and (D), (e)(2)(iv)(A), (C), and (F), and (e)(2)(ix)(D) through (F) of this section, you must keep a record of the file generated by the verification software for the applicable data specified in paragraphs (b)(1) through (37) of this section. Retention of this file satisfies the recordkeeping requirement for the data in paragraphs (b)(1) through (37) of this section.

(1) Mass of each solid fuel combusted (tons/year) (equation C–1 to § 98.33).

(2) Volume of each liquid fuel combusted (gallons/year) (equation C–1 to § 98.33).

(3) Volume of each gaseous fuel combusted (scf/year) (equation C–1 to § 98.33).

(4) Annual natural gas usage (therms/year) (equation C–1a to § 98.33).

(5) Annual natural gas usage (mmBtu/year) (equation C–1b to § 98.33).

(6) Mass of each solid fuel combusted (tons/year) (equation C–2a to § 98.33).

(7) Volume of each liquid fuel combusted (gallons/year) (equation C–2a to § 98.33).

(8) Volume of each gaseous fuel combusted (scf/year) (equation C–2a to § 98.33).

(9) Measured high heat value of each solid fuel, for month (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (mmBtu per ton) (equation C–2b to § 98.33). Annual average HHV of each solid fuel (mmBtu per ton) (equation C–2a to § 98.33).

(10) Measured high heat value of each liquid fuel, for month (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (mmBtu per gallons) (equation C–2b to § 98.33). Annual average HHV of each liquid fuel (mmBtu per gallons) (equation C–2a to § 98.33).

(11) Measured high heat value of each gaseous fuel, for month (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (mmBtu per scf) (equation C–2b to § 98.33). Annual average HHV of each gaseous fuel (mmBtu per scf) (equation C–2a to § 98.33).

(12) Mass of each solid fuel combusted during month (tons) (equation C–2b to § 98.33).

(13) Volume of each liquid fuel combusted during month (gallons) (equation C–2b to § 98.33).

(14) Volume of each gaseous fuel combusted during month (scf) (equation C–2b, equation C–5A, equation C–5B to § 98.33).

(15) Total mass of steam generated by municipal solid waste or each solid fuel combustion during the reporting year (pounds steam) (equation C–2c to § 98.33).

(16) Ratio of the boiler's maximum rated heat input capacity to its design rated steam output capacity (MMBtu/pounds steam) (equation C–2c to § 98.33).

(17) Annual mass of each solid fuel combusted (short tons/year) (equation C–3 to § 98.33).

(18) Annual average carbon content of each solid fuel (percent by weight, expressed as a decimal fraction) (equation C–3 to § 98.33). Where applicable, monthly carbon content of each solid fuel (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (percent by weight, expressed as a decimal fraction) (equation C–2b to § 98.33—see the definition of ''CC'' in equation C–3 to § 98.33).

(19) Annual volume of each liquid fuel combusted (gallons/year) (equation C–4 to § 98.33).

(20) Annual average carbon content of each liquid fuel (kg C per gallon of fuel) (equation C–4 to § 98.33). Where applicable, monthly carbon content of each liquid fuel (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (kg C per gallon of fuel) (equation C–2b to § 98.33—see the definition of ''CC'' in equation C–3 to § 98.33).

(21) Annual volume of each gaseous fuel combusted (scf/year) (equation C–5 to § 98.33).

(22) Annual average carbon content of each gaseous fuel (kg C per kg of fuel) (equation C–5 to § 98.33). Where applicable, monthly carbon content of each gaseous (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (kg C per kg of fuel) (equation C–5A to § 98.33).

(23) Annual average molecular weight of each gaseous fuel (kg/kg-mole) (equation C–5 to § 98.33). Where applicable, monthly molecular weight of each gaseous (which may be the arithmetic average of multiple determinations), or, if applicable, an appropriate substitute data value (kg/kg-mole) (equation C–5B to § 98.33).

(24) Molar volume conversion factor at standard conditions, as defined in § 98.6 (scf per kg-mole) (equation C–5 to § 98.33).

(25) Identify for each fuel if you will use the default high heat value from table C–1 to this subpart, or actual high heat value data (equation C–8 to § 98.33).

(26) High heat value of each solid fuel (mmBtu/tons) (equation C–8 to § 98.33).

(27) High heat value of each liquid fuel (mmBtu/gallon) (equation C–8 to § 98.33).

(28) High heat value of each gaseous fuel (mmBtu/scf) (equation C–8 to § 98.33).

(29) Cumulative annual heat input from combustion of each fuel (mmBtu) (equation C–10 to § 98.33).

(30) Total quantity of each solid fossil fuel combusted in the reporting year, as defined in § 98.6 (pounds) (equation C–13 to § 98.33).

(31) Total quantity of each liquid fossil fuel combusted in the reporting year, as defined in § 98.6 (gallons) (equation C–13 to § 98.33).

(32) Total quantity of each gaseous fossil fuel combusted in the reporting year, as defined in § 98.6 (scf) (equation C–13 to § 98.33).

(33) High heat value of the each solid fossil fuel (Btu/lb) (equation C–13 to § 98.33).

(34) High heat value of the each liquid fossil fuel (Btu/gallons) (equation C–13 to § 98.33).

(35) High heat value of the each gaseous fossil fuel (Btu/scf) (equation C–13 to § 98.33).

(36) Fuel-specific carbon based F-factor per fuel (scf CO_2/mmBtu) (equation C–13 to § 98.33).

(37) Moisture content used to calculate the wood and wood residuals wet basis HHV (percent), if applicable (equations C–1 and C–8 to § 98.33).

Subpart G—Ammonia Manufacturing

■ 16. Amend § 98.72 by revising paragraph (a) to read as follows:

§ 98.72 GHGs to report.

* * * * *

(a) CO_2 process emissions from steam reforming of a hydrocarbon or the gasification of solid and liquid raw material, reported for each ammonia manufacturing unit following the requirements of this subpart.

* * * * *

■ 17. Amend § 98.73 by revising the introductory text and paragraph (b) to read as follows:

§ 98.73 Calculating GHG emissions.

You must calculate and report the annual CO_2 process emissions from each ammonia manufacturing unit using the procedures in either paragraph (a) or (b) of this section.

* * * * *

(b) Calculate and report under this subpart process CO_2 emissions using the procedures in paragraphs (b)(1) through (4) of this section, as applicable.

(1) *Gaseous feedstock.* You must calculate, from each ammonia manufacturing unit, the CO_2 process emissions from gaseous feedstock according to equation G–1 to this section:

$$CO_{2,G} = \left(\sum_{n=1}^{12} \frac{44}{12} * Fdstk_n * CC_n * \frac{MW}{MVC}\right) * 0.001 \quad \text{(Eq. G–1)}$$

Where:

$CO_{2,G}$ = Annual CO_2 emissions arising from gaseous feedstock consumption (metric tons).

$Fdstk_n$ = Volume of the gaseous feedstock used in month n (scf of feedstock).

CC_n = Carbon content of the gaseous feedstock, for month n (kg C per kg of feedstock), determined according to § 98.74(c).

MW = Molecular weight of the gaseous feedstock (kg/kg-mole).

MVC = Molar volume conversion factor (849.5 scf per kg-mole at standard conditions).

44/12 = Ratio of molecular weights, CO_2 to carbon.

0.001 = Conversion factor from kg to metric tons.

n = Number of month.

(2) *Liquid feedstock.* You must calculate, from each ammonia manufacturing unit, the CO_2 process emissions from liquid feedstock according to equation G–2 to this section:

$$CO_{2,L} = \left(\sum_{n=1}^{12} \frac{44}{12} * Fdstk_n * CC_n\right) * 0.001 \quad \text{(Eq. G–2)}$$

Where:

$CO_{2,L}$ = Annual CO_2 emissions arising from liquid feedstock consumption (metric tons).

$Fdstk_n$ = Volume of the liquid feedstock used in month n (gallons of feedstock).

CC_n = Carbon content of the liquid feedstock, for month n (kg C per gallon of feedstock) determined according to § 98.74(c).

44/12 = Ratio of molecular weights, CO_2 to carbon.

0.001 = Conversion factor from kg to metric tons.

n = Number of month.

(3) *Solid feedstock.* You must calculate, from each ammonia manufacturing unit, the CO_2 process emissions from solid feedstock according to equation G–3 to this section:

$$CO_{2,S} = \left(\sum_{n=1}^{12} \frac{44}{12} * Fdstk_n * CC_n\right) * 0.001 \quad \text{(Eq. G–3)}$$

Where:

$CO_{2,S}$ = Annual CO_2 emissions arising from solid feedstock consumption (metric tons).

$Fdstk_n$ = Mass of the solid feedstock used in month n (kg of feedstock).

CC_n = Carbon content of the solid feedstock, for month n (kg C per kg of feedstock), determined according to § 98.74(c).

44/12 = Ratio of molecular weights, CO_2 to carbon.

0.001 = Conversion factor from kg to metric tons.

n = Number of month.

(4) *CO_2 process emissions.* You must calculate the annual CO_2 process emissions at each ammonia manufacturing unit according to equation G–4 to this section:

$$CO_2 = \sum_{p=1}^{3} CO_{2,p} \quad \text{(Eq. G–4)}$$

Where:

CO_2 = Annual CO_2 process emissions from each ammonia manufacturing unit (metric tons).

$CO_{2,p}$ = Annual CO_2 process emissions arising from feedstock consumption based on feedstock type “p” (metric tons/yr) as calculated in paragraphs (b)(1) through (3) of this section.

p = Index for feedstock type; 1 indicates gaseous feedstock; 2 indicates liquid feedstock; and 3 indicates solid feedstock.

* * * * *

■ 18. Amend § 98.76 by revising the introductory text and paragraphs (b)(1) and (13) and adding paragraph (b)(16) to read as follows:

§ 98.76 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) and (b) of this section, as applicable for each ammonia manufacturing unit.

* * * * *

(b) * * *

(1) Annual CO_2 process emissions (metric tons) for each ammonia manufacturing unit.

* * * * *

(13) Annual amount of CO_2 (metric tons) collected from ammonia production and consumed on site for urea production and the method used to determine the CO_2 consumed in urea production.

* * * * *

(16) Annual quantity of excess hydrogen produced that is not consumed through the production of ammonia (metric tons).

Subpart H—Cement Production

■ 19. Amend § 98.83 by:

■ a. Revising paragraph (d)(1);

■ b. Revising parameters ''CKD_{CaO}'' and ''CKD_{MgO}'' of equation H–4 in paragraph (d)(2)(ii)(A); and

■ c. Revising paragraph (d)(3).

The revisions read as follows:

§ 98.83 Calculating GHG emissions.

* * * * *

(d) * * *

(1) Calculate CO_2 process emissions from all kilns at the facility using equation H–1 to this section:

$$CO_{2\,CMF} = \sum_{m=1}^{k}\left[CO_{2\,Cli,m} + CO_{2\,rm,m}\right] \qquad \text{(Eq. H–1)}$$

Where:

$CO_{2\,CMF}$ = Annual process emissions of CO_2 from cement manufacturing, metric tons.

$CO_{2\,Cli,m}$ = Total annual emissions of CO_2 from clinker production from kiln m, metric tons.

$CO_{2\,rm,m}$ = Total annual emissions of CO_2 from raw materials from kiln m, metric tons.

k = Total number of kilns at a cement manufacturing facility.

(2) * * *

(ii) * * *

(A) * * *

CKD_{ncCaO} = Quarterly non-calcined CaO content of CKD not recycled to the kiln, wt-fraction.

* * * * *

CKD_{ncMgO} = Quarterly non-calcined MgO content of CKD not recycled to the kiln, wt-fraction.

* * * * *

(3) *CO_2 emissions from raw materials from each kiln.* Calculate CO_2 emissions from raw materials using equation H–5 to this section:

$$CO_{2\,rm,m} = \sum_{i=1}^{M}\left[rm * TOC_{rm} * \frac{44}{12} * \frac{2000}{2205}\right] \qquad \text{(Eq. H–5)}$$

Where:

rm = The amount of raw material i consumed annually from kiln m, tons/yr (dry basis) or the amount of raw kiln feed consumed annually from kiln m, tons/yr (dry basis).

$CO_{2,rm,m}$ = Annual CO_2 emissions from raw materials from kiln m.

TOC_{rm} = Organic carbon content of raw material i from kiln m or organic carbon content of combined raw kiln feed (dry basis) from kiln m, as determined in § 98.84(c) or using a default factor of 0.2 percent of total raw material weight.

M = Number of raw materials or 1 if calculating emissions based on combined raw kiln feed.

44/12 = Ratio of molecular weights, CO_2 to carbon.

2000/2205 = Conversion factor to convert tons to metric tons.

* * * * *

■ 20. Amend § 98.86 by adding paragraphs (a)(4) through (8) and (b)(19) through (28) to read as follows:

§ 98.86 Data reporting requirements.

* * * * *

(a) * * *

(4) Annual arithmetic average of total CaO content of clinker at the facility, wt-fraction.

(5) Annual arithmetic average of non-calcined CaO content of clinker at the facility, wt-fraction.

(6) Annual arithmetic average of total MgO content of clinker at the facility, wt-fraction.

(7) Annual arithmetic average of non-calcined MgO content of clinker at the facility, wt-fraction.

(8) Annual facility CKD not recycled to the kiln(s), tons.

(b) * * *

(19) Annual arithmetic average of total CaO content of clinker at the facility, wt-fraction.

(20) Annual arithmetic average of non-calcined CaO content of clinker at the facility, wt-fraction.

(21) Annual arithmetic average of total MgO content of clinker at the facility, wt-fraction.

(22) Annual arithmetic average of non-calcined MgO content of clinker at the facility, wt-fraction.

(23) Annual arithmetic average of total CaO content of CKD not recycled to the kiln(s) at the facility, wt-fraction.

(24) Annual arithmetic average of non-calcined CaO content of CKD not recycled to the kiln(s) at the facility, wt-fraction.

(25) Annual arithmetic average of total MgO content of CKD not recycled to the kiln(s) at the facility, wt-fraction.

(26) Annual arithmetic average of non-calcined MgO content of CKD not recycled to the kiln(s) at the facility, wt-fraction.

(27) Annual facility CKD not recycled to the kiln(s), tons.

(28) The amount of raw kiln feed consumed annually at the facility, tons (dry basis).

Subpart I—Electronics Manufacturing

■ 21. Revise and republish § 98.91 to read as follows:

§ 98.91 Reporting threshold.

(a) You must report GHG emissions under this subpart if electronics manufacturing production processes, as defined in § 98.90, are performed at your facility and your facility meets the requirements of either § 98.2(a)(1) or (2). To calculate total annual GHG emissions for comparison to the 25,000 metric ton CO_2e per year emission threshold in § 98.2(a)(2), follow the requirements of § 98.2(b), with one exception. Rather than using the calculation methodologies in § 98.93 to calculate emissions from electronics manufacturing production processes, calculate emissions of each fluorinated GHG from electronics manufacturing production processes by using paragraph (a)(1), (2), or (3) of this section, as appropriate, and then sum

the emissions of each fluorinated GHG and account for fluorinated heat transfer fluid emissions by using paragraph (a)(4) of this section.

(1) If you manufacture semiconductors or MEMS you must calculate annual production process emissions resulting from the use of each input gas for threshold applicability purposes using either the default emission factors shown in table I–1 to this subpart and equation I–1A to this section, or the consumption of each input gas, the default emission factors shown in table I–2 to this subpart, and equation I–1B to this section.

$$E_i = S * EF_i * GWP_i * 0.001 \quad \text{(Eq. I–1A)}$$

Where:

E_i = Annual production process emissions of gas i for threshold applicability purposes (metric tons CO_2e).

S = 100 percent of annual manufacturing capacity of a facility as calculated using equation I–5 to this section (m^2).

EF_i = Emission factor for gas i (kg/m^2) shown in table I–1 to this subpart.

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

0.001 = Conversion factor from kg to metric tons.

i = Emitted gas.

$$E_i = C_i * (GWP_i * (1 - U_i) + GWP_{CF4} * BCF_4 + GWP_{C2F6} * BC_2F_6) * 0.001 \quad \text{(Eq. I–1B)}$$

Where:

E_i = Annual production process emissions resulting from the use of input gas i for threshold applicability purposes (metric tons CO_2e).

C_i = Annual GHG (input gas i) purchases or consumption (kg). Only gases that are used in semiconductor or MEMS manufacturing processes listed at § 98.90(a)(1) through (4) must be considered for threshold applicability purposes.

$(1-U_i)$, BCF_4, and BC_2F_6 = Default emission factors for the gas consumption-based threshold applicability determination listed in table I–2 to this subpart.

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

(2) If you manufacture LCDs, you must calculate annual production process emissions resulting from the use of each input gas for threshold applicability purposes using either the default emission factors shown in table I–1 to this subpart and equation I–2A to this section or the consumption of each input gas, the default emission factors shown in table I–2 to this subpart, and equation I–2B to this section.

$$E_i = S * EF_i * GWP_i * 0.000001 \quad \text{(Eq. I–2A)}$$

Where:

E_i = Annual production process emissions of gas i for threshold applicability purposes (metric tons CO_2e).

S = 100 percent of annual manufacturing capacity of a facility as calculated using equation I–5 to this section (m^2).

EF_i = Emission factor for gas i (g/m^2).

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

0.000001 = Conversion factor from g to metric tons.

i = Emitted gas.

$$E_i = C_i * (GWP_i * (1 - U_i) + GWP_{CF4} * BCF_4 + GWP_{C2F6} * BC_2F_6) * 0.001 \quad \text{(Eq. I–2B)}$$

Where:

E_i = Annual production process emissions resulting from the use of input gas i for threshold applicability purposes (metric tons CO_2e).

C_i = Annual GHG (input gas i) purchases or consumption (kg). Only gases that are used in LCD manufacturing processes listed at § 98.90(a)(1) through (4) must be considered for threshold applicability purposes.

$(1-U_i)$, BCF_4, and BC_2F_6 = Default emission factors for the gas consumption-based threshold applicability determination listed in table I–2 to this subpart.

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

(3) If you manufacture PVs, you must calculate annual production process emissions resulting from the use of each input gas i for threshold applicability purposes using gas-appropriate GWP values shown in table A–1 to subpart A of this part, the default emission factors shown in table I–2 to this subpart, and equation I–3 to this section.

$$E_i = C_i * (GWP_i * (1 - U_i) + GWP_{CF4} * BCF_4 + GWP_{C2F6} * BC_2F_6) * 0.001 \quad \text{(Eq. I–3)}$$

Where:

E_i = Annual production process emissions resulting from the use of input gas i for threshold applicability purposes (metric tons CO_2e).

C_i = Annual fluorinated GHG (input gas i) purchases or consumption (kg). Only gases that are used in PV manufacturing processes listed at § 98.90(a)(1) through (4) must be considered for threshold applicability purposes.

$(1 - U_i)$, BCF_4, and BC_2F_6 = Default emission factors for the gas consumption-based threshold applicability determination listed in table I–2 to this subpart.

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

(4) You must calculate total annual production process emissions for threshold applicability purposes using equation I–4 to this section.

$$E_T = \delta * \sum_i E_i \quad \text{(Eq. I–4)}$$

Where:

E_T = Annual production process emissions of all fluorinated GHGs for threshold applicability purposes (metric tons CO_2e).

δ = Factor accounting for fluorinated heat transfer fluid emissions, estimated as 10 percent of total annual production process emissions at a semiconductor facility. Set equal to 1.1 when equation I–4 to this section is used to calculate total annual production process emissions from semiconductor manufacturing. Set equal to 1 when equation I–4 to this section is used to calculate total annual production process emissions from MEMS, LCD, or PV manufacturing.

E_i = Annual production process emissions of gas i for threshold applicability purposes (metric tons CO_2e), as calculated in equations I–1a, I–1b, I–2a, I–2b, or I–3 to this section.

i = Emitted gas.

(b) You must calculate annual manufacturing capacity of a facility using equation I–5 to this section.

$$S = \sum_x^{12} W_x \quad \text{(Eq. I–5)}$$

Where:

S = 100 percent of annual manufacturing capacity of a facility (m²).

W_x = Maximum substrate starts of fab f in month x (m² per month).

x = Month.

■ 22. Amend § 98.92 by revising paragraph (a) introductory text to read as follows:

§ 98.92 GHGs to report.

(a) You must report emissions of fluorinated GHGs (as defined in § 98.6), N_2O, and fluorinated heat transfer fluids (as defined in § 98.6). The fluorinated GHGs and fluorinated heat transfer fluids that are emitted from electronics manufacturing production processes include, but are not limited to, those listed in table I–21 to this subpart. You must individually report, as appropriate:

* * * * *

■ 23. Amend § 98.93 by:

■ a. Revising paragraph (a);

■ b. Revising the introductory text of paragraph (e);

■ c. Revising parameters ''UT_{ij}'' and ''Td_{ijp}'' of equation I–15 in paragraph (g); and

■ d. Revising paragraphs (h)(1) and (i).

The revisions read as follows:

§ 98.93 Calculating GHG emissions.

(a) You must calculate total annual emissions of each fluorinated GHG emitted by electronics manufacturing production processes from each fab (as defined in § 98.98) at your facility, including each input gas and each by-product gas. You must use either default gas utilization rates and by-product formations rates according to the procedures in paragraph (a)(1), (2), (6), or (7) of this section, as appropriate, or the stack test method according to paragraph (i) of this section, to calculate emissions of each input gas and each by-product gas.

(1) If you manufacture semiconductors, you must adhere to the procedures in paragraphs (a)(1)(i) through (iii) of this section. You must calculate annual emissions of each input gas and of each by-product gas using equations I–6, I–7, and I–9 to this section. If your fab uses less than 50 kg of a fluorinated GHG in one reporting year, you may calculate emissions as equal to your fab's annual consumption for that specific gas as calculated in equation I–11 to this section, plus any by-product emissions of that gas calculated under paragraph (a) of this section.

$$ProcesstypeE_i = \sum_{j=1}^{N} E_{ij} \quad \text{(Eq. I–6)}$$

Where:

$ProcesstypeE_i$ = Annual emissions of input gas i from the process type on a fab basis (metric tons).

E_{ij} = Annual emissions of input gas i from process sub-type or process type j as calculated in equation I–8A to this section (metric tons).

N = The total number of process sub-types j that depends on the electronics manufacturing fab and emission calculation methodology. If E_{ij} is calculated for a process type j in equation I–8A to this section, N = 1.

i = Input gas.

j = Process sub-type or process type.

$$ProcesstypeBE_k = \sum_{j=1}^{N} \sum_i BE_{kij} \quad \text{(Eq. I–7)}$$

Where:

$ProcesstypeBE_k$ = Annual emissions of by-product gas k from the processes type on a fab basis (metric tons).

BE_{kij} = Annual emissions of by-product gas k formed from input gas i used for process sub-type or process type j as calculated in equation I–8B to this section (metric tons).

N = The total number of process sub-types j that depends on the electronics manufacturing fab and emission calculation methodology. If BE_{kij} is calculated for a process type j in equation I–8B to this section, N = 1.

i = Input gas.

j = Process sub-type, or process type.

k = By-product gas.

(i) You must calculate annual fab-level emissions of each fluorinated GHG used for the plasma etching/wafer cleaning process type using default utilization and by-product formation rates as shown in table I–3 or I–4 to this subpart, and by using equations I–8A and I–8B to this section.

$$E_{ij} = C_{ij} * (1 - U_{ij}) * (1 - (a_{ij} * d_{ij} * UT_{ij})) * 0.001 \quad \text{(Eq. I–8A)}$$

Where:

E_{ij} = Annual emissions of input gas i from process sub-type or process type j, on a fab basis (metric tons).

C_{ij} = Amount of input gas i consumed for process sub-type or process type j, as calculated in equation I–13 to this section, on a fab basis (kg).

U_{ij} = Process utilization rate for input gas i for process sub-type or process type j (expressed as a decimal fraction).

a_{ij} = Fraction of input gas i used in process sub-type or process type j with abatement systems, on a fab basis (expressed as a decimal fraction).

d_{ij} = Fraction of input gas i destroyed or removed when fed into abatement systems by process tools where process sub-type, or process type j is used, on a fab basis, calculated by taking the tool weighted average of the claimed DREs for input gas i on tools that use process type or process sub-type j (expressed as a decimal fraction). This is zero unless the facility adheres to the requirements in § 98.94(f).

UT_{ij} = The average uptime factor of all abatement systems connected to process tools in the fab using input gas i in process sub-type or process type j, as calculated in equation I–15 to this section, on a fab basis (expressed as a decimal fraction).

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

j = Process sub-type or process type.

$$BE_{kij} = B_{kij} * C_{ij} * (1 - (a_{kij} * d_{kij} * UT_{kij})) * 0.001 \quad \text{(Eq. I–8B)}$$

Where:

BE_{kij} = Annual emissions of by-product gas k formed from input gas i from process sub-type or process type j, on a fab basis (metric tons).

B_{kij} = By-product formation rate of gas k created as a by-product per amount of input gas i (kg) consumed by process sub-type or process type j (kg). If all input gases consumed by a chamber cleaning process sub-type are non-carbon containing input gases, this is zero when the combination of the non-carbon containing input gas and chamber cleaning process sub-type is never used to clean chamber walls on equipment that process carbon-containing films during the year (*e.g.,* when NF_3 is used in remote plasma cleaning processes to only clean chambers that never process carbon-containing films during the year). If all input gases consumed by an etching and wafer cleaning process sub-type are non-carbon containing input gases, this is zero when the combination of the non-carbon containing input gas and etching and wafer cleaning process sub-type is never used to etch or wafer clean carbon-containing films during the year.

C_{ij} = Amount of input gas i consumed for process sub-type, or process type j, as calculated in equation I–13 to this section, on a fab basis (kg).

a_{kij} = Fraction of input gas i used for process sub-type, or process type j with abatement systems, on a fab basis (expressed as a decimal fraction).

d_{kij} = Fraction of by-product gas k destroyed or removed in when fed into abatement systems by process tools where process sub-type or process type j is used, on a fab basis, calculated by taking the tool weighted average of the claimed DREs for by-product gas k on tools that use input gas i in process type or process sub-type j (expressed as a decimal fraction). This is zero unless the facility adheres to the requirements in § 98.94(f).

UT_{kij} = The average uptime factor of all abatement systems connected to process tools in the fab emitting by-product gas k, formed from input gas i in process sub-type or process type j, on a fab basis (expressed as a decimal fraction). For this equation, UT_{kij} is assumed to be equal to UT_{ij} as calculated in equation I–15 to this section.

0.001 = Conversion factor from kg to metric tons.

i = Input gas.

j = Process sub-type or process type.

k = By-product gas.

(ii) You must calculate annual fab-level emissions of each fluorinated GHG used for each of the process sub-types associated with the chamber cleaning process type, including in-situ plasma chamber clean, remote plasma chamber clean, and in-situ thermal chamber clean, using default utilization and by-product formation rates as shown in table I–3 or I–4 to this subpart, and by using equations I–8A and I–8B to this section.

(iii) If default values are not available for a particular input gas and process type or sub-type combination in tables I–3 or I–4, you must follow the procedures in paragraph (a)(6) of this section.

(2) If you manufacture MEMS or PVs and use semiconductor tools and processes, you may use § 98.3(a)(1) to calculate annual fab-level emissions for those processes. For all other tools and processes used to manufacture MEMs, LCD and PV, you must calculate annual fab-level emissions of each fluorinated GHG used for the plasma etching and chamber cleaning process types using default utilization and by-product formation rates as shown in table I–5, I–6, or I–7 to this subpart, as appropriate, and by using equations I–8A and I–8B to this section. If default values are not available for a particular input gas and process type or sub-type combination in tables I–5, I–6, or I–7 to this subpart, you must follow the procedures in paragraph (a)(6) of this section. If your fab uses less than 50 kg of a fluorinated GHG in one reporting year, you may calculate emissions as equal to your fab's annual consumption for that specific gas as calculated in equation I–11 to this section, plus any by-product emissions of that gas calculated under this paragraph (a).

(3)–(5) [Reserved]

(6) If you are required, or elect, to perform calculations using default emission factors for gas utilization and by-product formation rates according to the procedures in paragraph (a)(1) or (2) of this section, and default values are not available for a particular input gas and process type or sub-type combination in tables I–3, I–4, I–5, I–6, or I–7 to this subpart, you must use a utilization rate (U_{ij}) of 0.2 (*i.e.,* a 1–U_{ij} of 0.8) and by-product formation rates of 0.15 for CF_4 and 0.05 for C_2F_6 and use equations I–8A and I–8B to this section.

(7) If your fab employs hydrocarbon-fuel-based combustion emissions control systems (HC fuel CECS), including, but not limited to, abatement systems as defined at § 98.98, that were purchased and installed on or after January 1, 2025, to control emissions from tools that use either NF_3 in remote plasma cleaning processes or F_2 as an input gas in any process type or sub-type, you must calculate the amount CF_4 produced within and emitted from such systems using equation I–9 to this section using default utilization and by-product formation rates as shown in table I–3 or I–4 to this subpart. A HC fuel CECS is assumed not to form CF_4 from F_2 if the electronics manufacturer can certify that the rate of conversion from F_2 to CF_4 is <0.1% for that HC fuel CECS.

$$EAB_{CF_4} = \sum_j C_{F_2,j} \bullet (1 - U_{F_2,j}) \bullet a_{F_2,j} \bullet UT_{F_2,j} \bullet AB_{CF_4,F_2} + C_{NF_3,RPC} \bullet B_{F_2,NF_3} \bullet a_{NF_3,RPC} \bullet UT_{NF_3,RPC,F2} \bullet AB_{CF_4,F_2} \quad \text{(Eq. I–9)}$$

Where:

EAB_{CF4} = Emissions of CF_4 from HC fuel CECS when direct reaction between hydrocarbon fuel and F_2 is not certified not to occur by the emissions control system manufacturer or electronics manufacturer, kg.

$C_{F2,j}$ = Amount of F_2 consumed for process type or sub-type j, as calculated in equation I–13 to this section, on a fab basis (kg).

$U_{F2,j}$ = Process utilization rate for F_2 for process type or sub-type j (expressed as a decimal fraction).

$a_{F2,j}$ = Within process sub-type or process type j, fraction of F_2 used in process tools with HC fuel CECS that are not certified not to form CF_4, on a fab basis, where the numerator is the number of tools that are equipped with HC fuel CECS that are not certified not to form CF_4 that use F_2 in process type j and the denominator is the total number of tools in the fab that use F_2 in process type j (expressed as a decimal fraction).

$UT_{F2,j}$ = The average uptime factor of all HC fuel CECS connected to process tools in the fab using F_2 in process sub-type or process type j (expressed as a decimal fraction).

$AB_{CF4,F2}$ = Mass fraction of F_2 in process exhaust gas that is converted into CF_4 by direct reaction with hydrocarbon fuel in a HC fuel CECS. The default value of $AB_{CF4,F2}$ = 0.116.

$C_{NF3,RPC}$ = Amount of NF_3 consumed in remote plasma cleaning processes, as calculated in equation I–13 to this section, on a fab basis (kg).

$B_{F2,NF3}$ = By-product formation rate of F_2 created as a by-product per amount of NF_3 (kg) consumed in remote plasma cleaning processes (kg).

$a_{NF3,RPC}$ = Within remote plasma cleaning processes, fraction of NF_3 used in process tools with HC fuel CECS that are not certified not to form CF_4, where the numerator is the number of tools running remote plasma cleaning processes that are equipped with HC fuel CECS that are not certified not to form CF_4 that use NF_3 and the denominator is the total number of tools that run remote plasma clean processes in the fab that use NF_3 (expressed as decimal fraction).

$UT_{NF3,RPC,F2}$ = The average uptime factor of all HC fuel CECS connected to process tools in the fab emitting by-product gas F_2, formed from input gas NF_3 in remote plasma cleaning processes, on a fab basis (expressed as a decimal fraction). For this equation, $UT_{NF3,RPC,F2}$ is assumed to be equal to $UT_{NF3,RPC}$ as calculated in equation I–15 to this section.

j = Process type or sub-type.

* * * * *

(e) You must calculate the amount of input gas i consumed, on a fab basis, for each process sub-type or process type j, using equation I–13 to this section. Where a gas supply system serves more than one fab, equation I–13 to this section is applied to that gas which has been apportioned to each fab served by that system using the apportioning factors determined in accordance with § 98.94(c). If you elect to calculate emissions using the stack test method in paragraph (i) of this section and to use this paragraph (e) to calculate the fraction each fluorinated input gas i exhausted from tools with abatement systems and the fraction of each by-product gas k exhausted from tools with abatement systems, you may substitute ‘‘The set of tools with abatement systems’’ for ‘‘Process sub-type or process type’’ in the definition of ‘‘j’’ in equation I–13 to this section.

* * * * *

(g) * * *

UT_{ij} = The average uptime factor of all abatement systems connected to process tools in the fab using input gas i in process sub-type or process type j (expressed as a decimal fraction). The average uptime factor may be set to one (1) if all the abatement systems for the relevant input gas i and process sub-type or type j are interlocked with all the tools using input gas i in process sub-type or type j and feeding the abatement systems such that no gas can flow to the tools if the abatement systems are not in operational mode.

Td_{ijp} = The total time, in minutes, that abatement system p, connected to process tool(s) in the fab using input gas i in process sub-type or process type j, is not in operational mode, as defined in § 98.98, when at least one of the tools connected to abatement system p is in operation. If your fab uses redundant abatement systems, you may account for Td_{ijp} as specified in § 98.94(f)(4)(vi).

* * * * *

(h) * * *

(1) If you use a fluorinated chemical both as a fluorinated heat transfer fluid and in other applications, you may calculate and report either emissions from all applications or from only those specified in the definition of fluorinated heat transfer fluids in § 98.6.

* * * * *

(i) *Stack test method.* As an alternative to the default emission factor method in paragraph (a) of this section, you may calculate fab-level fluorinated GHG emissions using fab-specific emission factors developed from stack testing. In this case, you must comply with the stack test method specified in paragraph (i)(3) of this section.

(1)–(2) [Reserved]

(3) *Stack system stack test method.* For each stack system in the fab, measure the emissions of each fluorinated GHG from the stack system by conducting an emission test. In addition, measure the fab-specific consumption of each fluorinated GHG by the tools that are vented to the stack systems tested. Measure emissions and consumption of each fluorinated GHG as specified in § 98.94(j). Develop fab-specific emission factors and calculate fab-level fluorinated GHG emissions using the procedures specified in paragraphs (i)(3)(i) through (viii) of this section. All emissions test data and procedures used in developing emission factors must be documented and recorded according to § 98.97.

(i) You must measure the fab-specific fluorinated GHG consumption of the tools that are vented to the stack systems during the emission test as specified in § 98.94(j)(3). Calculate the consumption for each fluorinated GHG for the test period.

(ii) You must calculate the emissions of each fluorinated GHG consumed as an input gas using equation I–17 to this section and each fluorinated GHG formed as a by-product gas using equation I–18 to this section and the procedures specified in paragraphs (i)(3)(ii)(A) through (E) of this section. If a stack system is comprised of multiple stacks, you must sum the emissions from each stack in the stack system when using equation I–17 or equation I–18 to this section.

$$E_{is} = MW_i * Q_s * \frac{1}{SV} * \frac{1}{10^3} * \sum_{m=1}^{N} \frac{X_{ism}}{10^9} * \Delta t_m \quad \text{(Eq. I–17)}$$

Where:

E_{is} = Total fluorinated GHG input gas i, emitted from stack system s, during the sampling period (kg).

X_{ism} = Average concentration of fluorinated GHG input gas i in stack system s, during the time interval m (ppbv).

MW_i = Molecular weight of fluorinated GHG input gas i (g/g-mole).

Q_s = Flow rate of the stack system s, during the sampling period (m^3/min).

SV = Standard molar volume of gas (0.0240 m^3/g-mole at 68 °F and 1 atm).

Δt_m = Length of time interval m (minutes). Each time interval in the FTIR sampling period must be less than or equal to 60 minutes (for example an 8 hour sampling period would consist of at least 8 time intervals).

$1/10^3$ = Conversion factor (1 kilogram/1,000 grams).

i = Fluorinated GHG input gas.

s = Stack system.

N = Total number of time intervals m in sampling period.

m = Time interval.

$$E_{ks} = MW_k * Q_s * \frac{1}{SV} * \frac{1}{10^3} * \sum_{m=1}^{N} \frac{X_{ksm}}{10^9} * \Delta t_m \qquad \text{(Eq. I–18)}$$

Where:

E_{ks} = Total fluorinated GHG by-product gas k, emitted from stack system s, during the sampling period (kg).

X_{ks} = Average concentration of fluorinated GHG by-product gas k in stack system s, during the time interval m (ppbv).

MW_k = Molecular weight of the fluorinated GHG by-product gas k (g/g-mole).

Q_s = Flow rate of the stack system s, during the sampling period (m^3/min).

SV = Standard molar volume of gas (0.0240 m^3/g-mole at 68 °F and 1 atm).

Δt_m = Length of time interval m (minutes). Each time interval in the FTIR sampling period must be less than or equal to 60 minutes (for example an 8 hour sampling period would consist of at least 8 time intervals).

$1/10^3$ = Conversion factor (1 kilogram/1,000 grams).

k = Fluorinated GHG by-product gas.

s = Stack system.

N = Total number of time intervals m in sampling period.

m = Time interval.

(A) If a fluorinated GHG is consumed during the sampling period, but emissions are not detected, use one-half of the field detection limit you determined for that fluorinated GHG according to § 98.94(j)(2) for the value of ''X_{ism}'' in equation I–17 to this section.

(B) If a fluorinated GHG is consumed during the sampling period and detected intermittently during the sampling period, use the detected concentration for the value of ''X_{ism}'' in equation I–17 to this section when available and use one-half of the field detection limit you determined for that fluorinated GHG according to § 98.94(j)(2) for the value of ''X_{ism}'' when the fluorinated GHG is not detected.

(C) If an expected or possible by-product, as listed in table I–17 to this subpart, is detected intermittently during the sampling period, use the measured concentration for ''X_{ksm}'' in equation I–18 to this section when available and use one-half of the field detection limit you determined for that fluorinated GHG according to § 98.94(j)(2) for the value of ''X_{ksm}'' when the fluorinated GHG is not detected.

(D) If a fluorinated GHG is not consumed during the sampling period and is an expected by-product gas as listed in table I–17 to this subpart and is not detected during the sampling period, use one-half of the field detection limit you determined for that fluorinated GHG according to § 98.94(j)(2) for the value of ''X_{ksm}'' in equation I–18 to this section.

(E) If a fluorinated GHG is not consumed during the sampling period and is a possible by-product gas as listed in table I–17 to this subpart, and is not detected during the sampling period, then assume zero emissions for that fluorinated GHG for the tested stack system.

(iii) You must calculate a fab-specific emission factor for each fluorinated GHG input gas consumed (in kg of fluorinated GHG emitted per kg of input gas i consumed) in the tools that vent to stack systems, as applicable, using equations I–19A and I–19B to this section or equations I–19A and I–19C to this section. Use equation I–19A to this section to calculate the controlled emissions for each carbon-containing fluorinated GHG that would result during the sampling period if the utilization rate for the input gas were equal to 0.2 ($E_{imax,f}$). If $\Sigma_s E_{i,s}$ (the total measured emissions of the fluorinated GHG across all stack systems, calculated based on the results of equation I–17 to this section) is less than or equal to $E_{imax,f}$ calculated in equation I–19A to this section, use equation I–19B to this section to calculate the emission factor for that fluorinated GHG. If $\Sigma_s E_{i,s}$ is larger than the $E_{imax,f}$ calculated in equation I–19A to this section, use equation I–19C to this section to calculate the emission factor and treat the difference between the total measured emissions $\Sigma_s E_{i,s}$ and the maximum expected controlled emissions $E_{imax,f}$ as a by-product of the other input gases, using equation I–20 to this section. For all fluorinated GHGs that do not contain carbon, use equation I–19B to this section to calculate the emission factor for that fluorinated GHG.

$$E_{imax,f} = 0.8 \bullet Activity_{if} \bullet (1 - UT_f \bullet a_{if} \bullet d_{if}) \qquad \text{(Eq. I–19A)}$$

Where:

$E_{imax,f}$ = Maximum expected controlled emissions of gas i from its use an input gas during the stack testing period, from fab f (max kg emitted).

$Activity_{if}$ = Consumption of fluorinated GHG input gas i, for fab f, in the tools vented to the stack systems being tested, during the sampling period, as determined following the procedures specified in § 98.94(j)(3) (kg consumed).

UT_f = The total uptime of all abatement systems for fab f, during the sampling period, as calculated in equation I–23 to this section (expressed as decimal fraction). If the stack system does not have abatement systems on the tools vented to the stack system, the value of this parameter is zero.

a_{if} = Fraction of input gas i emitted from tools with abatement systems in fab f (expressed as a decimal fraction), as calculated in equation I–24C to this section.

d_{if} = Fraction of fluorinated GHG input gas i destroyed or removed when fed into abatement systems by process tools in fab f, as calculated in equation I–24A to this section (expressed as decimal fraction).

f = Fab.

i = Fluorinated GHG input gas.

$$EF_{if} = \frac{\sum_s (E_{is})}{Activity_{if} * \left(UT_f + \left(\frac{1-UT_f}{1-(a_{if} \bullet d_{if})}\right)\right)} \quad \text{(Eq. I–19B)}$$

Where:

EF_{if} = Emission factor for fluorinated GHG input gas i, from fab f, representing 100 percent abatement system uptime (kg emitted/kg input gas consumed).

E_{is} = Mass emission of fluorinated GHG input gas i from stack system s during the sampling period (kg emitted).

$Activity_{if}$ = Consumption of fluorinated GHG input gas i, for fab f during the sampling period, as determined following the procedures specified in § 98.94(j)(3) (kg consumed).

UT_f = The total uptime of all abatement systems for fab f, during the sampling period, as calculated in equation I–23 to this section (expressed as decimal fraction). If the stack system does not have abatement systems on the tools vented to the stack system, the value of this parameter is zero.

a_{if} = Fraction of fluorinated GHG input gas i exhausted from tools with abatement systems in fab f (expressed as a decimal fraction), as calculated in equation I–24C to this section.

d_{if} = Fraction of fluorinated GHG input gas i destroyed or removed when fed into abatement systems by process tools in fab f, as calculated in equation I–24A to this section (expressed as decimal fraction). If the stack system does not have abatement systems on the tools vented to the stack system, the value of this parameter is zero.

f = Fab.

i = Fluorinated GHG input gas.

s = Stack system.

$$EF_{if} = 0.8 \bullet (1 - a_{if} \bullet d_{if}) \quad \text{(Eq. I–19C)}$$

EF_{if} = Emission factor for input gas i, from fab f, representing a 20-percent utilization rate and a 100-percent abatement system uptime (kg emitted/kg input gas consumed).

a_{if} = Fraction of input gas i emitted from tools with abatement systems in fab f (expressed as a decimal fraction), as calculated in equation I–24C to this section.

d_{if} = Fraction of fluorinated GHG input gas i destroyed or removed when fed into abatement systems by process tools in fab f, as calculated in equation I–24A to this section (expressed as decimal fraction).

f = Fab.

i = Fluorinated GHG input gas.

(iv) You must calculate a fab-specific emission factor for each fluorinated GHG formed as a by-product (in kg of fluorinated GHG per kg of total fluorinated GHG consumed) in the tools vented to stack systems, as applicable, using equation I–20 to this section. When calculating the by-product emission factor for an input gas for which $\Sigma_s E_{i,s}$ equals or exceeds $E_{imax,f}$, exclude the consumption of that input gas from the term "$\Sigma(Activity_{if})$."

$$EF_{kf} = \frac{\sum_s (E_{ks})}{\sum_i Activity_{if} * \left(UT_f + \left(\frac{1-UT_f}{1-(a_{kif} * d_{kif})}\right)\right)} \quad \text{(Eq. I–20)}$$

Where:

EF_{kf} = Emission factor for fluorinated GHG by-product gas k, from fab f, representing 100 percent abatement system uptime (kg emitted/kg of all input gases consumed in tools vented to stack systems).

E_{ks} = Mass emission of fluorinated GHG by-product gas k, emitted from stack system s, during the sampling period (kg emitted).

$Activity_{if}$ = Consumption of fluorinated GHG input gas i for fab f in tools vented to stack systems during the sampling period as determined following the procedures specified in § 98.94(j)(3) (kg consumed).

UT_f = The total uptime of all abatement systems for fab f, during the sampling period, as calculated in equation I–23 to this section (expressed as decimal fraction).

a_{kif} = Fraction of by-product k emitted from tools using input gas i with abatement systems in fab f (expressed as a decimal fraction), as calculated using equation I–24D to this section.

d_{kif} = Fraction of fluorinated GHG by-product gas k generated from input gas i destroyed or removed when fed into abatement systems by process tools in fab f, as calculated in equation I–24B to this section (expressed as decimal fraction).

f = Fab.

i = Fluorinated GHG input gas.

k = Fluorinated GHG by-product gas.

s = Stack system.

(v) You must calculate annual fab-level emissions of each fluorinated GHG consumed using equation I–21 to this section.

$$E_{if} = EF_{if} \bullet C_{if} \bullet UT_f + \frac{EF_{if}}{(1-(a_{if} \bullet d_{if}))} \bullet C_{if} \bullet (1 - UT_f) \quad \text{(Eq. I–21)}$$

Where:

E_{if} = Annual emissions of fluorinated GHG input gas i (kg/year) from the stack systems for fab f.

EF_{if} = Emission factor for fluorinated GHG input gas i emitted from fab f, as calculated in equation I–19 to this section (kg emitted/kg input gas consumed).

C_{if} = Total consumption of fluorinated GHG input gas i in tools that are vented to stack systems, for fab f, for the reporting year, as calculated using equation I–13 to this section (kg/year).

UT_f = The total uptime of all abatement systems for fab f, during the reporting year, as calculated using equation I–23 to this section (expressed as a decimal fraction).

a_{if} = Fraction of fluorinated GHG input gas i emitted from tools with abatement systems in fab f (expressed as a decimal fraction), as calculated using equation I–24C or I–24D to this section.

d_{if} = Fraction of fluorinated GHG input gas i destroyed or removed when fed into abatement systems by process tools in fab f that are included in the stack testing option, as calculated in equation I–24A to this section (expressed as decimal fraction).

f = Fab.

i = Fluorinated GHG input gas.

(vi) You must calculate annual fab-level emissions of each fluorinated GHG

by-product formed using equation I–22 to this section.

$$E_{kf} = EF_{kf} \bullet \sum_i C_{if} \bullet UT_f + EF_{kf} \bullet \sum_i \frac{C_{if} \bullet (1-UT_f)}{1-a_{kif} \bullet d_{kif}} \quad \text{(Eq. I–22)}$$

Where:

E_{kf} = Annual emissions of fluorinated GHG by-product gas k (kg/year) from the stack for fab f.

EF_{kf} = Emission factor for fluorinated GHG by-product gas k, emitted from fab f, as calculated in equation I–20 to this section (kg emitted/kg of all fluorinated input gases consumed).

C_{if} = Total consumption of fluorinated GHG input gas i in tools that are vented to stack systems, for fab f, for the reporting year, as calculated using equation I–13 to this section.

UT_f = The total uptime of all abatement systems for fab f, during the reporting year as calculated using equation I–23 to this section (expressed as a decimal fraction).

a_{kif} = Estimate of fraction of fluorinated GHG by-product gas k emitted in fab f from tools using input gas i with abatement systems (expressed as a decimal fraction), as calculated using equation I–24D to this section.

d_{kif} = Fraction of fluorinated GHG by-product k generated from input gas i destroyed or removed when fed into abatement systems by process tools in fab f that are included in the stack testing option, as calculated in equation I–24B to this section (expressed as decimal fraction).

f = Fab.

i = Fluorinated GHG input gas.

k = Fluorinated GHG by-product.

(vii) When using the stack testing method described in this paragraph (i), you must calculate abatement system uptime on a fab basis using equation I–23 to this section. When calculating abatement system uptime for use in equation I–19 and I–20 to this section, you must evaluate the variables ''Tdpf'' and ''UTpf'' for the sampling period instead of the reporting year.

$$UT_f = 1 - \frac{\sum_p Td_{pf}}{\sum_p UT_{pf}} \quad \text{(Eq. I–23)}$$

Where:

UT_f = The average uptime factor for all abatement systems in fab f (expressed as a decimal fraction). The average uptime factor may be set to one (1) if all the abatement systems in fab f are interlocked with all the tools feeding the abatement systems such that no gas can flow to the tools if the abatement systems are not in operational mode.

Td_{pf} = The total time, in minutes, that abatement system p, connected to process tool(s) in fab f, is not in operational mode as defined in § 98.98. If your fab uses redundant abatement systems, you may account for Tdpf as specified in § 98.94(f)(4)(vi).

UT_{pf} = Total time, in minutes per year, in which the tool(s) connected at any point during the year to abatement system p, in fab f could be in operation. For determining the amount of tool operating time, you may assume that tools that were installed for the whole of the year were operated for 525,600 minutes per year. For tools that were installed or uninstalled during the year, you must prorate the operating time to account for the days in which the tool was not installed; treat any partial day that a tool was installed as a full day (1,440 minutes) of tool operation. For an abatement system that has more than one connected tool, the tool operating time is 525,600 minutes per year if there was at least one tool installed at all times throughout the year. If you have tools that are idle with no gas flow through the tool, you may calculate total tool time using the actual time that gas is flowing through the tool.

f = Fab.

p = Abatement system.

(viii) When using the stack testing option described in this paragraph (i) and when using more than one DRE for the same input gas i or by-product gas k, you must calculate the weighted-average fraction of each fluorinated input gas i and each fluorinated by-product gas k that has more than one DRE and that is destroyed or removed in abatement systems for each fab f, as applicable, by using equation I–24A to this section (for input gases) and equation I–24B to this section (for by-product gases) and table I–18 to this subpart. If default values are not available in table I–18 for a particular input gas, you must use a value of 10.

$$D_{if} = \frac{\sum_p (\gamma_{i,p} \cdot \sum_{DREy} n_{i,p,DREy} \cdot DRE_y) + \sum_{DREz} DRE_z \cdot m_{i,q,DREz}}{\sum_p \gamma_{i,p} \cdot n_{i,p,a} + m_{i,q,a}} \quad \text{(Eq. I–24A)}$$

$$D_{kif} = \frac{\sum_p (\gamma_{k,i,p} \cdot \sum_{DREy} n_{k,i,p,DREy} \cdot DRE_y) + \sum_{DREz} DRE_z \cdot m_{k,i,q,DREz}}{\sum_p \gamma_{k,i,p} \cdot n_{k,i,p,a} + m_{k,i,q,a}} \quad \text{(Eq. I–24B)}$$

Where:

d_{if} = The average weighted fraction of fluorinated GHG input gas i destroyed or removed when fed into abatement systems by process tools in fab f (expressed as a decimal fraction).

d_{kif} = The average weighted fraction of fluorinated GHG by-product gas k generated from input gas i that is destroyed or removed when fed into abatement systems by process tools in fab f (expressed as a decimal fraction).

$n_{i,p,DREy}$ = Number of tools that use gas i, that run chamber cleaning process p, and that are equipped with abatement systems for gas i that have the DRE DREy.

$m_{i,q,DREz}$ = Number of tools that use gas i, that run etch and/or wafer cleaning processes, and that are equipped with abatement systems for gas i that have the DRE DREz.

$n_{i,p,a}$ = Total number of tools that use gas i, run chamber cleaning process type p, and that are equipped with abatement systems for gas i.

$m_{i,q,a}$ = Total number of tools that use gas i, run etch and/or wafer cleaning processes, and that are equipped with abatement systems for gas i.

$n_{k,i,p,DREy}$ = Number of tools that use gas i, generate by-product k, that run chamber cleaning process p, and that are equipped with abatement systems for gas i that have the DRE DREy.

$m_{k,i,q,DREz}$ = Number of tools that use gas i, generate by-product k, that run etch and/or wafer cleaning processes, and that are equipped with abatement systems for gas i that have the DRE DREz.
$n_{k,i,p,a}$ = Total number of tools that use gas i, generate by-product k, run chamber cleaning process type p, and that are equipped with abatement systems for gas i.
$m_{k,i,q,a}$ = Total number of tools that use gas i, generate by-product k, run etch and/or wafer cleaning processes, and that are equipped with abatement systems for gas i.
$\gamma_{i,p}$ = Default factor reflecting the ratio of uncontrolled emissions per tool of input gas i from tools running process sub-type p processes to uncontrolled emissions per tool of input gas i from process tools running process type q processes.
$\gamma_{k,i,p}$ = Default factor reflecting the ratio of uncontrolled emissions per tool of input gas i from tools running process sub-type p processes to uncontrolled emissions per tool of input gas i from process tools running process type q processes.
DRE_y = Default or alternative certified DRE for gas i for abatement systems connected to CVD tool.
DRE_z = Default or alternative certified DRE for gas i for abatement systems connected to etching and/or wafer cleaning tool.
p = Chamber cleaning process sub-type.
q = Reference process type. There is one process type q that consists of the combination of etching and/or wafer cleaning processes.
f = Fab.
i = Fluorinated GHG input gas.

(ix) When using the stack testing method described in this paragraph (i), you must calculate the fraction each fluorinated input gas i exhausted in fab f from tools with abatement systems and the fraction of each by-product gas k exhausted from tools with abatement systems, as applicable, by following either the procedure set forth in paragraph (i)(3)(ix)(A) of this section or the procedure set forth in paragraph (i)(3)(ix)(B) of this section.

(A) Use equation I–24C to this section (for input gases) and equation I–24D to this section (for by-product gases) and table I–18 to this subpart. If default values are not available in table I–18 for a particular input gas, you must use a value of 10.

$$A_{i,f} = \frac{\sum_p \gamma_{i,p} \cdot n_{i,p,a} + m_{i},q,a}{\sum_p \gamma_{i,p} \cdot n_{i,p} + m_{i,q}} \qquad \text{(Eq. I–24C)}$$

Where:
a_{if} = Fraction of fluorinated input gas i exhausted from tools with abatement systems in fab f (expressed as a decimal fraction).
$n_{i,p,a}$ = Number of tools that use gas i, that run chamber cleaning process sub-type p, and that are equipped with abatement systems for gas i.
$m_{i,q,a}$ = Number of tools that use gas i, that run etch and/or wafer cleaning processes, and that are equipped with abatement systems for gas i.
$n_{i,p}$ = Total number of tools using gas i and running chamber cleaning process sub-type p.
$m_{i,q}$ = Total number of tools using gas i and running etch and/or wafer cleaning processes.
$\gamma_{i,p}$ = Default factor reflecting the ratio of uncontrolled emissions per tool of input gas i from tools running process type p processes to uncontrolled emissions per tool of input gas i from process tools running process type q processes.
p = Chamber cleaning process sub-type.
q = Reference process type. There is one process type q that consists of the combination of etching and/or wafer cleaning processes.

$$A_{k,i,f} = \frac{\sum_p \gamma_{k,i,p} \cdot n_{k,i,p,a} + m_{k,i,q,a}}{\sum_p \gamma_{k,i,p} \cdot n_{k,i,p} + m_{k,i,q}} \qquad \text{Eq. I–24D}$$

Where:
$a_{k,i,f}$ = Fraction of by-product gas k exhausted from tools using input gas i with abatement systems in fab f (expressed as a decimal fraction).
$n_{k,i,p,a}$ = Number of tools that exhaust by-product gas k from input gas i, that run chamber cleaning process p, and that are equipped with abatement systems for gas k.
$m_{k,i,q,a}$ = Number of tools that exhaust by-product gas k from input gas i, that run etch and/or wafer cleaning processes, and that are equipped with abatement systems for gas k.
$n_{k,i,p}$ = Total number of tools emitting by-product k from input gas i and running chamber cleaning process p.
$m_{k,i,q}$ = Total number of tools emitting by-product k from input gas i and running etch and/or wafer cleaning processes.
$\gamma_{k,i,p}$ = Default factor reflecting the ratio of uncontrolled emissions per tool of by-product gas k from input gas i from tools running chamber cleaning process p to uncontrolled emissions per tool of by-product gas k from input gas i from process tools running etch and/or wafer cleaning processes.
p = Chamber cleaning process sub-type.
q = Reference process type. There is one process type q that consists of the combination of etching and/or wafer cleaning processes.

(B) Use paragraph (e) of this section to apportion consumption of gas i either to tools with abatement systems and tools without abatement systems or to each process type or sub-type, as applicable. If you apportion consumption of gas i to each process type or sub-type, calculate the fractions of input gas i and by-product gas k formed from gas i that are exhausted from tools with abatement systems based on the numbers of tools with and without abatement systems within each process type or sub-type.

(4) *Method to calculate emissions from fluorinated GHGs that are not tested.* Calculate emissions from consumption of each intermittent low-use fluorinated GHG as defined in § 98.98 of this subpart using the default utilization and by-product formation rates provided in table I–11, I–12, I–13, I–14, or I–15 to this subpart, as applicable, and by using equations I–8A, I–8B, I–9, and I–13 to this section. If a fluorinated GHG was not being used during the stack testing and does not meet the definition of intermittent low-use fluorinated GHG in § 98.98, then you must test the stack systems associated with the use of that fluorinated GHG at a time when that gas is in use at a magnitude that would allow you to determine an emission factor for that gas according to the procedures specified in paragraph (i)(3) of this section.

(5) [Reserved]

■ 24. Amend § 98.94 by:
■ a. Revising paragraph (c) introductory text;
■ b. Adding paragraph (e);
■ c. Revising paragraphs (f)(3), (f)(4) introductory text, (f)(4)(iii), (j)(1) introductory text, (j)(1)(i), (j)(3) introductory text, and (j)(5); and
■ d. Removing and reserving paragraphs (j)(6) and (j)(8)(v).

The revisions and addition read as follows:

§ 98.94 Monitoring and QA/QC requirements.

* * * * *

(c) You must develop apportioning factors for fluorinated GHG and N_2O consumption (including the fraction of gas consumed by process tools connected to abatement systems as in equations I–8A, I–8B, I–9, and I–10 to § 98.93), to use in the equations of this subpart for each input gas i, process sub-type, process type, stack system, and fab as appropriate, using a fab-specific engineering model that is documented in your site GHG Monitoring Plan as required under § 98.3(g)(5). This model must be based on a quantifiable metric, such as wafer passes or wafer starts, or direct measurement of input gas consumption as specified in paragraph (c)(3) of this section. To verify your model, you must demonstrate its precision and accuracy by adhering to the requirements in paragraphs (c)(1) and (2) of this section.

* * * * *

(e) If you use HC fuel CECS purchased and installed on or after January 1, 2025 to control emissions from tools that use either NF_3 as an input gas in remote plasma cleaning processes or F_2 as an input gas in any process, and if you use a value less than 1 for either $a_{F2,j}$ or $a_{NF3,RPC}$ in equation I–9 to § 98.93, you must certify and document that the model for each of the systems for which you are claiming that it does not form CF_4 from F_2 has been tested and verified to produce less than 0.1% CF_4 from F_2 and that each of the systems is installed, operated, and maintained in accordance with the directions of the HC fuel CECS manufacturer. Hydrocarbon-fuel-based combustion emissions control systems include but are not limited to abatement systems as defined in § 98.98 that are hydrocarbon-fuel-based. The rate of conversion from F_2 to CF_4 must be measured using a scientifically sound, industry-accepted method that accounts for dilution through the abatement device, such as EPA 430–R–10–003 (incorporated by reference, see § 98.7), adjusted to calculate the rate of conversion from F_2 to CF_4 rather than the DRE. Either the HC fuel CECS manufacturer or the electronics manufacturer may perform the measurement. The flow rate of F_2 into the tested HC fuel CECS may be metered using a calibrated mass flow controller.

(f) * * *

(3) If you use default destruction and removal efficiency values in your emissions calculations under § 98.93(a), (b), and/or (i), you must certify and document that the abatement systems at your facility for which you use default destruction or removal efficiency values are specifically designed for fluorinated GHG or N_2O abatement, as applicable, and provide the abatement system manufacturer-verified DRE value that meets (or exceeds) the default destruction or removal efficiency in table I–16 to this subpart for the fluorinated GHG or N_2O. For abatement systems purchased and installed on or after January 1, 2025, you must also certify and document that the abatement system has been tested by the abatement system manufacturer based on the methods specified in paragraph (f)(3)(i) of this section and verified to meet (or exceed) the default destruction or removal efficiency in table I–16 for the fluorinated GHG or N_2O under worst-case flow conditions as defined in paragraph (f)(3)(ii) of this section. If you use a verified destruction and removal efficiency value that is lower than the default in table I–16 to this subpart in your emissions calculations under § 98.93(a), (b), and/or (i), you must certify and document that the abatement systems at your facility for which you use the verified destruction or removal efficiency values are specifically designed for fluorinated GHG or N_2O abatement, as applicable, and provide the abatement system manufacturer-verified DRE value that is lower than the default destruction or removal efficiency in table I–16 for the fluorinated GHG or N_2O. For abatement systems purchased and installed on or after January 1, 2025, you must also certify and document that the abatement system has been tested by the abatement system manufacturer based on the methods specified in paragraph (f)(3)(i) of this section and verified to meet or exceed the destruction or removal efficiency value used for that fluorinated GHG or N_2O under worst-case flow conditions as defined in paragraph (f)(3)(ii) of this section. If you elect to calculate fluorinated GHG emissions using the stack test method under § 98.93(i), you must also certify that you have included and accounted for all abatement systems designed for fluorinated GHG abatement and any respective downtime in your emissions calculations under § 98.93(i)(3).

(i) For purposes of paragraph (f)(3) of this section, destruction and removal efficiencies for abatement systems purchased and installed on or after January 1, 2025, must be measured using a scientifically sound, industry-accepted measurement methodology that accounts for dilution through the abatement system, such as EPA 430–R–10–003 (incorporated by reference, see § 98.7).

(ii) Worst-case flow conditions are defined as the highest total fluorinated GHG or N_2O flows through each model of emissions control systems (gas by gas and process type by process type across the facility) and the highest total flow scenarios (with N_2 dilution accounted for) across the facility during which the abatement system is claimed to be in operational mode.

(4) If you calculate and report controlled emissions using neither the default destruction or removal efficiency values in table I–16 to this subpart nor an abatement system manufacturer-verified lower destruction or removal efficiency value per paragraph (f)(3) of this section, you must use an average of properly measured destruction or removal efficiencies for each gas and process sub-type or process type combination, as applicable, determined in accordance with procedures in paragraphs (f)(4)(i) through (vi) of this section. This includes situations in which your fab employs abatement systems not specifically designed for fluorinated GHG or N_2O abatement or for which your fab operates abatement systems outside the range of parameters specified in the documentation supporting the certified DRE and you elect to reflect emission reductions due to these systems. You must not use a default value from table I–16 to this subpart for any abatement system not specifically designed for fluorinated GHG and N_2O abatement, for any abatement system not certified to meet the default value from table I–16, or for any gas and process type combination for which you have measured the destruction or removal efficiency according to the requirements of paragraphs (f)(4)(i) through (vi) of this section.

* * * * *

(iii) If you elect to take credit for abatement system destruction or removal efficiency before completing testing on 20 percent of the abatement systems for that gas and process sub-type or process type combination, as applicable, you must use default destruction or removal efficiencies or a verified destruction or removal efficiency, if verified at a lower value, for a gas and process type combination. You must not use a default value from table I–16 to this subpart for any abatement system not specifically designed for fluorinated GHG and N_2O abatement, and must not take credit for abatement system destruction or removal efficiency before completing testing on 20 percent of the abatement systems for that gas and process sub-

type or process type combination, as applicable. Following testing on 20 percent of abatement systems for that gas and process sub-type or process type combination, you must calculate the average destruction or removal efficiency as the arithmetic mean of all test results for that gas and process sub-type or process type combination, until you have tested at least 30 percent of all abatement systems for each gas and process sub-type or process type combination. After testing at least 30 percent of all systems for a gas and process sub-type or process type combination, you must use the arithmetic mean of the most recent 30 percent of systems tested as the average destruction or removal efficiency. You may include results of testing conducted on or after January 1, 2011 for use in determining the site-specific destruction or removal efficiency for a given gas and process sub-type or process type combination if the testing was conducted in accordance with the requirements of paragraph (f)(4)(i) of this section.

* * * * *

(j) * * *

(1) Stack system testing. Conduct an emissions test for each stack system according to the procedures in paragraphs (j)(1)(i) through (iv) of this section.

(i) You must conduct an emission test during which the fab is operating at a representative operating level, as defined in § 98.98, and with the abatement systems connected to the stack system being tested operating with at least 90-percent uptime, averaged over all abatement systems, during the 8-hour (or longer) period for each stack system, or at no less than 90 percent of the abatement system uptime rate measured over the previous reporting year, averaged over all abatement systems. Hydrocarbon-fuel-based combustion emissions control systems that were purchased and installed on or after January 1, 2025, that are used to control emissions from tools that use either NF_3 in remote plasma cleaning processes or F_2 as an input gas in any process type or sub-type, and that are not certified not to form CF_4, must operate with at least 90-percent uptime during the test.

* * * * *

(3) *Fab-specific fluorinated GHG consumption measurements.* You must determine the amount of each fluorinated GHG consumed by each fab during the sampling period for all process tools connected to the stack systems under § 98.93(i)(3), according to the procedures in paragraphs (j)(3)(i) and (ii) of this section.

* * * * *

(5) *Emissions testing frequency.* You must conduct emissions testing to develop fab-specific emission factors on a frequency according to the procedures in paragraph (j)(5)(i) or (ii) of this section.

(i) *Annual testing.* You must conduct an annual emissions test for each stack system unless you meet the criteria in paragraph (j)(5)(ii) of this section to skip annual testing. Each set of emissions testing for a stack system must be separated by a period of at least 2 months.

(ii) *Criteria to test less frequently.* After the first 3 years of annual testing, you may calculate the relative standard deviation of the emission factors for each fluorinated GHG included in the test and use that analysis to determine the frequency of any future testing. As an alternative, you may conduct all three tests in less than 3 calendar years for purposes of this paragraph (j)(5)(ii), but this does not relieve you of the obligation to conduct subsequent annual testing if you do not meet the criteria to test less frequently. If the criteria specified in paragraphs (j)(5)(ii)(A) and (B) of this section are met, you may use the arithmetic average of the three emission factors for each fluorinated GHG and fluorinated GHG byproduct for the current year and the next 4 years with no further testing unless your fab operations are changed in a way that triggers the re-test criteria in paragraph (j)(8) of this section. In the fifth year following the last stack test included in the previous average, you must test each of the stack systems and repeat the relative standard deviation analysis using the results of the most recent three tests (*i.e.* , the new test and the two previous tests conducted prior to the 4-year period). If the criteria specified in paragraphs (j)(5)(ii)(A) and (B) of this section are not met, you must use the emission factors developed from the most recent testing and continue annual testing. You may conduct more than one test in the same year, but each set of emissions testing for a stack system must be separated by a period of at least 2 months. You may repeat the relative standard deviation analysis using the most recent three tests, including those tests conducted prior to the 4-year period, to determine if you are exempt from testing for the next 4 years.

(A) The relative standard deviation of the total CO_2e emission factors calculated from each of the three tests (expressed as the total CO_2e fluorinated GHG emissions of the fab divided by the total CO_2e fluorinated GHG use of the fab) is less than or equal to 15 percent.

(B) The relative standard deviation for all single fluorinated GHGs that individually accounted for 5 percent or more of CO_2e emissions were less than 20 percent.

* * * * *

■ 25. Amend § 98.96 by:

■ a. Revising paragraphs (c)(1) and (2);

■ b. Adding paragraph (o); and

■ c. Revising paragraphs (p)(2), (q)(2) and (3), (r)(2), (w)(2), (y) introductory text, (y)(1), (y)(2)(i) and (iv), and (y)(4).

The revisions and addition read as follows:

§ 98.96 Data reporting requirements.

* * * * *

(c) * * *

(1) When you use the procedures specified in § 98.93(a), each fluorinated GHG emitted from each process type for which your fab is required to calculate emissions as calculated in equations I–6, I–7, and I–9 to § 98.93.

(2) When you use the procedures specified in § 98.93(a), each fluorinated GHG emitted from each process type or process sub-type as calculated in equations I–8A and I–8B to § 98.93, as applicable.

* * * * *

(o) For all HC fuel CECS that were purchased and installed on or after January 1, 2025, that are used to control emissions from tools that use either NF_3 as an input gas in remote plasma clean processes or F_2 as an input gas in any process type or sub-type and for which you are not calculating emissions under equation I–9 to § 98.93, certification that the rate of conversion from F_2 to CF_4 is <0.1% and that the systems are installed, operated, and maintained in accordance with the directions of the HC fuel CECS manufacturer. Hydrocarbon-fuel-based combustion emissions control systems include but are not limited to abatement systems as defined in § 98.98 that are hydrocarbon-fuel-based. If you make the certification based on your own testing, you must certify that you tested the model of the system according to the requirements specified in § 98.94(e). If you make the certification based on testing by the HC fuel CECS manufacturer, you must provide documentation from the HC fuel CECS manufacturer that the rate of conversion from F_2 to CF_4 is <0.1% when tested according to the requirements specified in § 98.94(e).

(p) * * *

(2) The basis of the destruction or removal efficiency being used (default, manufacturer-verified, or site-specific measurement according to

§ 98.94(f)(4)(i)) for each process sub-type or process type and for each gas.

(q) * * *

(2) If you use default destruction or removal efficiency values in your emissions calculations under § 98.93(a), (b), or (i), certification that the site maintenance plan for abatement systems for which emissions are being reported contains the manufacturer's recommendations and specifications for installation, operation, and maintenance for each abatement system. To use the default or lower manufacturer-verified destruction or removal efficiency values, operation of the abatement system must be within manufacturer's specifications, which may include, for example, specifications on vacuum pumps' purges, fuel and oxidizer settings, supply and exhaust flows and pressures, and utilities to the emissions control equipment including fuel gas flow and pressure, calorific value, and water quality, flow and pressure.

(3) If you use default destruction or removal efficiency values in your emissions calculations under § 98.93(a), (b), and/or (i), certification that the abatement systems for which emissions are being reported were specifically designed for fluorinated GHG or N_2O abatement, as applicable. You must support this certification by providing abatement system supplier documentation stating that the system was designed for fluorinated GHG or N_2O abatement, as applicable, and supply the destruction or removal efficiency value at which each abatement system is certified for the fluorinated GHG or N_2O abated, as applicable. You may only use the default destruction or removal efficiency value if the abatement system is verified to meet or exceed the destruction or removal efficiency default value in table I–16 to this subpart. If the system is verified at a destruction or removal efficiency value lower than the default value, you may use the verified value.

* * * * *

(r) * * *

(2) Use equation I–28 to this section to calculate total unabated emissions, in metric ton CO_2e, of all fluorinated GHG emitted from electronics manufacturing processes whose emissions of fluorinated GHG you calculated according to the stack testing procedures in § 98.93(i)(3). For each set of processes, use the same input gas consumption (C_{if}), input gas emission factors (EF_{if}), by-product gas emission factors (EF_{kf}), fractions of tools abated (a_{if} and a_{kif}), and destruction efficiencies (d_{if} and d_{ik}) to calculate unabated emissions as you used to calculate emissions.

$$SFGHG = \sum_i \left[\frac{EF_{if}}{(1-(a_{if}*d_{if}))} * C_{if} * GWP_i\right] + \sum_k \left[EF_{kf} * \sum_i \frac{C_{if}}{1-(a_{kif} \bullet d_{ik})} * GWP_k\right] \quad \text{Eq. I–28}$$

Where:

SFGHG = Total unabated emissions of fluorinated GHG emitted from electronics manufacturing processes in the fab, expressed in metric ton CO_2e for which you calculated total emission according to the procedures in § 98.93(i)(3).

EF_{if} = Emission factor for fluorinated GHG input gas i, emitted from fab f, as calculated in equation I–19 to § 98.93 (kg emitted/kg input gas consumed).

a_{if} = Fraction of fluorinated GHG input gas i used in fab f in tools with abatement systems (expressed as a decimal fraction).

d_{if} = Fraction of fluorinated GHG i destroyed or removed in abatement systems connected to process tools in fab f, as calculated from equation I–24A to § 98.93, which you used to calculate total emissions according to the procedures in § 98.93(i)(3) (expressed as a decimal fraction).

C_{if} = Total consumption of fluorinated GHG input gas i, of tools vented to stack systems, for fab f, for the reporting year, expressed in metric ton CO_2e, which you used to calculate total emissions according to the procedures in § 98.93(i)(3) (expressed as a decimal fraction).

EF_{kf} = Emission factor for fluorinated GHG by-product gas k, emitted from fab f, as calculated in equation I–20 to § 98.93 (kg emitted/kg of all input gases consumed in tools vented to stack systems).

a_{kif} = Fraction of fluorinated GHG by-product gas k emitted in fab f from tools using input gas i with abatement systems (expressed as a decimal fraction), as calculated using equation I–24D to § 98.93.

d_{ik} = Fraction of fluorinated GHG byproduct k destroyed or removed in abatement systems connected to process tools in fab f, as calculated from equation I–24B to § 98.93, which you used to calculate total emissions according to the procedures in § 98.93(i)(3) (expressed as a decimal fraction).

GWP_i = GWP of emitted fluorinated GHG i from table A–1 to subpart A of this part.

GWP_k = GWP of emitted fluorinated GHG by-product k from table A–1 to subpart A of this part.

i = Fluorinated GHG.

k = Fluorinated GHG by-product.

* * * * *

(w) * * *

(2) An inventory of all stack systems from which process fluorinated GHG are emitted.

* * * * *

(y) If your semiconductor manufacturing facility manufactures wafers greater than 150 mm and emits more than 40,000 metric ton CO_2e of GHG emissions, based on your most recently submitted annual report as required in paragraph (c) of this section, from the electronics manufacturing processes subject to reporting under this subpart, you must prepare and submit a technology assessment report every five years to the Administrator (or an authorized representative) that meets the requirements specified in paragraphs (y)(1) through (6) of this section. Any other semiconductor manufacturing facility may voluntarily submit this report to the Administrator. If your semiconductor manufacturing facility manufactures only 150 mm or smaller wafers, you are not required to prepare and submit a technology assessment report, but you are required to prepare and submit a report if your facility begins manufacturing wafers 200 mm or larger during or before the calendar year preceding the year the technology assessment report is due. If your semiconductor manufacturing facility is no longer required to report to the GHGRP under subpart I due to the cessation of semiconductor manufacturing as described in § 98.2(i)(3), you are not required to submit a technology assessment report.

(1) The first technology assessment report due after January 1, 2025, is due on March 31, 2028, and subsequent reports must be delivered every 5 years no later than March 31 of the year in which it is due.

(2) * * *

(i) It must describe how the gases and technologies used in semiconductor manufacturing using 200 mm and 300 mm wafers in the United States have changed in the past 5 years and whether any of the identified changes are likely to have affected the emissions characteristics of semiconductor manufacturing processes in such a way that the default utilization and by-product formation rates or default destruction or removal efficiency factors of this subpart may need to be updated.

* * * * *

(iv) It must provide any utilization and byproduct formation rates and/or destruction or removal efficiency data that have been collected in the previous 5 years that support the changes in semiconductor manufacturing processes described in the report. Any utilization or byproduct formation rate data submitted must be reported using both of the methods specified in paragraphs (y)(2)(iv)(A) and (B) of this section if multiple fluorinated input gases are used, unless one of the input gases does not have a reference process utilization rate in table I–19 or I–20 to this subpart for the process type and wafer size whose emission factors are being measured, in which case the data must be submitted using the method specified in paragraph (y)(2)(iv)(A) of this section. If only one fluorinated input gas is fed into the process, you must use equations I–29A and I–29B to this section. In addition to using the methods specified in paragraphs (y)(2)(iv)(A) and (B) of this section, you have the option to calculate and report the utilization or byproduct formation rate data using any alternative calculation methodology. The report must include the input gases used and measured, the utilization rates measured, the byproduct formation rates measured, the process type, the process subtype for chamber clean processes, the wafer size, and the methods used for the measurements. The report must also specify the method used to calculate each reported utilization and by-product formation rate, and provide a unique record number for each data set. For any destruction or removal efficiency data submitted, the report must include the input gases used and measured, the destruction and removal efficiency measured, the process type, the methods used for the measurements, and whether the abatement system is specifically designed to abate the gas measured under the operating conditions used for the measurement. If you choose to use an additional alternative calculation methodology to calculate and report the input gas emission factors and by-product formation rates, you must provide a complete, mathematical description of the alternative method used (including the equation used to calculate each reported utilization and by-product formation rate) and include the information in this paragraph (y)(2)(iv).

(A) *All-input gas method.* Use equation I–29A to this section to calculate the input gas emission factor $(1 - U_{ij})$ for each input gas in a single test. If the result of equation I–29A exceeds 0.8 for an F–GHG that contains carbon, you must use equation I–29C to this section to calculate the input gas emission factor for that F–GHG and equation I–29D to this section to calculate the by-product formation rate for that F–GHG from the other input gases. Use equation I–29B to this section to calculate the by-product formation rates from each input gas for F–GHGs that are not input gases. If a test uses a cleaning or etching gas that does not contain carbon in combination with a cleaning or etching gas that does contain carbon and the process chamber is not used to etch or deposit carbon-containing films, you may elect to assign carbon containing by-products only to the carbon-containing input gases. If you choose to assign carbon containing by-products only to carbon-containing input gases, remove the input mass of the non-carbon containing gases from the sum of $Mass_i$ and the sum of $Mass_g$ in equations I–29B and I–29D to this section, respectively.

$$\left(1 - U_{ij}\right) = \frac{(E_i)}{(Mass_i)} \quad \text{(Eq. I–29A)}$$

Where:

U_{ij} = Process utilization rate for fluorinated GHG i, process type j.

E_i = The mass emissions of input gas i.

$Mass_i$ = The mass of input gas i fed into the process.

i = Fluorinated GHG.

j = Process type.

$$BEF_{kji} = \frac{(E_k)}{\sum_i Mass_i} \quad \text{(Eq. I–29B)}$$

Where:

BEF_{kji} = By-product formation rate for gas k from input gas i, for process type j, where gas k is not an input gas.

E_k = The mass emissions of by-product gas k.

$Mass_i$ = The mass of input gas i fed into the process.

i = Fluorinated GHG.

j = Process type.

k = Fluorinated GHG by-product.

$$\left(1 - U_{ij}\right) = 0.8 \quad \text{(Eq. I–29C)}$$

Where:

U_{ij} = Process utilization rate for fluorinated GHG i, process type j.

$$BEF_{ijg} = \frac{(E_i - 0.8 * Mass_i)}{\sum_g Mass_g} \quad \text{(Eq. I–29D)}$$

Where:

BEF_{ijg} = By-product formation rate for gas i from input gas g for process type j.

E_i = The mass emissions of input gas i.

$Mass_i$ = The mass of input gas i fed into the process.

$Mass_g$ = The mass of input gas g fed into the process, where g does not equal input gas i.

i = Fluorinated GHG.

g = Fluorinated GHG input gas, where gas g is not equal to gas i.

j = Process type.

(B) *Reference emission factor method.* Calculate the input gas emission factors and by-product formation rates from a test using equations I–30A, I–30B, and I–29B to this section, and table I–19 or I–20 to this subpart. In this case, use

equation I–30A to this section to calculate the input gas emission factors and use equation I–30B and I–29B to this section to calculate the by-product formation rates.

$$(1 - U_{ij}) = (1 - U_{ijr}) * \left[\frac{E_i}{(Mass_i * (1 - U_{ijr}) + \sum_g Mass_g BEF_{ijgr})}\right] \quad \text{(Eq. I–30A)}$$

Where:

U_{ij} = Process utilization rate for fluorinated GHG i, process type j.

U_{ijr} = Reference process utilization rate for fluorinated GHG i, process type j, for input gas i, using table I–19 or I–20 to this subpart as appropriate.

E_i = The mass emissions of input gas i.

$Mass_i$ = The mass of gas i fed into the process.

$Mass_g$ = The mass of input gas g fed into the process, where g does not equal input gas i.

BEF_{ijgr} = Reference by-product formation rate for gas i from input gas g for process type j, using table I–19 or I–20 to this subpart as appropriate.

i = Fluorinated GHG.

g = Fluorinated GHG input gas, where gas g is not equal to gas i.

r = Reference data.

$$BEF_{ijg} = BEF_{ijgr} * \left[\frac{E_i}{(Mass * (1 - U_{ijr}) + \sum_g Mass_g BEF_{ijgr})}\right] \quad \text{(Eq. I–30B)}$$

Where:

BEF_{ijg} = By-product formation rate for gas i from input gas g for process type j, where gas i is also an input gas.

BEF_{ijgr} = Reference by-product formation rate for gas i from input gas g for process type j from table I–19 or I–20 to this subpart, as appropriate.

U_{ijr} = Reference process utilization rate for fluorinated GHG i, process type j, for input gas i, using table I–19 or I–20 to this subpart, as appropriate.

E_i = The mass emissions of input gas i.

$Mass_i$ = The mass of gas i fed into the process.

$Mass_g$ = The mass of input gas g fed into the process, where g does not equal input gas i.

i = Fluorinated GHG.

j = Process type.

g = Fluorinated GHG input gas, where gas g is not equal to gas i.

r = Reference data.

* * * * *

(4) Multiple semiconductor manufacturing facilities may submit a single consolidated technology assessment report as long as the facility identifying information in § 98.3(c)(1) and the certification statement in § 98.3(c)(9) is provided for each facility for which the consolidated report is submitted.

* * * * *

■ 26. Amend § 98.97 by:

■ a. Adding paragraph (b);

■ b. Revising paragraphs (d)(1)(iii), (d)(3), (d)(5)(i), (d)(6) and (7), and (d)(9)(i);

■ c. Removing and reserving paragraph (i)(1); and

■ d. Revising paragraphs (i)(5) and (9) and (k).

The addition and revisions read as follows:

§ 98.97 Records that must be retained.

* * * * *

(b) If you use HC fuel CECS purchased and installed on or after January 1, 2025, to control emissions from tools that use either NF_3 as an input gas in remote plasma cleaning processes or F_2 as an input gas in any process, and if you use a value less than 1 for either $a_{F2,j}$ or $a_{NF3,RPC}$ in equation I–9 to § 98.93, certification and documentation that the model for each of the systems that you claim does not form CF_4 from F_2 has been tested and verified to produce less than 0.1% CF_4 from F_2, and certification that the site maintenance plan includes the HC fuel CECS manufacturer's recommendations and specifications for installation, operation, and maintenance of those systems. If you are relying on your own testing to make the certification that the model produces less than 0.1% CF_4 from F_2, the documentation must include the model tested, the method used to perform the testing (*e.g.,* EPA 430–R–10–003, modified to calculate the formation rate of CF_4 from F_2 rather than the DRE), complete documentation of the results of any initial and subsequent tests, and a final report similar to that specified in EPA 430–R–10–003 (incorporated by reference, see § 98.7), with appropriate adjustments to reflect the measurement of the formation rate of CF_4 from F_2 rather than the DRE. If you are relying on testing by the HC fuel CECS manufacturer to make the certification that the system produces less than 0.1% CF_4 from F_2, the documentation must include the model tested, the method used to perform the testing, and the results of the test.

* * * * *

(d) * * *

(1) * * *

(iii) If you use either default destruction or removal efficiency values or certified destruction or removal efficiency values that are lower than the default values in your emissions calculations under § 98.93(a), (b), and/or (i), certification that the abatement systems for which emissions are being reported were specifically designed for fluorinated GHG and N_2O abatement, as required under § 98.94(f)(3), certification that the site maintenance plan includes the abatement system manufacturer's recommendations and specifications for installation, operation, and maintenance, and the certified destruction and removal efficiency values for all applicable abatement systems. For abatement systems purchased and installed on or after January 1, 2025, also include records of the method used to measure the destruction and removal efficiency values.

* * * * *

(3) Where either the default destruction or removal efficiency value or a certified destruction or removal efficiency value that is lower than the default is used, documentation from the abatement system supplier describing the equipment's designed purpose and emission control capabilities for fluorinated GHG and N_2O.

* * * * *

(5) * * *

(i) The number of abatement systems of each manufacturer, and model numbers, and the manufacturer's certified fluorinated GHG and N_2O destruction or removal efficiency, if any.

* * * * *

(6) Records of all inputs and results of calculations made accounting for the uptime of abatement systems used during the reporting year, in accordance with equations I–15 or I–23 to § 98.93, as applicable. The inputs should

include an indication of whether each value for destruction or removal efficiency is a default value, lower manufacturer-verified value, or a measured site-specific value.

(7) Records of all inputs and results of calculations made to determine the average weighted fraction of each gas destroyed or removed in the abatement systems for each stack system using equations I–24A and I–24B to § 98.93, if applicable. The inputs should include an indication of whether each value for destruction or removal efficiency is a default value, lower manufacturer-verified value, or a measured site-specific value.

* * * * *

(9) * * *

(i) The site maintenance plan for abatement systems must be based on the abatement system manufacturer's recommendations and specifications for installation, operation, and maintenance if you use default or lower manufacturer-verified destruction and removal efficiency values in your emissions calculations under § 98.93(a), (b), and/or (i). If the manufacturer's recommendations and specifications for installation, operation, and maintenance are not available, you cannot use default destruction and removal efficiency values or lower manufacturer-verified value in your emissions calculations under § 98.93(a), (b), and/or (i). If you use an average of properly measured destruction or removal efficiencies determined in accordance with the procedures in § 98.94(f)(4)(i) through (vi), the site maintenance plan for abatement systems must be based on the abatement system manufacturer's recommendations and specifications for installation, operation, and maintenance, where available. If you deviate from the manufacturer's recommendations and specifications, you must include documentation that demonstrates how the deviations do not negatively affect the performance or destruction or removal efficiency of the abatement systems.

* * * * *

(i) * * *

(5) The fab-specific emission factor and the calculations and data used to determine the fab-specific emission factor for each fluorinated GHG and by-product, as calculated using equations I–19A, I–19B, I–19C and I–20 to § 98.93(i)(3).

* * * * *

(9) The number of tools vented to each stack system in the fab and all inputs and results for the calculations accounting for the fraction of gas exhausted through abatement systems using equations I–24C and I–24D to § 98.93.

* * * * *

(k) Annual gas consumption for each fluorinated GHG and N_2O as calculated in equation I–11 to § 98.93, including where your fab used less than 50 kg of a particular fluorinated GHG or N_2O used at your facility for which you have not calculated emissions using equations I–6, I–7, I–8A, I–8B, I–9, I–10, I–21, or I–22 to § 98.93, the chemical name of the GHG used, the annual consumption of the gas, and a brief description of its use.

* * * * *

■ 27. Amend § 98.98 by:

■ a. Removing the definition ''Fluorinated heat transfer fluids'';

■ b. Adding the definition ''Hydrocarbon-fuel based combustion emission control systems (HC fuel CECs)'' in alphabetical order; and

■ c. Revising the definition ''Operational mode''.

The revisions and addition read as follows:

§ 98.98 Definitions.

* * * * *

Hydrocarbon-fuel based combustion emission control system (HC fuel CECS) means a hydrocarbon fuel-based combustion device or equipment that is designed to destroy or remove gas emissions in exhaust streams via combustion from one or more electronics manufacturing production processes, and that is connected to manufacturing tools that have the potential to emit F_2 or fluorinated greenhouse gases. HC fuel CECs include both emission control systems that are and are not designed to destroy or remove fluorinated GHGs or N_2O.

* * * * *

Operational mode means the time in which an abatement system is properly installed, maintained, and operated according to the site maintenance plan for abatement systems as required in § 98.94(f)(1) and defined in § 98.97(d)(9). This includes being properly operated within the range of parameters as specified in the site maintenance plan for abatement systems. For abatement systems purchased and installed on or after January 1, 2025, this includes being properly operated within the range of parameters specified in the DRE certification documentation. An abatement system is considered to not be in operational mode when it is not operated and maintained according to the site maintenance plan for abatement systems or, for abatement systems purchased and installed on or after January 1, 2025, not operated within the range of parameters as specified in the DRE certification documentation.

* * * * *

■ 28. Revise table I–1 to subpart I to read as follows:

TABLE I–1 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS FOR MANUFACTURING CAPACITY-BASED THRESHOLD APPLICABILITY DETERMINATION

Product type	Emission factors EF_i							
	CF_4	C_2F_6	CHF_3	c-C_4F_8	C_3F_8	NF_3	SF_6	N_2O
Semiconductors (kg/m²)	0.9	1.0	0.04	NA	0.05	0.04	0.20	NA
LCD (g/m²)	0.65	NA	0.0024	0.00	NA	1.29	4.14	17.06
MEMS (kg/m²)	0.015	NA	NA	0.076	NA	NA	1.86	NA

Notes: NA denotes not applicable based on currently available information.

■ 29. Revise table I–2 to subpart I to read as follows:

TABLE I–2 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS FOR GAS CONSUMPTION-BASED THRESHOLD APPLICABILITY DETERMINATION

	Process gas i	
	Fluorinated GHGs	N_2O
$1-U_i$	0.8	1
BCF_4	0.15	0
BC_2F_6	0.05	0

■ 30. Revise table I–3 to subpart I to read as follows:

TABLE I–3 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1-U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 150 mm AND 200 mm WAFER SIZES

Process type/sub-type	Process gas i												
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_2HF_5	CH_3F	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
Etching/Wafer Cleaning													
$1-U_i$	0.73	0.72	0.51	0.13	0.064	0.70	NA	0.14	0.19	0.55	0.083	0.072	NA
BCF_4	NA	0.10	0.085	0.079	0.077	NA	NA	0.11	0.0040	0.13	0.095	NA	NA
BC_2F_6	0.041	NA	0.035	0.025	0.024	0.0034	NA	0.037	0.025	0.11	0.073	0.014	NA
BC_4F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
$BCHF_3$	0.091	0.047	NA	0.049	NA	NA	NA	0.040	NA	0.0012	0.066	0.0039	NA
Chamber Cleaning													
In situ plasma cleaning													
$1-U_i$	0.92	0.55	NA	NA	NA	NA	0.40	0.10	0.18	NA	NA	NA	0.14
BCF_4	NA	0.19	NA	NA	NA	NA	0.20	0.11	0.14	NA	NA	NA	0.13
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.045
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Remote plasma cleaning													
$1-U_i$	NA	NA	NA	NA	NA	NA	NA	NA	0.028	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	0.015	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BF_2	NA	NA	NA	NA	NA	NA	NA	NA	0.5	NA	NA	NA	NA
In situ thermal cleaning													
$1-U_i$	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA = Not applicable; *i.e.,* there are no applicable default emission factor measurements for this gas. This does not necessarily imply that a particular gas is not used in or emitted from a particular process sub-type or process type.

31. Revise table I–4 to subpart I to read as follows:

TABLE I–4 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1-U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 300 mm AND 450 mm WAFER SIZE

Process type/sub-type	Process gas i											
	CF_4	C_2F_6	CHF_3	CH_2F_2	CH_3F	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
Etching/Wafer Cleaning												
$1-U_i$	0.65	0.80	0.37	0.20	0.30	0.30	0.18	0.16	0.30	0.15	0.10	NA
BCF_4	NA	0.21	0.076	0.060	0.0291	0.21	0.045	0.044	0.033	0.059	0.11	NA
BC_2F_6	0.058	NA	0.058	0.043	0.009	0.018	0.027	0.045	0.041	0.062	0.083	NA
BC_4F_8	0.0046	NA	0.0027	0.054	0.0070	NA	NA	NA	NA	0.0051	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.00012	NA
$BCHF_3$	0.012	NA	NA	0.057	0.016	0.012	0.028	0.023	0.0039	0.017	0.0069	NA
BCH_2F_2	0.005	NA	0.0024	NA	0.0033	NA	0.0021	0.00074	0.000020	0.000030	NA	NA
BCH_3F	0.0061	NA	0.027	0.0036	NA	0.00073	0.0063	0.0080	0.0082	0.00065	NA	NA

TABLE I–4 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 300 mm AND 450 mm WAFER SIZE—Continued

Process type/sub-type	Process gas i											
	CF_4	C_2F_6	CHF_3	CH_2F_2	CH_3F	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
Chamber Cleaning												
In situ plasma cleaning												
$1–U_i$	NA	NA	NA	NA	NA	NA	NA	0.20	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	0.037	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Remote plasma cleaning												
$1–U_i$	NA	NA	NA	NA	NA	0.063	NA	0.018	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	0.037	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
$BCHF_3$	NA	NA	NA	NA	NA	NA	NA	0.000059	NA	NA	NA	NA
BCH_2F_2	NA	NA	NA	NA	NA	NA	NA	0.00088	NA	NA	NA	NA
BCH_3F	NA	NA	NA	NA	NA	NA	NA	0.0028	NA	NA	NA	NA
BF_2	NA	NA	NA	NA	NA	NA	NA	0.5	NA	NA	NA	NA
In situ thermal cleaning												
$1–U_i$	NA	NA	NA	NA	NA	NA	NA	0.28	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	0.010	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

Notes: NA = Not applicable; *i.e.,* there are no applicable default emission factor measurements for this gas. This does not necessarily imply that a particular gas is not used in or emitted from a particular process sub-type or process type.

■ 32. Revise table I–8 to subpart I to read as follows:

TABLE I–8 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–UN_2O_{,j}$) FOR N_2O UTILIZATION ($UN_2O_{,j}$)

Manufacturing type/process type/wafer size	N_2O
Semiconductor Manufacturing:	
200 mm or Less:	
CVD $1–U_i$	1.0
Other Manufacturing Process $1–U_i$	1.0
300 mm or greater:	
CVD $1–U_i$	0.5
Other Manufacturing Process $1–U_i$	1.0
LCD Manufacturing:	
CVD Thin Film Manufacturing $1–U_i$	0.63
All other N_2O Processes	1.0

■ 33. Revise table I–11 to subpart I to read as follows:

TABLE I–11 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR USE WITH THE STACK TEST METHOD

[150 mm and 200 mm Wafers]

All processes	Process gas i													
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_2HF_5	CH_3F	C_3F_8	C_4F_8	NF_3	NF_3 Remote	SF_6	C_4F_6	C_5F_8	C_4F_8O
$1–U_i$	0.79	0.55	0.51	0.13	0.064	0.70	0.40	0.12	0.18	0.028	0.58	0.083	0.072	0.14
BCF_4	NA	0.19	0.085	0.079	0.077	NA	0.20	0.11	0.11	0.015	0.13	0.095	NA	0.13
BC_2F_6	0.027	NA	0.035	0.025	0.024	0.0034	NA	0.019	0.0059	NA	0.10	0.073	0.014	0.045
BC_4F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_5F_8	0.00077	NA	0.0012	NA	NA	NA	NA	0.0043	NA	NA	NA	NA	NA	NA
$BCHF_3$	0.060	0.0020	NA	0.049	NA	NA	NA	0.020	NA	NA	0.0011	0.066	0.0039	NA
BF_2	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.50	NA	NA	NA	NA

Notes: NA = Not applicable; *i.e.,* there are no applicable emission factor measurements for this gas. This does not necessarily imply that a particular gas is not used in or emitted from a particular process sub-type or process type.

■ 34. Revise table I–12 to subpart I to read as follows:

TABLE I–12 TO SUBPART I OF PART 98—DEFAULT EMISSION FACTORS ($1–U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR USE WITH THE STACK TEST METHOD

[300 mm and 450 mm Wafers]

All processes	Process gas i													
	CF_4	C_2F_6	CHF_3	CH_2F_2	CH_3F	C_3F_8	C_3F_8 Remote	C_4F_8	NF_3	NF_3 Remote	SF_6	C_4F_6	C_5F_8	C_4F_8O
$1–U_i$	0.65	0.80	0.37	0.20	0.30	0.30	0.063	0.183	0.19	0.018	0.30	0.15	0.100	NA
BCF_4	NA	0.21	0.076	0.060	0.029	0.21	NA	0.045	0.040	0.037	0.033	0.059	0.109	NA
BC_2F_6	0.058	NA	0.058	0.043	0.0093	0.18	NA	0.027	0.0204	NA	0.041	0.062	0.083	NA
BC_4F_6	0.0083	NA	0.01219	NA	0.001	NA	NA	0.008	NA	NA	NA	NA	NA	NA
BC_4F_8	0.0046	NA	0.00272	0.054	0.007	NA	NA	NA	NA	NA	NA	0.0051	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.00012	NA
BCH_2F_2	0.005	NA	0.0024	NA	0.0033	NA	NA	0.0021	0.00034	0.00088	0.000020	0.000030	NA	NA
BCH_3F	0.0061	NA	0.027	0.0036	NA	0.0007	NA	0.0063	0.0036	0.0028	0.0082	0.00065	NA	NA
$BCHF_3$	0.012	NA	NA	0.057	0.016	0.012	NA	0.028	0.0106	0.000059	0.0039	0.017	0.0069	NA
BF_2	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.50	NA	NA	NA	NA

■ 35. Revise table I–16 to subpart I to read as follows:

TABLE I–16 TO SUBPART I OF PART 98—DEFAULT EMISSION DESTRUCTION OR REMOVAL EFFICIENCY (DRE) FACTORS FOR ELECTRONICS MANUFACTURING

Manufacturing type/process type/gas	Default DRE (%)
MEMS, LCDs, and PV Manufacturing	60
Semiconductor Manufacturing:	
CF_4	87
CH_3F	98
CHF_3	97
CH_2F_2	98
C_4F_8	93
C_4F_8O	93
C_5F_8	97
C_4F_6	95
C_3F_8	98
C_2HF_5	97
C_2F_6	98
SF_6	95
NF_3	96
All other carbon-based fluorinated GHGs used in Semiconductor Manufacturing	60
N_2O Processes.	
CVD and all other N_2O-using processes	60

■ 36. Add table I–18 to subpart I to read as follows:

TABLE I–18 TO SUBPART I OF PART 98—DEFAULT FACTORS FOR GAMMA ($\gamma_{i,p}$ AND $\gamma_{k,i,p}$) FOR SEMICONDUCTOR MANUFACTURING AND FOR MEMS AND PV MANUFACTURING UNDER CERTAIN CONDITIONS * FOR USE WITH THE STACK TESTING METHOD

Process type	In-situ thermal or in-situ plasma cleaning					Remote plasma cleaning		
Gas	CF_4	C_2F_6	c-C_4F_8	NF_3	SF_6	C_3F_8	CF_4	NF_3
If manufacturing wafer sizes ≤200 mm AND manufacturing 300 mm (or greater) wafer sizes								
γ_i	13	9.3	4.7	14	11	NA	NA	5.7
$\gamma_{CF4,i}$	NA	23	6.7	63	8.7	NA	NA	58
$\gamma_{C2F6,i}$	NA	NA	NA	NA	3.4	NA	NA	NA
$\gamma_{CHF3,i}$	NA	NA	NA	NA	NA	NA	NA	0.24
$\gamma_{CH2F2,i}$	NA	NA	NA	NA	NA	NA	NA	111
$\gamma_{CH3F,i}$	NA	NA	NA	NA	NA	NA	NA	33
If manufacturing ≤200 mm OR manufacturing 300 mm (or greater) wafer sizes								
γ_i (≤ 200 mm wafer size)	13	9.3	4.7	2.9	11	NA	NA	1.4

TABLE I–18 TO SUBPART I OF PART 98—DEFAULT FACTORS FOR GAMMA ($\gamma_{i,p}$ AND $\gamma_{k,i,p}$) FOR SEMICONDUCTOR MANUFACTURING AND FOR MEMS AND PV MANUFACTURING UNDER CERTAIN CONDITIONS * FOR USE WITH THE STACK TESTING METHOD—Continued

Process type	In-situ thermal or in-situ plasma cleaning					Remote plasma cleaning		
Gas	CF_4	C_2F_6	c-C_4F_8	NF_3	SF_6	C_3F_8	CF_4	NF_3
$\gamma_{CF4,i}$ (≤200 mm wafer size)	NA	23	6.7	110	8.7	NA	NA	36
$\gamma_{C2F6,i}$ (≤200 mm wafer size)	NA	NA	NA	NA	3.4	NA	NA	NA
γ_i (300 mm wafer size)	NA	NA	NA	26	NA	NA	NA	10
$\gamma_{CF4,i}$ (300 mm wafer size)	NA	NA	NA	17	NA	NA	NA	80
$\gamma_{C2F6,i}$ (300 mm wafer size)	NA	NA	NA	NA	NA	NA	NA	NA
$\gamma_{CHF3,i}$ (300 mm wafer size)	NA	NA	NA	NA	NA	NA	NA	0.24
$\gamma_{CH2F2,i}$ (300 mm wafer size)	NA	NA	NA	NA	NA	NA	NA	111
$\gamma_{CH3F,i}$ (300 mm wafer size)	NA	NA	NA	NA	NA	NA	NA	33

* If you manufacture MEMS or PVs and use semiconductor tools and processes, you may use the corresponding γ in this table. For all other tools and processes, a default γ of 10 must be used.

■ 37. Add table I–19 to subpart I to read as follows:

TABLE I–19 TO SUBPART I OF PART 98—REFERENCE EMISSION FACTORS ($1-U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 150 MM AND 200 MM WAFER SIZES

Process type/sub-type	Process gas i												
	CF_4	C_2F_6	CHF_3	CH_2F_2	C_2HF_5	CH_3F	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
Etching/Wafer Cleaning													
$1-U_i$	0.73	0.46	0.31	0.37	0.064	0.66	NA	0.21	0.20	0.55	0.086	0.072	NA
BCF_4	NA	0.20	0.10	0.031	0.077	NA	NA	0.17	0.0040	0.023	0.0089	NA	NA
BC_2F_6	0.029	NA	NA	NA	NA	NA	NA	0.065	NA	NA	0.045	0.014	NA
BC_4F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_4F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_5F_8	NA	NA	NA	NA	NA	NA	NA	0.016	NA	NA	NA	NA	NA
$BCHF_3$	0.13	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.0039	NA
Chamber Cleaning													
In situ plasma cleaning													
$1-U_i$	0.92	0.55	NA	NA	NA	NA	0.40	0.10	0.18	NA	NA	NA	0.14
BCF_4	NA	0.19	NA	NA	NA	NA	0.20	0.11	0.14	NA	NA	NA	0.13
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.045
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Remote plasma cleaning													
$1-U_i$	NA	NA	NA	NA	NA	NA	NA	NA	0.028	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	0.015	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
In situ thermal cleaning													
$1-U_i$	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

■ 38. Add table I–20 to subpart I to read as follows:

TABLE I–20 TO SUBPART I OF PART 98—REFERENCE EMISSION FACTORS ($1-U_{ij}$) FOR GAS UTILIZATION RATES (U_{ij}) AND BY-PRODUCT FORMATION RATES (B_{ijk}) FOR SEMICONDUCTOR MANUFACTURING FOR 300 MM WAFER SIZES

Process type/sub-type	Process gas i											
	CF_4	C_2F_6	CHF_3	CH_2F_2	CH_3F	C_3F_8	C_4F_8	NF_3	SF_6	C_4F_6	C_5F_8	C_4F_8O
Etching/Wafer Cleaning												
$1-U_i$	0.68	0.80	0.35	0.15	0.34	0.30	0.16	0.17	0.28	0.17	0.10	NA
BCF_4	NA	0.21	0.073	0.020	0.038	0.21	0.045	0.035	0.0072	0.034	0.11	NA
BC_2F_6	0.041	NA	0.040	0.0065	0.0064	0.18	0.030	0.038	0.0017	0.025	0.083	NA
BC_4F_6	0.0015	NA	0.00010	NA	0.0010	NA	0.00083	NA	NA	NA	NA	NA
BC_4F_8	0.0051	NA	0.00061	NA	0.0070	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.00012	NA
BC_5F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
$BCHF_3$	0.0056	NA	NA	0.033	0.0049	0.012	0.029	0.0065	0.0012	0.019	0.0069	NA
BCH_2F_2	0.014	NA	0.0026	NA	0.0023	NA	0.0014	0.00086	0.000020	0.000030	NA	NA
BCH_3F	0.00057	NA	0.12	NA	NA	0.00073	NA	NA	0.0082	NA	NA	NA
Chamber Cleaning												
In situ plasma cleaning												
$1-U_i$	NA	NA	NA	NA	NA	NA	NA	0.20	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	0.037	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Remote plasma cleaning												
$1-U_i$	NA	NA	NA	NA	NA	0.063	NA	0.018	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	0.038	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
$BCHF_3$	NA	NA	NA	NA	NA	NA	NA	0.000059	NA	NA	NA	NA
BCH_2F_2	NA	NA	NA	NA	NA	NA	NA	0.0016	NA	NA	NA	NA
BCH_3F	NA	NA	NA	NA	NA	NA	NA	0.0028	NA	NA	NA	NA
In situ thermal cleaning												
$1-U_i$	NA	NA	NA	NA	NA	NA	NA	0.28	NA	NA	NA	NA
BCF_4	NA	NA	NA	NA	NA	NA	NA	0.010	NA	NA	NA	NA
BC_2F_6	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
BC_3F_8	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

■ 39. Add table I–21 to subpart I to read as follows:

TABLE I–21 TO SUBPART I OF PART 98—EXAMPLES OF FLUORINATED GHGS USED BY THE ELECTRONICS INDUSTRY

Product type	Fluorinated GHGs used during manufacture
Electronics	CF_4, C_2F_6, C_3F_8, c-C_4F_8, c-C_4F_8O, C_4F_6, C_5F_8, CHF_3, CH_2F_2, NF_3, SF_6, and fluorinated HTFs (CF_3-(O-CF(CF_3)-CF_2)n-(O-CF_2)m-O-CF_3, $C_nF_{2n}+_2$, $C_nF_{2n}+_1$(O)$C_mF_{2m}+_1$, $C_nF_{2n}O$, ($C_nF_{2n}+_1$)$_{3N}$).

Subpart N—Glass Production

■ 40. Revise and republish § 98.146 to read as follows:

§ 98.146 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) and (b) of this section, as applicable.

(a) If a CEMS is used to measure CO_2 emissions, then you must report under this subpart the relevant information required under § 98.36 for the Tier 4 Calculation Methodology and the following information specified in paragraphs (a)(1) through (3) of this section:

(1) Annual quantity of each carbonate-based raw material (tons) charged to each continuous glass melting furnace and for all furnaces combined.

(2) Annual quantity of glass produced (tons), by glass type, from each continuous glass melting furnace and from all furnaces combined.

(3) Annual quantity (tons), by glass type, of recycled scrap glass (cullet) charged to each continuous glass melting furnace and for all furnaces combined.

(b) If a CEMS is not used to determine CO_2 emissions from continuous glass melting furnaces, and process CO_2 emissions are calculated according to the procedures specified in § 98.143(b), then you must report the following information as specified in paragraphs (b)(1) through (9) of this section:

(1) Annual process emissions of CO_2 (metric tons) for each continuous glass melting furnace and for all furnaces combined.

(2) Annual quantity of each carbonate-based raw material charged (tons) to all furnaces combined.

(3) Annual quantity of glass produced (tons), by glass type, from each continuous glass melting furnace and from all furnaces combined.

(4) Annual quantity (tons), by glass type, of recycled scrap glass (cullet) charged to each continuous glass melting furnace and for all furnaces combined.

(5) Results of all tests, if applicable, used to verify the carbonate-based mineral mass fraction for each carbonate-based raw material charged to a continuous glass melting furnace, as specified in paragraphs (b)(5)(i) through (iii) of this section.

(i) Date of test.

(ii) Method(s) and any variations used in the analyses.

(iii) Mass fraction of each sample analyzed.

(6) [Reserved]

(7) Method used to determine decimal fraction of calcination, unless you used the default value of 1.0.

(8) Total number of continuous glass melting furnaces.

(9) The number of times in the reporting year that missing data procedures were followed to measure monthly quantities of carbonate-based raw materials, recycled scrap glass (cullet), or mass fraction of the carbonate-based minerals for any continuous glass melting furnace (months).

■ 41. Amend § 98.147 by revising and republishing paragraphs (a) and (b) to read as follows:

§ 98.147 Records that must be retained.

* * * * *

(a) If a CEMS is used to measure emissions, then you must retain the records required under § 98.37 for the Tier 4 Calculation Methodology and the following information specified in paragraphs (a)(1) through (3) of this section:

(1) Monthly glass production rate for each continuous glass melting furnace, by glass type (tons).

(2) Monthly amount of each carbonate-based raw material charged to each continuous glass melting furnace (tons).

(3) Monthly amount (tons) of recycled scrap glass (cullet) charged to each continuous glass melting furnace, by glass type.

(b) If process CO_2 emissions are calculated according to the procedures specified in § 98.143(b), you must retain the records in paragraphs (b)(1) through (6) of this section.

(1) Monthly glass production rate for each continuous glass melting furnace, by glass type (tons).

(2) Monthly amount of each carbonate-based raw material charged to each continuous glass melting furnace (tons).

(3) Monthly amount (tons) of recycled scrap glass (cullet) charged to each continuous glass melting furnace, by glass type.

(4) Data on carbonate-based mineral mass fractions provided by the raw material supplier for all raw materials consumed annually and included in calculating process emissions in equation N–1 to § 98.143, if applicable.

(5) Results of all tests, if applicable, used to verify the carbonate-based mineral mass fraction for each carbonate-based raw material charged to a continuous glass melting furnace, including the data specified in paragraphs (b)(5)(i) through (v) of this section.

(i) Date of test.

(ii) Method(s), and any variations of the methods, used in the analyses.

(iii) Mass fraction of each sample analyzed.

(iv) Relevant calibration data for the instrument(s) used in the analyses.

(v) Name and address of laboratory that conducted the tests.

(6) The decimal fraction of calcination achieved for each carbonate-based raw material, if a value other than 1.0 is used to calculate process mass emissions of CO_2.

* * * * *

Subpart P—Hydrogen Production

■ 42. Revise § 98.160 to read as follows:

§ 98.160 Definition of the source category.

(a) A hydrogen production source category consists of facilities that produce hydrogen gas as a product.

(b) This source category comprises process units that produce hydrogen by reforming, gasification, oxidation, reaction, or other transformations of feedstocks except the processes listed in paragraph (b)(1) or (2) of this section.

(1) Any process unit for which emissions are reported under another subpart of this part. This includes, but is not necessarily limited to:

(i) Ammonia production units for which emissions are reported under subpart G.

(ii) Catalytic reforming units at petroleum refineries that transform

naphtha into higher octane aromatics for which emissions are reported under subpart Y.

(iii) Petrochemical process units for which emissions are reported under subpart X.

(2) Any process unit that only separates out diatomic hydrogen from a gaseous mixture and is not associated with a unit that produces hydrogen created by transformation of one or more feedstocks, other than those listed in paragraph (b)(1) of this section.

(c) This source category includes the process units that produce hydrogen and stationary combustion units directly associated with hydrogen production (*e.g.* , reforming furnace and hydrogen production process unit heater).

■ 43. Amend § 98.162 by revising paragraph (a) to read as follows:

§ 98.162 GHGs to report.

* * * * *

(a) CO_2 emissions from each hydrogen production process unit, including fuel combustion emissions accounted for in the calculation methodologies in § 98.163.

* * * * *

■ 44. Amend § 98.163 by revising the introductory text, paragraph (b) introductory text, and paragraph (c) to read as follows:

§ 98.163 Calculating GHG emissions.

You must calculate and report the annual CO_2 emissions from each hydrogen production process unit using the procedures specified in paragraphs (a) through (c) of this section, as applicable.

* * * * *

(b) Fuel and feedstock material balance approach. Calculate and report CO_2 emissions as the sum of the annual emissions associated with each fuel and feedstock used for each hydrogen production process unit by following paragraphs (b)(1) through (3) of this section. The carbon content and molecular weight shall be obtained from the analyses conducted in accordance with § 98.164(b)(2), (3), or (4), as applicable, or from the missing data procedures in § 98.165. If the analyses are performed annually, then the annual value shall be used as the monthly average. If the analyses are performed more frequently than monthly, use the arithmetic average of values obtained during the month as the monthly average.

* * * * *

(c) If GHG emissions from a hydrogen production process unit are vented through the same stack as any combustion unit or process equipment that reports CO_2 emissions using a CEMS that complies with the Tier 4 Calculation Methodology in subpart C of this part, then the owner or operator shall report under this subpart the combined stack emissions according to the Tier 4 Calculation Methodology in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part. If GHG emissions from a hydrogen production process unit using a CEMS that complies with the Tier 4 Calculation Methodology in subpart C of this part does not include combustion emissions from the hydrogen production unit (*i.e.* , the hydrogen production unit has separate stacks for process and combustion emissions), then the calculation methodology in paragraph (b) of this section shall be used considering only fuel inputs to calculate and report CO_2 emissions from fuel combustion related to the hydrogen production unit.

■ 45. Amend § 98.164 by:

■ a. Revising the introductory text, paragraphs (b)(2) through (4), and (b)(5) introductory text; and

■ b. Adding paragraphs (b)(5)(xix) and (c).

The revisions and additions read as follows:

§ 98.164 Monitoring and QA/QC requirements.

The GHG emissions data for hydrogen production process units must be quality-assured as specified in paragraph (a) or (b) of this section, as appropriate for each process unit, except as provided in paragraph (c) of this section:

* * * * *

(b) * * *

(2) Determine the carbon content and the molecular weight annually of standard gaseous hydrocarbon fuels and feedstocks having consistent composition (*e.g.,* natural gas) according to paragraph (b)(5) of this section. For gaseous fuels and feedstocks that have a maximum product specification for carbon content less than or equal to 0.00002 kg carbon per kg of gaseous fuel or feedstock, you may instead determine the carbon content and the molecular weight annually using the product specification's maximum carbon content and molecular weight. For other gaseous fuels and feedstocks (*e.g.,* biogas, refinery gas, or process gas), sample and analyze no less frequently than weekly to determine the carbon content and molecular weight of the fuel and feedstock according to paragraph (b)(5) of this section.

(3) Determine the carbon content of fuel oil, naphtha, and other liquid fuels and feedstocks at least monthly, except annually for standard liquid hydrocarbon fuels and feedstocks having consistent composition, or upon delivery for liquid fuels and feedstocks delivered by bulk transport (*e.g.,* by truck or rail) according to paragraph (b)(5) of this section. For liquid fuels and feedstocks that have a maximum product specification for carbon content less than or equal to 0.00006 kg carbon per gallon of liquid fuel or feedstock, you may instead determine the carbon content annually using the product specification's maximum carbon content.

(4) Determine the carbon content of coal, coke, and other solid fuels and feedstocks at least monthly, except annually for standard solid hydrocarbon fuels and feedstocks having consistent composition, or upon delivery for solid fuels and feedstocks delivered by bulk transport (*e.g.,* by truck or rail) according to paragraph (b)(5) of this section.

(5) Except as provided in paragraphs (b)(2) and (3) of this section for fuels and feedstocks with a carbon content below the specified levels, you must use the following applicable methods to determine the carbon content for all fuels and feedstocks, and molecular weight of gaseous fuels and feedstocks. Alternatively, you may use the results of chromatographic analysis of the fuel and feedstock, provided that the chromatograph is operated, maintained, and calibrated according to the manufacturer's instructions; and the methods used for operation, maintenance, and calibration of the chromatograph are documented in the written monitoring plan for the unit under § 98.3(g)(5).

* * * * *

(xix) For fuels and feedstocks with a carbon content below the specified levels in paragraphs (b)(2) and (3) of this section, if the methods listed in paragraphs (b)(5)(i) through (xviii) of this section are not appropriate because the relevant compounds cannot be detected, the quality control requirements are not technically feasible, or use of the method would be unsafe, you may use modifications of the methods listed in paragraphs (b)(5)(i) through (xviii) or use other methods that are applicable to your fuel or feedstock.

(c) You may use best available monitoring methods as specified in paragraph (c)(2) of this section for measuring the fuel used by each stationary combustion unit directly associated with hydrogen production (*e.g.,* reforming furnace and hydrogen production process unit heater) that

meets the criteria specified in paragraph (c)(1) of this section. Eligibility to use best available monitoring methods ends upon the completion of any planned process unit or equipment shutdown after January 1, 2025.

(1) To be eligible to use best available monitoring methods, you must meet all criteria in paragraphs (c)(1)(i) through (iv) of this section.

(i) The stationary combustion unit must be directly associated with hydrogen production (*e.g.,* reforming furnace and hydrogen production process unit heater).

(ii) A measurement device meeting the requirements in paragraph (b)(1) of this section is not installed to measure the fuel used by each stationary combustion unit as of January 1, 2025.

(iii) The hydrogen production unit and associated stationary combustion unit are operated continuously.

(iv) Installation of a measurement device to measure the fuel used by each stationary combustion unit that meets the requirements in paragraph (b)(1) of this section must require a planned process equipment or unit shutdown or can only be done through a hot tap.

(2) Best available monitoring methods means any of the following methods:

(i) Monitoring methods currently used by the facility that do not meet the specifications of this subpart.

(ii) Supplier data.

(iii) Engineering calculations.

(iv) Other company records.

■ 46. Revise § 98.166 to read as follows:

§ 98.166 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the following information for each hydrogen production process unit:

(a) The unit identification number.

(b) If a CEMS is used to measure CO_2 emissions, then you must report the relevant information required under § 98.36 for the Tier 4 Calculation Methodology. If the CEMS measures emissions from either a common stack for multiple hydrogen production units or a common stack for hydrogen production unit(s) and other source(s), you must also report the estimated decimal fraction of the total annual CO_2 emissions attributable to this hydrogen production process unit (estimated using engineering estimates or best available data).

(c) If a material balance is used to calculate emissions using equations P–1 through P–3 to § 98.163, as applicable, report the total annual CO_2 emissions (metric tons) and the name and annual quantity (metric tons) of each carbon-containing fuel and feedstock.

(d) The information specified in paragraphs (d)(1) through (10):

(1) The type of hydrogen production unit (steam methane reformer (SMR) only, SMR followed by water gas shift reaction (WGS), partial oxidation (POX) only, POX followed by WGS, autothermal reforming only, autothermal reforming followed by WGS, water electrolysis, brine electrolysis, other (specify)).

(2) The type of hydrogen purification method (pressure swing adsorption, amine adsorption, membrane separation, other (specify), none).

(3) Annual quantity of hydrogen produced by reforming, gasification, oxidation, reaction, or other transformation of feedstocks (metric tons).

(4) Annual quantity of hydrogen that is purified only (metric tons). This quantity may be assumed to be equal to the annual quantity of hydrogen in the feedstocks to the hydrogen production unit.

(5) Annual quantity of ammonia intentionally produced as a desired product, if applicable (metric tons).

(6) Quantity of CO_2 collected and transferred off site in either gas, liquid, or solid forms, following the requirements of subpart PP of this part.

(7) Annual quantity of carbon other than CO_2 or methanol collected and transferred off site or transferred to a separate process unit within the facility for which GHG emissions associated with this carbon is being reported under other provisions of this part, in either gas, liquid, or solid forms (metric tons carbon).

(8) Annual quantity of methanol intentionally produced as a desired product, if applicable, (metric tons) for each process unit.

(9) Annual net quantity of steam consumed by the unit, (metric tons). Include steam purchased or produced outside of the hydrogen production unit. If the hydrogen production unit is a net producer of steam, enter the annual net quantity of steam consumed by the unit as a negative value.

(10) An indication (yes or no) if best available monitoring methods were used, in accordance with § 98.164(c), to determine fuel flow for each stationary combustion unit directly associated with hydrogen production (*e.g.,* reforming furnace and hydrogen production process unit heater). If yes, report:

(i) The beginning date of using best available monitoring methods, in accordance with § 98.164(c), to determine fuel flow for each stationary combustion unit directly associated with hydrogen production (*e.g.,* reforming furnace and hydrogen production process unit heater).

(ii) The anticipated or actual end date of using best available monitoring methods, as applicable, in accordance with § 98.164(c), to determine fuel flow for each stationary combustion unit directly associated with hydrogen production (*e.g.,* reforming furnace and hydrogen production process unit heater).

■ 47. Amend § 98.167 by:

■ a. Revising paragraphs (a) and (b);

■ b. Removing and reserving paragraph (c); and

■ c. Revising paragraphs (d) and (e) introductory text.

The revisions read as follows:

§ 98.167 Records that must be retained.

* * * * *

(a) If a CEMS is used to measure CO_2 emissions, then you must retain under this subpart the records required for the Tier 4 Calculation Methodology in § 98.37, and, if the CEMS measures emissions from a common stack for multiple hydrogen production units or emissions from a common stack for hydrogen production unit(s) and other source(s), records used to estimate the decimal fraction of the total annual CO_2 emissions from the CEMS monitoring location attributable to each hydrogen production unit.

(b) You must retain records of all analyses and calculations conducted to determine the values reported in § 98.166(b).

* * * * *

(d) The owner or operator must document the procedures used to ensure the accuracy of the estimates of fuel and feedstock usage in § 98.163(b), including, but not limited to, calibration of weighing equipment, fuel and feedstock flow meters, and other measurement devices. The estimated accuracy of measurements made with these devices must also be recorded, and the technical basis for these estimates must be provided.

(e) The applicable verification software records as identified in this paragraph (e). You must keep a record of the file generated by the verification software specified in § 98.5(b) for the applicable data specified in paragraphs (e)(1) through (12) of this section. Retention of this file satisfies the recordkeeping requirement for the data in paragraphs (e)(1) through (12) of this section for each hydrogen production unit.

* * * * *

Subpart Q—Iron and Steel Production

■ 48. Amend § 98.173 by revising equation Q–5 in paragraph (b)(1)(v) to read as follows:

§ 98.173 Calculating GHG emissions.

* * * * *

(b) * * *

(1) * * *

(v) * * *

$$CO_2 = \frac{44}{12} * \Big[(Iron) * (C_{iron}) + (Scrap) * (C_{scrap}) + (Flux) * (C_{Flux}) + (Electrode) * (C_{Electrode}) + (Carbon) * (C_{Carbon}) - (Steel) * (C_{Steel}) + (F_g) * (C_{gf}) * \frac{MW}{MVC} * 0.001 - (Slag) * (C_{Slag}) - (R) * (C_R)\Big] \quad \text{(Eq. Q–5)}$$

* * * * *

■ 49. Amend § 98.174 by:

■ a. Revising paragraph (b)(2) introductory text;

■ b. Redesignating paragraph (b)(2)(vi) as paragraph (b)(2)(vii); and

■ c. Adding new paragraph (b)(2)(vi).

The revision and addition read as follows:

§ 98.174 Monitoring and QA/QC requirements.

* * * * *

(b) * * *

(2) Except as provided in paragraph (b)(4) of this section, determine the carbon content of each process input and output annually for use in the applicable equations in § 98.173(b)(1) based on analyses provided by the supplier, analyses provided by material recyclers who manage process outputs for sale or use by other industries, or by the average carbon content determined by collecting and analyzing at least three samples each year using the standard methods specified in paragraphs (b)(2)(i) through (vii) of this section as applicable.

* * * * *

(vi) ASTM E415–17, Standard Test Method for Analysis of Carbon and Low-Alloy Steel by Spark Atomic Emission Spectrometry (incorporated by reference, see § 98.7) as applicable for steel.

* * * * *

■ 50. Amend § 98.176 by revising paragraphs (e)(2) and adding paragraph (g) to read as follows:

§ 98.176 Data reporting requirements.

* * * * *

(e) * * *

(2) Whether the carbon content was determined from information from the supplier, material recycler, or by laboratory analysis, and if by laboratory analysis, the method used in § 98.174(b)(2).

* * * * *

(g) For each unit, the type of unit, the annual production capacity, and annual operating hours.

* * * * *

Subpart S—Lime Manufacturing

■ 51. Amend § 98.193 by revising equation S–4 in paragraph (b)(2)(iv) to read as follows:

§ 98.193 Calculating GHG emissions.

* * * * *

(b) * * *

(2) * * *

(iv) * * *

$$E_{CO2,net} = \sum_{i=1}^{t}\sum_{n=1}^{12}(EF_{LIME,i,n} * M_{LIME,i,n}) + \sum_{i=1}^{b}\sum_{n=1}^{12}(EF_{LKD,i,n} * M_{LKD,i,n}) + \sum_{i=1}^{z} E_{waste,i} \quad \text{(Eq. S–4)}$$

* * * * *

■ 52. Amend § 98.196 by:

■ a. Revising paragraph (a) introductory text;

■ b. Adding paragraphs (a)(9) through (14);

■ c. Revising paragraphs (b) introductory text and (b)(17); and

■ d. Adding paragraphs (b)(22) and (23).

The revisions and additions read as follows:

§ 98.196 Data reporting requirements.

* * * * *

(a) If a CEMS is used to measure CO_2 emissions, then you must report under this subpart the relevant information required by § 98.36 and the information listed in paragraphs (a)(1) through (14) of this section.

* * * * *

(9) Annual arithmetic average of calcium oxide content for each type of lime product produced (metric tons CaO/metric ton lime).

(10) Annual arithmetic average of magnesium oxide content for each type of lime product produced (metric tons MgO/metric ton lime).

(11) Annual arithmetic average of calcium oxide content for each type of calcined lime byproduct/waste sold (metric tons CaO/metric ton lime).

(12) Annual arithmetic average of magnesium oxide content for each type of calcined lime byproduct/waste sold (metric tons MgO/metric ton lime).

(13) Annual arithmetic average of calcium oxide content for each type of calcined lime byproduct/waste not sold (metric tons CaO/metric ton lime).

(14) Annual arithmetic average of magnesium oxide content for each type of calcined lime byproduct/waste not sold (metric tons MgO/metric ton lime)

(b) If a CEMS is not used to measure CO_2 emissions, then you must report the information listed in paragraphs (b)(1) through (23) of this section.

* * * * *

(17) Indicate whether CO_2 was captured and used on-site (*e.g.,* for use in a purification process, the manufacture of another product). If CO_2 was captured and used on-site, provide the information in paragraphs (b)(17)(i) and (ii) of this section.

(i) The annual amount of CO_2 captured for use in all on-site processes.

(ii) The method used to determine the amount of CO_2 captured.

* * * * *

(22) Annual average results of chemical composition analysis of all lime byproducts or wastes not sold.

(23) Annual quantity (tons) of all lime byproducts or wastes not sold.

Subpart U—Miscellaneous Uses of Carbonate

■ 53. Amend § 98.210 by revising paragraph (b) to read as follows:

§ 98.210 Definition of the source category.

* * * * *

(b) This source category does not include equipment that uses carbonates or carbonate containing minerals that are consumed in the production of cement, glass, ferroalloys, iron and steel, lead, lime, phosphoric acid, pulp and paper, soda ash, sodium bicarbonate, sodium hydroxide, zinc, or ceramics.

* * * * *

Subpart X-Petrochemical Production

■ 54. Amend § 98.243 by revising paragraphs (b)(3) and (d)(5) to read as follows:

§ 98.243 Calculating GHG emissions.

* * * * *

(b) * * *

(3) For each flare, calculate CO_2, CH_4, and N_2O emissions using the methodology specified in § 98.253(b).

* * * * *

(d) * * *

(5) For each flare, calculate CO_2, CH_4, and N_2O emissions using the methodology specified in § 98.253(b).

■ 55. Amend § 98.244 by revising paragraph (b)(4)(iii) to read as follows:

§ 98.244 Monitoring and QA/QC requirements.

* * * * *

(b) * * *

(4) * * *

(iii) ASTM D2505–88 (Reapproved 2004)e1 (incorporated by reference, see § 98.7).

* * * * *

■ 56. Amend § 98.246 by revising paragraphs (a) introductory text, (a)(2), (5), (13) and (15), (b)(7) and (8), and (c) to read as follows:

§ 98.246 Data reporting requirements.

* * * * *

(a) If you use the mass balance methodology in § 98.243(c), you must report the information specified in paragraphs (a)(1) through (15) of this section for each type of petrochemical produced, reported by process unit.

* * * * *

(2) The type of petrochemical produced.

* * * * *

(5) Annual quantity of each type of petrochemical produced from each process unit (metric tons). If you are electing to consider the petrochemical process unit to be the entire integrated ethylene dichloride/vinyl chloride monomer process, the portion of the total amount of ethylene dichloride (EDC) produced that is used in vinyl chloride monomer (VCM) production may be a measured quantity or an estimate that is based on process knowledge and best available data. The portion of the total amount of EDC produced that is not utilized in VCM production must be measured in accordance with § 98.244(b)(2) or (3). Sum the amount of EDC used in the production of VCM plus the amount of separate EDC product to report as the total quantity of EDC petrochemical from an integrated EDC/VCM petrochemical process unit.

* * * * *

(13) Name and annual quantity (in metric tons) of each product included in equations X–1, X–2, and X–3 to § 98.243. If you are electing to consider the petrochemical process unit to be the entire integrated ethylene dichloride/vinyl chloride monomer process, the reported quantity of EDC product should include only that which was not used in the VCM process.

* * * * *

(15) For each gaseous feedstock or product for which the volume was used in equation X–1 to § 98.243, report the annual average molecular weight of the measurements or determinations, conducted according to § 98.243(c)(3) or (4). Report the annual average molecular weight in units of kg per kg mole.

(b) * * *

(7) Information listed in § 98.256(e) for each flare that burns process off-gas. Additionally, provide estimates based on engineering judgment of the fractions of the total CO_2, CH_4 and N_2O emissions that are attributable to combustion of off-gas from the petrochemical process unit(s) served by the flare.

(8) Annual quantity of each type of petrochemical produced from each process unit (metric tons).

* * * * *

(c) If you comply with the combustion methodology specified in § 98.243(d), you must report under this subpart the information listed in paragraphs (c)(1) through (6) of this section.

(1) The ethylene process unit ID or other appropriate descriptor.

(2) For each stationary combustion unit that burns ethylene process off-gas (or group of stationary sources with a common pipe), except flares, the relevant information listed in § 98.36 for the applicable Tier methodology. For each stationary combustion unit or group of units (as applicable) that burns ethylene process off-gas, provide an estimate based on engineering judgment of the fraction of the total emissions that is attributable to combustion of off-gas from the ethylene process unit.

(3) Information listed in § 98.256(e) for each flare that burns ethylene process off-gas. Additionally, provide estimates based on engineering judgment of the fractions of the total CO_2, CH_4 and N_2O emissions that are attributable to combustion of off-gas from the ethylene process unit(s) served by the flare.

(4) Name and annual quantity of each carbon-containing feedstock (metric tons).

(5) Annual quantity of ethylene produced from each process unit (metric tons).

(6) Name and annual quantity (in metric tons) of each product produced in each process unit.

Subpart Y—Petroleum Refineries

■ 57. Amend § 98.250 by revising paragraph (c) to read as follows:

§ 98.250 Definition of source category.

* * * * *

(c) This source category consists of the following sources at petroleum refineries: Catalytic cracking units; fluid coking units; delayed coking units; catalytic reforming units; asphalt blowing operations; blowdown systems; storage tanks; process equipment components (compressors, pumps, valves, pressure relief devices, flanges, and connectors) in gas service; marine vessel, barge, tanker truck, and similar loading operations; flares; and sulfur recovery plants.

§ 98.252 [Amended]

■ 58. Amend § 98.252 by removing and reserving paragraphs (e) and (i).

■ 59. Amend § 98.253 by:

■ a. Revising the introductory text of paragraphs (b) and (c);

■ b. Revising and republishing paragraphs (c)(4) and (5);

■ c. Revising paragraph (e) introductory text;

■ d. Removing and reserving paragraph (g); and

■ e. Revising and republishing paragraphs (i)(2) and (5).

The revisions read as follows:

§ 98.253 Calculating GHG emissions.

* * * * *

(b) For flares, calculate GHG emissions according to the requirements in paragraphs (b)(1) through (3) of this section. All gas discharged through the flare stack must be included in the flare

GHG emissions calculations with the exception of the following, which may be excluded as applicable: gas used for the flare pilots, and if using the calculation method in paragraph (b)(1)(iii) of this section, the gas released during start-up, shutdown, or malfunction events of 500,000 scf/day or less.

* * * * *

(c) For catalytic cracking units and traditional fluid coking units, calculate the GHG emissions from coke burn-off using the applicable methods described in paragraphs (c)(1) through (5) of this section.

* * * * *

(4) Calculate CH_4 emissions using either unit specific measurement data, a unit-specific emission factor based on a source test of the unit, or equation Y–9 to this section.

$$CH_4 = \left(CO_2 * \frac{EmF_2}{EmF_1}\right) \quad \text{(Eq. Y–9)}$$

Where:

CH_4 = Annual methane emissions from coke burn-off (metric tons CH4/year).

CO_2 = Emission rate of CO_2 from coke burn-off calculated in paragraphs (c)(1), (c)(2), (e)(1), or (e)(2) of this section, as applicable (metric tons/year).

EmF_1 = Default CO_2 emission factor for petroleum coke from table C–1 to subpart C of this part (kg CO_2/MMBtu).

EmF_2 = Default CH_4 emission factor for ''PetroleumProducts'' from table C–2 to subpart C of this part (kg CH_4/MMBtu).

(5) Calculate N_2O emissions using either unit specific measurement data, a unit-specific emission factor based on a source test of the unit, or equation Y–10 to this section.

$$N_2O = \left(CO_2 * \frac{EmF_3}{EmF_1}\right) \quad \text{(Eq. Y–10)}$$

Where:

N_2O = Annual nitrous oxide emissions from coke burn-off (mt N_2O/year).

CO_2 = Emission rate of CO_2 from coke burn-off calculated in paragraphs (c)(1), (c)(2), (e)(1), or (e)(2) of this section, as applicable (metric tons/year).

EmF_1 = Default CO_2 emission factor for petroleum coke from table C–1 to subpart C of this part (kg CO_2/MMBtu).

EmF_3 = Default N_2O emission factor for ''PetroleumProducts'' from table C–2 to subpart C of this part (kg N_2O/MMBtu).

* * * * *

(e) For catalytic reforming units, calculate the CO_2 emissions from coke burn-off using the applicable methods described in paragraphs (e)(1) through (3) of this section and calculate the CH_4 and N_2O emissions using the methods described in paragraphs (c)(4) and (5) of this section, respectively.

* * * * *

(i) * * *

(2) Determine the typical mass of water in the delayed coking unit vessel at the end of the cooling cycle prior to venting to the atmosphere using equation Y–18b to this section.

$$M_{water} = \rho_{water} \times \left((H_{water}) \times \frac{\pi \times D^2}{4} - \frac{f_{coke} \times M_{coke}}{\rho_{particle}}\right) \quad \text{(Eq. Y–18b)}$$

Where:

M_{water} = Mass of water in the delayed coking unit vessel at the end of the cooling cycle just prior to atmospheric venting or draining (metric tons/cycle).

ρ_{water} = Density of water at average temperature of the delayed coking unit vessel at the end of the cooling cycle just prior to atmospheric venting (metric tons per cubic feet; mt/ft^3). Use the default value of 0.0270 mt/ft^3.

H_{water} = Typical distance from the bottom of the coking unit vessel to the top of the water level at the end of the cooling cycle just prior to atmospheric venting or draining (feet) from company records or engineering estimates.

f_{coke} = Fraction of the coke-filled bed that is covered by water at the end of the cooling cycle just prior to atmospheric venting or draining. Use 1 if the water fully covers coke-filled portion of the coke drum.

M_{coke} = Typical dry mass of coke in the delayed coking unit vessel at the end of the coking cycle (metric tons/cycle) as determined in paragraph (i)(1) of this section.

$\rho_{particle}$ = Particle density of coke (metric tons per cubic feet; mt/ft^3). Use the default value of 0.0382 mt/ft^3.

D = Diameter of delayed coking unit vessel (feet).

* * * * *

(5) Calculate the CH_4 emissions from decoking operations at each delayed coking unit using equation Y–18f to this section.

$$CH_4 = M_{steam} \times EmF_{DCU} \times N \times 0.001 \quad \text{(Eq. Y–18f)}$$

Where:

CH_4 = Annual methane emissions from the delayed coking unit decoking operations (metric ton/year).

M_{steam} = Mass of steam generated and released per decoking cycle (metric tons/cycle) as determined in paragraph (i)(4) of this section.

EmF_{DCU} = Methane emission factor for delayed coking unit (kilograms CH_4 per metric ton of steam; kg CH_4/mt steam) from unit-specific measurement data. If you do not have unit-specific measurement data, use the default value of 7.9 kg CH_4/metric ton steam.

N = Cumulative number of decoking cycles (or coke-cutting cycles) for all delayed coking unit vessels associated with the delayed coking unit during the year.

0.001 = Conversion factor (metric ton/kg).

* * * * *

■ 60. Amend § 98.254 by:

■ a. Revising the introductory text of paragraphs (d) and (e); and

■ b. Removing and reserving paragraphs (h) and (i).

The revisions read as follows:

§ 98.254 Monitoring and QA/QC requirements.

* * * * *

(d) Except as provided in paragraph (g) of this section, determine gas composition and, if required, average molecular weight of the gas using any of the following methods. Alternatively, the results of chromatographic or direct mass spectrometer analysis of the gas may be used, provided that the gas chromatograph or mass spectrometer is operated, maintained, and calibrated according to the manufacturer's instructions; and the methods used for operation, maintenance, and calibration of the gas chromatograph or mass spectrometer are documented in the written Monitoring Plan for the unit under § 98.3(g)(5).

* * * * *

(e) Determine flare gas higher heating value using any of the following methods. Alternatively, the results of chromatographic analysis of the gas may be used, provided that the gas chromatograph is operated, maintained, and calibrated according to the manufacturer's instructions; and the methods used for operation, maintenance, and calibration of the gas chromatograph are documented in the written Monitoring Plan for the unit under § 98.3(g)(5).

* * * * *

§ 98.255 [Amended]

■ 61. Amend § 98.255 by removing and reserving paragraph (d).

■ 62. Amend § 98.256 by:

■ a. Removing and reserving paragraphs (b) and (i);

■ b. Adding paragraph (j)(2); and

■ c. Revising paragraph (k)(6).

The addition and revision read as follows:

§ 98.256 Data reporting requirements.

* * * * *

(j) * * *

(2) Maximum rated throughput of the unit, in metric tons asphalt/stream day.

* * * * *

(k) * * *

(6) The basis for the typical dry mass of coke in the delayed coking unit vessel at the end of the coking cycle (mass measurements from company records or calculated using equation Y–18a to § 98.253). If you use mass measurements from company records to determine the typical dry mass of coke in the delayed coking unit vessel at the end of the coking cycle, you must also report:

(i) Internal height of delayed coking unit vessel (feet) for each delayed coking unit.

(ii) Typical distance from the top of the delayed coking unit vessel to the top of the coke bed (*i.e.* , coke drum outage) at the end of the coking cycle (feet) from company records or engineering estimates for each delayed coking unit.

* * * * *

■ 63. Amend § 98.257 by:

■ a. Revising paragraphs (b)(16) through (19);

■ b. Removing and reserving paragraphs (b)(27) through (31);

■ c. Revising paragraphs (b)(45), (46), and (53); and

■ d. Removing and reserving paragraphs (b)(54) through (56).

The revisions read as follows:

§ 98.257 Records that must be retained.

* * * * *

(b) * * *

(16) Value of unit-specific CH_4 emission factor, including the units of measure, for each catalytic cracking unit, traditional fluid coking unit, and catalytic reforming unit (calculation method in § 98.253(c)(4)).

(17) Annual activity data (*e.g.* , input or product rate), including the units of measure, in units of measure consistent with the emission factor, for each catalytic cracking unit, traditional fluid coking unit, and catalytic reforming unit (calculation method in § 98.253(c)(4)).

(18) Value of unit-specific N_2O emission factor, including the units of measure, for each catalytic cracking unit, traditional fluid coking unit, and catalytic reforming unit (calculation method in § 98.253(c)(5)).

(19) Annual activity data (*e.g.* , input or product rate), including the units of measure, in units of measure consistent with the emission factor, for each catalytic cracking unit, traditional fluid coking unit, and catalytic reforming unit (calculation method in § 98.253(c)(5)).

* * * * *

(45) Mass of water in the delayed coking unit vessel at the end of the cooling cycle prior to atmospheric venting or draining (metric ton/cycle) (equations Y–18b and Y–18e to § 98.253) for each delayed coking unit.

(46) Typical distance from the bottom of the coking unit vessel to the top of the water level at the end of the cooling cycle just prior to atmospheric venting or draining (feet) from company records or engineering estimates (equation Y–18b to § 98.253) for each delayed coking unit.

* * * * *

(53) Fraction of the coke-filled bed that is covered by water at the end of the cooling cycle just prior to atmospheric venting or draining (equation Y–18b to § 98.253) for each delayed coking unit.

* * * * *

Subpart AA—Pulp and Paper Manufacturing

■ 64. Revise and republish § 98.273 to read as follows:

§ 98.273 Calculating GHG emissions.

(a) For each chemical recovery furnace located at a kraft or soda facility, you must determine CO_2, biogenic CO_2, CH_4, and N_2O emissions using the procedures in paragraphs (a)(1) through (4) of this section. CH4 and N2O emissions must be calculated as the sum of emissions from combustion of fuels and combustion of biomass in spent liquor solids.

(1) Calculate CO_2 emissions from fuel combustion using direct measurement of fuels consumed and default emissions factors according to the Tier 1 methodology for stationary combustion sources in § 98.33(a)(1). Tiers 2 or 3 from § 98.33(a)(2) or (3) may be used to calculate CO_2 emissions if the respective monitoring and QA/QC requirements described in § 98.34 are met.

(2) Calculate CH_4 and N_2O emissions from fuel combustion using direct measurement of fuels consumed, default or site-specific HHV, and default emissions factors and convert to metric tons of CO_2 equivalent according to the methodology for stationary combustion sources in § 98.33(c).

(3) Calculate biogenic CO_2 emissions and emissions of CH_4 and N_2O from biomass using measured quantities of spent liquor solids fired, site-specific HHV, and default emissions factors, according to equation AA–1 to this section:

$$CO_2, CH_4, \text{or } N_2O \text{ from biomass} = (0.90718) * \text{Solids} * \text{HHV} * \text{EF} \qquad \text{(Eq. AA–1)}$$

Where:

CO_2, CH_4, or N_2O, from Biomass = Biogenic CO_2 emissions or emissions of CH_4 or N_2O from spent liquor solids combustion (metric tons per year).

Solids = Mass of spent liquor solids combusted (short tons per year) determined according to § 98.274(b).
HHV = Annual high heat value of the spent liquor solids (mmBtu per kilogram) determined according to § 98.274(b).
EF = Default emission factor for CO_2, CH_4, or N_2O, from table AA–1 to this subpart (kg CO_2, CH_4, or N_2O per mmBtu).
0.90718 = Conversion factor from short tons to metric tons.

(4) Calculate biogenic CO_2 emissions from combustion of biomass (other than spent liquor solids) with other fuels according to the applicable methodology for stationary combustion sources in § 98.33(e).

(b) For each chemical recovery combustion unit located at a sulfite or stand-alone semichemical facility, you must determine CO_2, CH_4, and N_2O emissions using the procedures in paragraphs (b)(1) through (5) of this section:

(1) Calculate CO_2 emissions from fuel combustion using direct measurement of fuels consumed and default emissions factors according to the Tier 1 Calculation Methodology for stationary combustion sources in § 98.33(a)(1). Tiers 2 or 3 from § 98.33(a)(2) or (3) may be used to calculate CO_2 emissions if the respective monitoring and QA/QC requirements described in § 98.34 are met.

(2) Calculate CH_4 and N_2O emissions from fuel combustion using direct measurement of fuels consumed, default or site-specific HHV, and default emissions factors and convert to metric tons of CO_2 equivalent according to the methodology for stationary combustion sources in § 98.33(c).

(3) Calculate biogenic CO_2 emissions using measured quantities of spent liquor solids fired and the carbon content of the spent liquor solids, according to equation AA–2 to this section:

$$\text{Biogenic } CO_2 = \frac{44}{12} * \text{Solids} * CC * (0.90718) \qquad \text{(Eq. AA–2)}$$

Where:
Biogenic CO_2 = Annual CO_2 mass emissions for spent liquor solids combustion (metric tons per year).
Solids = Mass of the spent liquor solids combusted (short tons per year) determined according to § 98.274(b).
CC = Annual carbon content of the spent liquor solids, determined according to § 98.274(b) (percent by weight, expressed as a decimal fraction, *e.g.* , 95% = 0.95).
44/12 = Ratio of molecular weights, CO_2 to carbon.
0.90718 = Conversion from short tons to metric tons.

(4) Calculate biogenic CO_2 emissions from combustion of biomass (other than spent liquor solids) with other fuels according to the applicable methodology for stationary combustion sources in § 98.33(e).

(c) For each pulp mill lime kiln located at a kraft or soda facility, you must determine CO_2, CH_4, and N_2O emissions using the procedures in paragraphs (c)(1) through (4) of this section:

(1) Calculate CO_2 emissions from fuel combustion using direct measurement of fuels consumed and default HHV and default emissions factors, according to the Tier 1 Calculation Methodology for stationary combustion sources in § 98.33(a)(1). Tiers 2 or 3 from § 98.33(a)(2) or (3) may be used to calculate CO_2 emissions if the respective monitoring and QA/QC requirements described in § 98.34 are met.

(2) Calculate CH_4 and N_2O emissions from fuel combustion using direct measurement of fuels consumed, default or site-specific HHV, and default emissions factors and convert to metric tons of CO_2 equivalent according to the methodology for stationary combustion sources in § 98.33(c); use the default HHV listed in table C–1 to subpart C of this part and the default CH_4 and N_2O emissions factors listed in table AA–2 to this subpart.

(3) Biogenic CO_2 emissions from conversion of $CaCO_3$ to CaO are included in the biogenic CO_2 estimates calculated for the chemical recovery furnace in paragraph (a)(3) of this section.

(4) Calculate biogenic CO_2 emissions from combustion of biomass with other fuels according to the applicable methodology for stationary combustion sources in § 98.33(e).

(d) For makeup chemical use, you must calculate CO_2 emissions by using direct or indirect measurement of the quantity of chemicals added and ratios of the molecular weights of CO_2 and the makeup chemicals, according to equation AA–3 to this section:

$$CO_2 = \left[M_{(CaCO_3)} * \frac{44}{100} + M_{(NaCO_3)} * \frac{44}{105.99}\right] * 1000 \text{ kg/metric ton} \qquad \text{(Eq. AA–3)}$$

Where:
CO_2 = CO_2 mass emissions from makeup chemicals (kilograms/yr).
M ($CaCO_3$) = Make-up quantity of $CaCO_3$ used for the reporting year (metric tons per year).
M ($NaCO_3$) = Make-up quantity of Na_2CO_3 used for the reporting year (metric tons per year).
44 = Molecular weight of CO_2.
100 = Molecular weight of $CaCO_3$.
105.99 = Molecular weight of Na_2CO_3.

■ 65. Amend § 98.276 by revising paragraph (a) to read as follows:

§ 98.276 Data reporting requirements.

* * * * *

(a) Annual emissions of CO_2, biogenic CO_2, CH_4, and N_2O (metric tons per year).

* * * * *

■ 66. Amend § 98.277 by revising paragraph (d) to read as follows:

§ 98.277 Records that must be retained.

* * * * *

(d) Annual quantity of spent liquor solids combusted in each chemical recovery furnace and chemical recovery combustion unit, and the basis for determining the annual quantity of the spent liquor solids combusted (whether based on T650 om-05 Solids Content of Black Liquor, TAPPI (incorporated by reference, see § 98.7) or an online measurement system). If an online measurement system is used, you must retain records of the calculations used to determine the annual quantity of spent liquor solids combusted from the continuous measurements.

* * * * *

Subpart BB—Silicon Carbide Production

■ 67. Amend § 98.286 by revising the introductory text and adding paragraph (c) to read as follows:

§ 98.286 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified

in paragraph (a) or (b) of this section, and paragraph (c) of this section, as applicable for each silicon carbide production facility.

* * * * *

(c) If methane abatement technology is used at the silicon carbide production facility, you must report the information in paragraphs (c)(1) through (3) of this section. Upon reporting this information once in an annual report, you are not required to report this information again unless the information changes during a reporting year, in which case, the reporter must include any updates in the annual report for the reporting year in which the change occurred.

(1) Type of methane abatement technology used on each silicon carbide process unit or production furnace, and date of installation for each.

(2) Methane destruction efficiency for each methane abatement technology (percent destruction). You must either use the manufacturer's specified destruction efficiency or the destruction efficiency determined via a performance test. If you report the destruction efficiency determined via a performance test, you must also report the test method that was used during the performance test.

(3) Percentage of annual operating hours that methane abatement technology was in use for all silicon carbide process units or production furnaces combined.

■ 68. Amend § 98.287 by revising the introductory text and adding paragraph (d) to read as follows:

§ 98.287 Records that must be retained.

In addition to the records required by § 98.3(g), you must retain the records specified in paragraphs (a) through (d) of this section for each silicon carbide production facility.

* * * * *

(d) Records of all information reported as required under § 98.286(c).

■ 69. Revise and republish subpart DD consisting of §§ 98.300 through 98.308 to read as follows:

Subpart DD—Electrical Transmission and Distribution Equipment Use

Sec.

98.300 Definition of the source category.
98.301 Reporting threshold.
98.302 GHGs to report.
98.303 Calculating GHG emissions.
98.304 Monitoring and QA/QC requirements.
98.305 Procedures for estimating missing data.
98.306 Data reporting requirements.
98.307 Records that must be retained.
98.308 Definitions.

§ 98.300 Definition of the source category.

(a) The electrical transmission and distribution equipment use source category consists of all electric transmission and distribution equipment and servicing inventory insulated with or containing fluorinated GHGs, including but not limited to sulfur hexafluoride (SF_6) and perfluorocarbons (PFCs), used within an electric power system. Electric transmission and distribution equipment and servicing inventory includes, but is not limited to:

(1) Gas-insulated substations.

(2) Circuit breakers.

(3) Switchgear, including closed-pressure and hermetically sealed-pressure switchgear and gas-insulated lines containing fluorinated GHGs, including but not limited to SF_6 and PFCs.

(4) Gas containers such as pressurized cylinders.

(5) Gas carts.

(6) Electric power transformers.

(7) Other containers of fluorinated GHG, including but not limited to SF_6 and PFCs.

(b) [Reserved]

§ 98.301 Reporting threshold.

(a) You must report GHG emissions under this subpart if you are an electric power system as defined in § 98.308 and your facility meets the requirements of § 98.2(a)(1). To calculate total annual GHG emissions for comparison to the 25,000 metric ton CO_2e per year emission threshold in table A–3 to subpart A to this part, you must calculate emissions of each fluorinated GHG that is a component of a reportable insulating gas and then sum the emissions of each fluorinated GHG resulting from the use of electrical transmission and distribution equipment for threshold applicability purposes using equation DD–1 to this section.

$$E = \sum_j \sum_i NC_{EPS,j} * GHG_{i,w} * GWP_i * EF * 0.000453592 \qquad \text{(Eq. DD–1)}$$

Where:

E = Annual emissions for threshold applicability purposes (metric tons CO_2e).

$NC_{EPS,j}$ = the total nameplate capacity of equipment containing reportable insulating gas j (excluding hermetically sealed-pressure equipment) located within the facility plus the total nameplate capacity of equipment containing reportable insulting gas j (excluding hermetically sealed-pressure equipment) that is not located within the facility but is under common ownership or control (lbs).

$GHG_{i,w}$ = The weight fraction of fluorinated GHG i in reportable insulating gas j in the gas insulated equipment included in the total nameplate capacity $NC_{EPS,j}$, expressed as a decimal fraction. If fluorinated GHG i is not part of a gas mixture, use a value of 1.0.

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

EF = Emission factor for electrical transmission and distribution equipment (lbs emitted/lbs nameplate capacity). For all gases, use an emission factor or 0.1.

i = Fluorinated GHG contained in the electrical transmission and distribution equipment.

0.000453592 = Conversion factor from lbs to metric tons.

(b) A facility other than an electric power system that is subject to this part because of emissions from any other source category listed in table A–3 or A–4 to subpart A of this part is not required to report emissions under subpart DD of this part unless the total estimated emissions of fluorinated GHGs that are components of reportable insulating gases, as calculated in equation DD–2 to this section, equals or exceeds 25,000 tons CO_2e.

$$E = \sum_j \sum_i NC_{other,j} * GHG_{i,w} * GWP_i * EF * 0.000453592 \qquad \text{(Eq. DD–2)}$$

Where:

E = Annual emissions for threshold applicability purposes (metric tons CO_2e).

$NC_{other,j}$ = For a facility other than an electric power system, the total nameplate capacity of equipment containing reportable insulating gas j (excluding hermetically sealed-pressure equipment) located within the facility (lbs).

$GHG_{i,w}$ = The weight fraction of fluorinated GHG i in reportable insulating gas j in the gas insulated equipment included in

the total nameplate capacity $NC_{other,j}$, expressed as a decimal fraction. If fluorinated GHG i is not part of a gas mixture, use a value of 1.0.

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

EF = Emission factor for electrical transmission and distribution equipment (lbs emitted/lbs nameplate capacity). For all gases, use an emission factor or 0.1.

i = Fluorinated GHG contained in the electrical transmission and distribution equipment.

0.000453592 = Conversion factor from lbs to metric tons.

§ 98.302 GHGs to report.

You must report emissions of each fluorinated GHG, including but not limited to SF_6 and PFCs, from your facility (including emissions from fugitive equipment leaks, installation, servicing, equipment decommissioning and disposal, and from storage cylinders) resulting from the transmission and distribution servicing inventory and equipment listed in § 98.300(a), except you are not required to report emissions of fluorinated GHGs that are components of insulating gases whose weighted average GWPs, as calculated in equation DD–3 to this section, are less than or equal to one. For acquisitions of equipment containing or insulated with fluorinated GHGs, you must report emissions from the equipment after the title to the equipment is transferred to the electric power transmission or distribution entity.

$$GWP_j = \sum_i GHG_{i,w} * GWP_i \qquad \text{(Eq. DD–3)}$$

Where:

GWP_j = Weighted average GWP of insulating gas j.

$GHG_{i,w}$ = The weight fraction of GHG i in insulating gas j, expressed as a decimal. fraction. If GHG i is not part of a gas mixture, use a value of 1.0.

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

i = GHG contained in the electrical transmission and distribution equipment.

§ 98.303 Calculating GHG emissions.

(a) *Calculating GHG emissions.* Calculate the annual emissions of each fluorinated GHG that is a component of any reportable insulating gas using the mass-balance approach in equation DD–4 to this section:

$$\text{User Emissions}_i = \Sigma_j\, GHG_{i,w} * [(\text{Decrease in Inventory of Reportable Insulating Gas j}) + (\text{Acquisitions of Reportable Insulating Gas j}) - (\text{Disbursements of Reportable Insulating Gas j}) - (\text{Net Increase in Total Nameplate Capacity of Equipment Operated Containing Reportable Insulating Gas j})] \qquad \text{(Eq. DD–4)}$$

Where:

User Emissions_i = Emissions of fluorinated GHG i from the facility (pounds).

$GHG_{i,w}$ = The weight fraction of fluorinated GHG i in reportable insulating gas j if reportable insulating gas j is a gas mixture, expressed as a decimal fraction. If fluorinated GHG i is not part of a gas mixture, use a value of 1.0.

Decrease in Inventory of Reportable Insulating Gas j = (Pounds of reportable insulating gas j stored in containers, but not in energized equipment, at the beginning of the year) − (Pounds of reportable insulating gas j stored in containers, but not in energized equipment, at the end of the year). Reportable insulating gas inside equipment that is not energized is considered to be ‘‘stored in containers.’’

Acquisitions of Reportable Insulating gas j = (Pounds of reportable insulating gas j purchased or otherwise acquired from chemical producers, chemical distributors, or other entities in bulk) + (Pounds of reportable insulating gas j purchased or otherwise acquired from equipment manufacturers, equipment distributors, or other entities with or inside equipment, including hermetically sealed-pressure switchgear, while the equipment was not in use) + (Pounds of each SF_6 insulating gas j returned to facility after off-site recycling) + (Pounds of reportable insulating gas j acquired inside equipment, except hermetically sealed-pressure switchgear, that was transferred while the equipment was in use, *e.g.,* through acquisition of all or part of another electric power system).

Disbursements of Reportable Insulating gas j = (Pounds of reportable insulating gas j returned to suppliers) + (Pounds of reportable insulating gas j sent off site for recycling) + (Pounds of reportable insulating gas j sent off-site for destruction) + (Pounds of reportable insulating gas j that was sold or transferred to other entities in bulk) + (Pounds of reportable insulating gas j contained in equipment, including hermetically sealed-pressure switchgear, that was sold or transferred to other entities while the equipment was not in use) + (Pounds of reportable insulating gas j inside equipment, except hermetically sealed-pressure switchgear, that was transferred while the equipment was in use, *e.g.,* through sale of all or part of the electric power system to another electric power system).

Net Increase in Total Nameplate Capacity of Equipment Operated containing reportable insulating gas j = (The Nameplate Capacity of new equipment, as defined at § 98.308, containing reportable insulating gas j in pounds) − (Nameplate Capacity of retiring equipment, as defined at § 98.308, containing reportable insulating gas j in pounds). (Note that Nameplate Capacity refers to the full and proper charge of equipment rather than to the actual charge, which may reflect leakage).

(b) *Nameplate capacity adjustments.* Users of closed-pressure electrical equipment with a voltage capacity greater than 38 kV may measure and adjust the nameplate capacity value specified by the equipment manufacturer on the nameplate attached to that equipment, or within the equipment manufacturer's official product specifications, by following the requirements in paragraphs (b)(1) through (10) of this section. Users of other electrical equipment are not permitted to adjust the nameplate capacity value of the other equipment.

(1) If you elect to measure the nameplate capacity value(s) of one or more pieces of electrical equipment with a voltage capacity greater than 38 kV, you must measure the nameplate capacity values of all the electrical

equipment in your facility that has a voltage capacity greater than 38 kV and that is installed or retired in that reporting year and in subsequent reporting years.

(2) You must adopt the measured nameplate capacity value for any piece of equipment for which the absolute value of the difference between the measured nameplate capacity value and the nameplate capacity value most recently specified by the manufacturer equals or exceeds two percent of the nameplate capacity value most recently specified by the manufacturer.

(3) You may adopt the measured nameplate capacity value for equipment for which the absolute value of the difference between the measured nameplate capacity value and the nameplate capacity value most recently specified by the manufacturer is less than two percent of the nameplate capacity value most recently specified by the manufacturer, but if you elect to adopt the measured nameplate capacity for that equipment, then you must adopt the measured nameplate capacity value for all of the equipment for which the difference between the measured nameplate capacity value and the nameplate capacity value most recently specified by the manufacturer is less than two percent of the nameplate capacity value most recently specified by the manufacturer. This applies in the reporting year in which you first adopt the measured nameplate capacity for the equipment and in subsequent reporting years.

(4) Users of electrical equipment measuring the nameplate capacity of any new electrical equipment must:

(i) Record the amount of insulating gas in the equipment at the time the equipment was acquired (pounds), either per information provided by the manufacturer, or by transferring insulating gas from the equipment to a gas container and measuring the amount of insulating gas transferred. The equipment user is responsible for ensuring the gas is accounted for consistent with the methodologies specified in paragraphs (b)(4)(ii) through (iii) and (b)(5) of this section. If no insulating gas was in the device when it was acquired, record this value as zero.

(ii) If insulating gas is added to the equipment subsequent to the acquisition of the equipment to energize it the first time, transfer the insulating gas to the equipment to reach the temperature-compensated design operating pressure per manufacturer specifications. Follow the manufacturer-specified procedure to ensure that the measured temperature accurately reflects the temperature of the insulating gas, *e.g.,* by measuring the insulating gas pressure and vessel temperature after allowing appropriate time for the temperature of the transferred gas to equilibrate with the vessel temperature. Measure and calculate the total amount of reportable insulating gas added to the device using one of the methods specified in paragraphs (b)(4)(ii)(A) and (B) of this section.

(A) To determine the amount of reportable insulating gas transferred to the electrical equipment, weigh the gas container being used to fill the device prior to, and after, the addition of the reportable insulating gas to the electrical equipment, and subtract the second value (after-transfer gas container weight) from the first value (prior-to-transfer gas container weight). Account for any gas contained in hoses before and after the transfer.

(B) Connect a mass flow meter between the electrical equipment and a gas cart. Transfer gas to the equipment to reach the temperature-compensated design operating pressure per manufacturer specifications. During gas transfer, you must keep the mass flow rate within the range specified by the mass flow meter manufacturer to assure an accurate and precise mass flow meter reading. Close the connection to the GIE from the mass flow meter hose and ensure that the gas trapped in the filling hose returns through the mass flow meter. Calculate the amount of gas transferred from the mass reading on the mass flow meter.

(iii) Sum the results of paragraphs (b)(4)(i) and (ii) to obtain the measured nameplate capacity for the new equipment.

(5) Electrical equipment users measuring the nameplate capacity of any retiring electrical equipment must:

(i) Measure and record the initial system pressure and vessel temperature prior to removing any insulating gas.

(ii) Compare the initial system pressure and temperature to the equipment manufacturer's temperature/pressure curve for that equipment and insulating gas.

(iii) If the temperature-compensated initial system pressure of the electrical equipment does not match the temperature-compensated design operating pressure specified by the equipment manufacturer, you may either:

(A) Add or remove insulating gas to/from the electrical equipment until the manufacturer-specified value is reached, or

(B) If the temperature-compensated initial system pressure of the electrical equipment is no higher than the temperature-compensated design operating pressure specified by the manufacturer and no lower than five pounds per square inch (5 psi) less than the temperature-compensated design operating pressure specified by the manufacturer, use equation DD–5 to this section to calculate the nameplate capacity based on the mass recorded under paragraph (b)(5)(vi) of this section.

(iv) Weigh the gas container being used to receive the gas and record this value.

(v) Recover insulating gas from the electrical equipment until five minutes after the pressure in the electrical equipment reaches a pressure of at most five pounds per square inch absolute (5 psia).

(vi) Record the amount of insulating gas recovered (pounds) by weighing the gas container that received the gas and subtracting the weight recorded pursuant to paragraph (b)(5)(iv)(B) of this section from this value. Account for any gas contained in hoses before and after the transfer. The amount of gas recovered shall be the measured nameplate capacity for the electrical equipment unless the final temperature-compensated pressure of the electrical equipment exceeds 0.068 psia (3.5 Torr) or the electrical equipment user is calculating the nameplate capacity pursuant to paragraph (b)(5)(iii)(B) of this section, in which cases the measured nameplate capacity shall be the result of equation DD–5 to this section.

(vii) If you are calculating the nameplate capacity pursuant to paragraph (b)(5)(iii)(B) of this section, use equation DD–5 to this section to do so.

$$NC_C = \frac{P_{NC}}{(P_i - P_f)} \times M_R \qquad \text{(Eq. DD–5)}$$

Where:

NC_C = Nameplate capacity of the equipment measured and calculated by the equipment user (pounds).

P_i = Initial temperature-compensated pressure of the equipment, based on the temperature-pressure curve for the insulating gas (psia).

P_f = Final temperature-compensated pressure of the equipment, based on the temperature-pressure curve for the insulating gas (psia). This may be equated to zero if the final temperature-compensated pressure of the equipment is equal to or lower than 0.068 psia (3.5 Torr).

P_{NC} = Temperature-compensated pressure of the equipment at the manufacturer-specified filling density of the equipment (*i.e.,* at the full and proper charge, psia).

M_R = Mass of insulating gas recovered from the equipment, measured in paragraph (b)(5)(vi) of this section (pounds).

(viii) Record the final system pressure and vessel temperature.

(6) Instead of measuring the nameplate capacity of electrical equipment when it is retired, users may measure the nameplate capacity of electrical equipment during maintenance activities that require opening the gas compartment, but they must follow the procedures set forth in paragraph (b)(5) of this section.

(7) If the electrical equipment will remain energized, and the electrical equipment user is adopting the user-measured nameplate capacity, the electrical equipment user must affix a revised nameplate capacity label, showing the revised nameplate value and the year the nameplate capacity adjustment process was performed, to the device by the end of the calendar year in which the process was completed. The manufacturer's previous nameplate capacity label must remain visible after the revised nameplate capacity label is affixed to the device.

(8) For each piece of electrical equipment whose nameplate capacity was adjusted during the reporting year, the revised nameplate capacity value must be used in all provisions wherein the nameplate capacity is required to be recorded, reported, or used in a calculation in this subpart unless otherwise specified herein.

(9) The nameplate capacity of a piece of electrical equipment may only be adjusted more than once if the physical capacity of the device has changed (*e.g.,* replacement of bushings) after the initial adjustment was performed, in which case the equipment user must adjust the nameplate capacity pursuant to the provisions of this paragraph (b).

(10) Measuring devices used to measure the nameplate capacity of electrical equipment under this paragraph (b) must meet the following accuracy and precision requirements:

(i) Flow meters must be certified by the manufacturer to be accurate and precise to within one percent of the largest value that the flow meter can, according to the manufacturer's specifications, accurately record.

(ii) Pressure gauges must be certified by the manufacturer to be accurate and precise to within 0.5% of the largest value that the gauge can, according to the manufacturer's specifications, accurately record.

(iii) Temperature gauges must be certified by the manufacturer to be accurate and precise to within +/−1.0 °F.

(iv) Scales must be certified by the manufacturer to be accurate and precise to within one percent of the true weight.

§ 98.304 Monitoring and QA/QC requirements.

(a) [Reserved]

(b) You must adhere to the following QA/QC methods for reviewing the completeness and accuracy of reporting:

(1) Review inputs to equation DD–4 to § 98.303 to ensure inputs and outputs to the company's system are included.

(2) Do not enter negative inputs and confirm that negative emissions are not calculated. However, the Decrease in fluorinated GHG Inventory and the Net Increase in Total Nameplate Capacity may be calculated as negative numbers.

(3) Ensure that beginning-of-year inventory matches end-of-year inventory from the previous year.

(4) Ensure that in addition to fluorinated GHG purchased from bulk gas distributors, fluorinated GHG purchased from Original Equipment Manufacturers (OEM) and fluorinated GHG returned to the facility from off-site recycling are also accounted for among the total additions.

(c) Ensure the following QA/QC methods are employed throughout the year:

(1) Ensure that cylinders returned to the gas supplier are consistently weighed on a scale that is certified to be accurate and precise to within 2 pounds of true weight and is periodically recalibrated per the manufacturer's specifications. Either measure residual gas (the amount of gas remaining in returned cylinders) or have the gas supplier measure it. If the gas supplier weighs the residual gas, obtain from the gas supplier a detailed monthly accounting, within ±2 pounds, of residual gas amounts in the cylinders returned to the gas supplier.

(2) Ensure that cylinders weighed for the beginning and end of year inventory measurements are weighed on a scale that is certified to be accurate and precise to within 2 pounds of true weight and is periodically recalibrated per the manufacturer's specifications. All scales used to measure quantities that are to be reported under § 98.306 must be calibrated using calibration procedures specified by the scale manufacturer. Calibration must be performed prior to the first reporting year. After the initial calibration, recalibration must be performed at the minimum frequency specified by the manufacturer.

(3) Ensure all substations have provided information to the manager compiling the emissions report (if it is not already handled through an electronic inventory system).

(d) GHG Monitoring Plans, as described in § 98.3(g)(5), must be completed by April 1, 2011.

§ 98.305 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations is required. Replace missing data, if needed, based on data from equipment with a similar nameplate capacity for fluorinated GHGs, and from similar equipment repair, replacement, and maintenance operations.

§ 98.306 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the following information for each electric power system, by chemical:

(a) Nameplate capacity of equipment (pounds) containing each insulating gas:

(1) Existing at the beginning of the year (excluding hermetically sealed-pressure switchgear).

(2) New hermetically sealed-pressure switchgear during the year.

(3) New equipment other than hermetically sealed-pressure switchgear during the year.

(4) Retired hermetically sealed-pressure switchgear during the year.

(5) Retired equipment other than hermetically sealed-pressure switchgear during the year.

(b) Transmission miles (length of lines carrying voltages above 35 kilovolts).

(c) Distribution miles (length of lines carrying voltages at or below 35 kilovolts).

(d) Pounds of each reportable insulating gas stored in containers, but not in energized equipment, at the beginning of the year.

(e) Pounds of each reportable insulating gas stored in containers, but not in energized equipment, at the end of the year.

(f) Pounds of each reportable insulating gas purchased or otherwise acquired in bulk from chemical producers, chemical distributors, or other entities.

(g) Pounds of each reportable insulating gas purchased or otherwise acquired from equipment manufacturers, equipment distributors, or other entities with or inside equipment, including hermetically sealed-pressure switchgear, while the equipment was not in use.

(h) Pounds of each reportable insulating gas returned to facility after off-site recycling.

(i) Pounds of each reportable insulating gas acquired inside equipment, except hermetically sealed-pressure switchgear, that was transferred while the equipment was in use, *e.g.,* through acquisition of all or part of another electric power system.

(j) Pounds of each reportable insulating gas returned to suppliers.

(k) Pounds of each reportable insulating gas that was sold or transferred to other entities in bulk.

(l) Pounds of each reportable insulating gas sent off-site for recycling.

(m) Pounds of each reportable insulating gas sent off-site for destruction.

(n) Pounds of each reportable insulating gas contained in equipment, including hermetically sealed-pressure switchgear, that was sold or transferred to other entities while the equipment was not in use.

(o) Pounds of each reportable insulating gas disbursed inside equipment, except hermetically sealed-pressure switchgear, that was transferred while the equipment was in use, *e.g.,* through sale of all or part of the electric power system to another electric power system.

(p) State(s) or territory in which the facility lies.

(q) The number of reportable-insulating-gas-containing pieces of equipment in each of the following equipment categories:

(1) New hermetically sealed-pressure switchgear during the year.

(2) New equipment other than hermetically sealed-pressure switchgear during the year.

(3) Retired hermetically sealed-pressure switchgear during the year.

(4) Retired equipment other than hermetically sealed-pressure switchgear during the year.

(r) The total of the nameplate capacity values most recently assigned by the electrical equipment manufacturer(s) to each of the following groups of equipment:

(1) All new equipment whose nameplate capacity values were measured by the user under this subpart and for which the user adopted the user-measured nameplate capacity value during the year.

(2) All retiring equipment whose nameplate capacity values were measured by the user under this subpart and for which the user adopted the user-measured nameplate capacity value during the year.

(s) The total of the nameplate capacity values measured by the electrical equipment user for each of the following groups of equipment:

(1) All new equipment whose nameplate capacity values were measured by the user under this subpart and for which the user adopted the user-measured nameplate capacity value during the year.

(2) All retiring equipment whose nameplate capacity values were measured by the user under this subpart and for which the user adopted the user-measured nameplate capacity value during the year.

(t) For each reportable insulating gas reported in paragraphs (a), (d) through (o), and (q) of this section, an ID number or other appropriate descriptor that is unique to that reportable insulating gas.

(u) For each ID number or descriptor reported in paragraph (t) of this section for each unique insulating gas, the name (as required in § 98.3(c)(4)(iii)(G)(1)) and weight percent of each fluorinated gas in the insulating gas.

§ 98.307 Records that must be retained.

(a) In addition to the information required by § 98.3(g), you must retain records of the information reported and listed in § 98.306.

(b) For each piece of electrical equipment whose nameplate capacity is measured by the equipment user, retain records of the following:

(1) Equipment manufacturer name.

(2) Year equipment was manufactured. If the date year the equipment was manufactured cannot be determined, report a best estimate of the year of manufacture and record how the estimated year was determined.

(3) Manufacturer serial number. For any piece of equipment whose serial number is unknown (*e.g.,* the serial number does not exist or is not visible), another unique identifier must be recorded as the manufacturer serial number. The electrical equipment user must retain documentation that allows for each electrical equipment to be readily identifiable.

(4) Equipment type (*i.e.,* closed-pressure vs. hermetically sealed-pressure).

(5) Equipment voltage capacity (in kilovolts).

(6) The name and GWP of each insulating gas used.

(7) Nameplate capacity value (pounds), as specified by the equipment manufacturer. The value must reflect the latest value specified by the manufacturer during the reporting year.

(8) Nameplate capacity value (pounds) measured by the equipment user.

(9) The date the nameplate capacity measurement process was completed.

(10) The measurements and calculations used to calculate the value in paragraph (b)(8) of this section.

(11) The temperature-pressure curve and/or other information used to derive the initial and final temperature-adjusted pressures of the equipment.

(12) Whether or not the nameplate capacity value in paragraph (b)(8) of this section has been adopted for the piece of electrical equipment.

§ 98.308 Definitions.

Except as specified in this section, all terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

Facility, with respect to an electric power system, means the electric power system as set out in this definition. An electric power system is comprised of all electric transmission and distribution equipment insulated with or containing fluorinated GHGs that is linked through electric power transmission or distribution lines and functions as an integrated unit, that is owned, serviced, or maintained by a single electric power transmission or distribution entity (or multiple entities with a common owner), and that is located between:

(1) The point(s) at which electric energy is obtained from an electricity generating unit or a different electric power transmission or distribution entity that does not have a common owner; and

(2) The point(s) at which any customer or another electric power transmission or distribution entity that does not have a common owner receives the electric energy. The facility also includes servicing inventory for such equipment that contains fluorinated GHGs.

Electric power transmission or distribution entity means any entity that transmits, distributes, or supplies electricity to a consumer or other user, including any company, electric cooperative, public electric supply corporation, a similar Federal department (including the Bureau of Reclamation or the Corps of Engineers), a municipally owned electric department offering service to the

public, an electric public utility district, or a jointly owned electric supply project.

Energized, for the purposes of this subpart, means connected through busbars or cables to an electrical power system or fully-charged, ready for service, and being prepared for connection to the electrical power system. Energized equipment does not include spare gas insulated equipment (including hermetically-sealed pressure switchgear) in storage that has been acquired by the facility, and is intended for use by the facility, but that is not being used or prepared for connection to the electrical power system.

Insulating gas, for the purposes of this subpart, means any fluorinated GHG or fluorinated GHG mixture, including but not limited to SF_6 and PFCs, that is used as an insulating and/or arc-quenching gas in electrical equipment.

New equipment, for the purposes of this subpart, means either any gas insulated equipment, including hermetically-sealed pressure switchgear, that is not energized at the beginning of the reporting year but is energized at the end of the reporting year, or any gas insulated equipment other than hermetically-sealed pressure switchgear that has been transferred while in use, meaning it has been added to the facility's inventory without being taken out of active service (*e.g.,* when the equipment is sold to or acquired by the facility while remaining in place and continuing operation).

Operator, for the purposes of this subpart, means any person who operates or supervises a facility, excluding a person whose sole responsibility is to ensure reliability, balance load or otherwise address electricity flow.

Reportable insulating gas, for purposes of this subpart, means an insulating gas whose weighted average GWP, as calculated in equation DD–3 to § 98.302, is greater than one. A fluorinated GHG that makes up either part or all of a reportable insulating gas is considered to be a component of the reportable insulating gas.

Retired equipment, for the purposes of this subpart, means either any gas insulated equipment including hermetically-sealed pressure switchgear, that is energized at the beginning of the reporting year but is not energized at the end of the reporting year, or any gas insulated equipment other than hermetically-sealed pressure switchgear that has been transferred while in use, meaning it has been removed from the facility's inventory without being taken out of active service (*e.g.,* when the equipment is acquired by a new facility while remaining in place and continuing operation).

Subpart FF—Underground Coal Mines

■ 70. Amend § 98.323 by revising parameter ''MCFi'' of equation FF–3 in paragraph (b) introductory text to read as follows:

§ 98.323 Calculating GHG emissions.

* * * * *

(b) * * *

MCF_i = Moisture correction factor for the measurement period, volumetric basis.

= 1 when V_i and C_i are measured on a dry basis or if both are measured on a wet basis.

= $1 - (fH2O)_i$ when V_i is measured on a wet basis and C_i is measured on a dry basis.

= $1/[1 - (fH2O)_i]$ when V_i is measured on a dry basis and C_i is measured on a wet basis.

* * * * *

■ 71. Amend § 98.326 by revising paragraph (t) to read as follows:

§ 98.326 Data reporting requirements.

* * * * *

(t) Mine Safety and Health Administration (MSHA) identification number for this coal mine.

Subpart GG—Zinc Production

■ 72. Amend § 98.333 by revising paragraph (b)(1) introductory text to read as follows:

§ 98.333 Calculating GHG emissions.

* * * * *

(b) * * *

(1) For each Waelz kiln or electrothermic furnace at your facility used for zinc production, you must determine the mass of carbon in each carbon-containing material, other than fuel, that is fed, charged, or otherwise introduced into each Waelz kiln and electrothermic furnace at your facility for each year and calculate annual CO_2 process emissions from each affected unit at your facility using equation GG–1 to this section. For electrothermic furnaces, carbon containing input materials include carbon electrodes and carbonaceous reducing agents. For Waelz kilns, carbon containing input materials include carbonaceous reducing agents. If you document that a specific material contributes less than 1 percent of the total carbon into the process, you do not have to include the material in your calculation using equation R–1 to § 98.183.

* * * * *

■ 73. Amend § 98.336 by adding paragraphs (a)(6) and (b)(6) to read as follows:

§ 98.336 Data reporting requirements.

* * * * *

(a) * * *

(6) Total amount of electric arc furnace dust annually consumed by all Waelz kilns at the facility (tons).

(b) * * *

(6) Total amount of electric arc furnace dust annually consumed by all Waelz kilns at the facility (tons).

* * * * *

Subpart HH—Municipal Solid Waste Landfills

■ 74. Amend § 98.343 by revising paragraphs (a)(2) and (c)(3) to read as follows:

§ 98.343 Calculating GHG emissions.

(a) * * *

(2) For years when material-specific waste quantity data are available, apply equation HH–1 to this section for each waste quantity type and sum the CH_4 generation rates for all waste types to calculate the total modeled CH_4 generation rate for the landfill. Use the appropriate parameter values for k, DOC, MCF, DOC_F, and F shown in table HH–1 to this subpart. The annual quantity of each type of waste disposed must be calculated as the sum of the daily quantities of waste (of that type) disposed. You may use the uncharacterized MSW parameters for a portion of your waste materials when using the material-specific modeling approach for mixed waste streams that cannot be designated to a specific material type. For years when waste composition data are not available, use the bulk waste parameter values for k and DOC in table HH–1 to this subpart for the total quantity of waste disposed in those years.

* * * * *

(c) * * *

(3) For landfills with landfill gas collection systems, calculate CH_4 emissions using the methodologies specified in paragraphs (c)(3)(i) and (ii) of this section.

(i) Calculate CH_4 emissions from the modeled CH_4 generation and measured CH_4 recovery using equation HH–6 to this section.

$$\text{Emissions} = \left[\left(G_{CH4} - \sum_{n=1}^{N} R_n\right) \times (1 - OX) + \sum_{n=1}^{N}\left\{R_n \times \left(1 - \left(DE_n \times F_{Dest,n}\right)\right)\right\}\right] \quad \text{(Eq. HH–6)}$$

Where:

Emissions = Methane emissions from the landfill in the reporting year (metric tons CH_4).

G_{CH4} = Modeled methane generation rate in reporting year from equation HH–1 to this section or the quantity of recovered CH_4 from equation HH–4 to this section, whichever is greater (metric tons CH_4).

N = Number of landfill gas measurement locations (associated with a destruction device or gas sent off-site). If a single monitoring location is used to monitor volumetric flow and CH_4 concentration of the recovered gas sent to one or multiple destruction devices, then N = 1.

R_n = Quantity of recovered CH_4 from equation HH–4 to this section for the nth measurement location (metric tons CH_4).

OX = Oxidation fraction. Use the appropriate oxidation fraction default value from table HH–4 to this subpart.

DE_n = Destruction efficiency (lesser of manufacturer's specified destruction efficiency and 0.99) for the nth measurement location. If the gas is transported off-site for destruction, use DE = 1. If the volumetric flow and CH_4 concentration of the recovered gas is measured at a single location providing landfill gas to multiple destruction devices (including some gas destroyed on-site and some gas sent off-site for destruction), calculate DE_n as the arithmetic average of the DE values determined for each destruction device associated with that measurement location.

$f_{Dest,n}$ = Fraction of hours the destruction device associated with the nth measurement location was operating during active gas flow calculated as the annual operating hours for the destruction device divided by the annual hours flow was sent to the destruction device. The annual operating hours for the destruction device should include only those periods when flow was sent to the destruction device and the destruction device was operating at its intended temperature or other parameter indicative of effective operation. For flares, times when there is no flame present must be excluded from the annual operating hours for the destruction device. If the gas is transported off-site for destruction, use $f_{Dest,n}$ = 1. If the volumetric flow and CH_4 concentration of the recovered gas is measured at a single location providing landfill gas to multiple destruction devices (including some gas destroyed on-site and some gas sent off-site for destruction), calculate $f_{Dest,n}$ as the arithmetic average of the f_{Dest} values determined for each destruction device associated with that measurement location.

(ii) Calculate CH_4 generation and CH_4 emissions using measured CH_4 recovery and estimated gas collection efficiency and equations HH–7 and HH–8 to this section.

$$MG = \left[\frac{1}{CE}\sum_{c=1}^{C}\left[\frac{\sum_{x=1}^{X} R_{x,c}}{f_{Rec,c}}\right] \times (1 - OX)\right] \quad \text{(Eq. HH–7)}$$

$$\text{Emissions} = \left[\left(\frac{1}{CE}\sum_{c=1}^{C}\left[\frac{\sum_{x=1}^{X} R_{x,c}}{f_{Rec,c}}\right] - \sum_{n=1}^{N} R_n\right) \times (1 - OX) + \sum_{n=1}^{N}\left\{R_n \times \left(1 - \left(DE_n \times f_{Dest,n}\right)\right)\right\}\right] \quad \text{(Eq. HH–8)}$$

Where:

MG = Methane generation, adjusted for oxidation, from the landfill in the reporting year (metric tons CH_4).

Emissions = Methane emissions from the landfill in the reporting year (metric tons CH_4).

C = Number of landfill gas collection systems operated at the landfill.

X = Number of landfill gas measurement locations associated with landfill gas collection system "c".

N = Number of landfill gas measurement locations (associated with a destruction device or gas sent off-site). If a single monitoring location is used to monitor volumetric flow and CH_4 concentration of the recovered gas sent to one or multiple destruction devices, then N = 1. Note that $N = \Sigma_{(c=1)}{}^{C}[\Sigma_{(x=1)}{}^{X}[1]]$.

$R_{x,c}$ = Quantity of recovered CH_4 from equation HH–4 to this section for the xth measurement location for landfill gas collection system "c" (metric tons CH_4).

R_n = Quantity of recovered CH_4 from equation HH–4 to this section for the nth measurement location (metric tons CH_4).

CE = Collection efficiency estimated at landfill, taking into account system coverage, operation, measurement practices, and cover system materials from table HH–3 to this subpart. If area by soil cover type information is not available, use applicable default value for CE4 in table HH–3 to this subpart for all areas under active influence of the collection system.

$f_{Rec,c}$ = Fraction of hours the landfill gas collection system "c" was operating normally (annual operating hours/8760 hours per year or annual operating hours/8784 hours per year for a leap year). Do not include periods of shutdown or poor operation, such as times when pressure, temperature, or other parameters indicative of operation are outside of normal variances, in the annual operating hours.

OX = Oxidation fraction. Use appropriate oxidation fraction default value from table HH–4 to this subpart.

DE_n = Destruction efficiency, (lesser of manufacturer's specified destruction efficiency and 0.99) for the nth measurement location. If the gas is transported off-site for destruction, use DE = 1. If the volumetric flow and CH_4 concentration of the recovered gas is measured at a single location providing landfill gas to multiple destruction devices (including some gas destroyed on-site and some gas sent off-site for destruction), calculate DE_n as the arithmetic average of the DE values determined for each destruction device associated with that measurement location.

$f_{Dest,n}$ = Fraction of hours the destruction device associated with the nth measurement location was operating during active gas flow calculated as the annual operating hours for the destruction device divided by the annual hours flow was sent to the destruction device. The annual operating hours for the destruction device should include only those periods when flow was sent to the destruction device and the destruction device was operating at its intended temperature or other parameter indicative of effective operation. For flares, times when there is no flame present must be excluded from the annual operating hours for the destruction device. If the gas is transported off-site for destruction, use $f_{Dest,n}$ = 1. If the volumetric flow and CH_4 concentration of the recovered gas is measured at a single location providing landfill gas to multiple destruction devices (including some gas destroyed on-site and some gas sent off-site for destruction), calculate $f_{Dest,n}$ as the arithmetic average of the f_{Dest} values determined for each destruction device

associated with that measurement location.

■ 75. Amend § 98.346 by:

■ a. Redesignating paragraphs (h) and (i) as paragraphs (i) and (j), respectively.

■ b. Adding new paragraph (h); and

■ c. Revising newly redesignated paragraphs (j)(5) through (7).

The addition and revisions read as follows:

§ 98.346 Data reporting requirements.

* * * * *

(h) An indication of the applicability of part 60 or part 62 of this chapter requirements to the landfill (part 60, subparts WWW and XXX of this chapter, approved state plan implementing part 60, subparts Cc or Cf of this chapter, Federal plan as implemented at part 62, subparts GGG or OOO of this chapter, or not subject to part 60 or part 62 of this chapter municipal solid waste landfill rules), and if the landfill is subject to a part 60 or part 62 of this chapter municipal solid waste landfill rule, an indication of whether the landfill gas collection system is required under part 60 or part 62 of this chapter.

* * * * *

(j) * * *

(5) The number of gas collection systems at the landfill facility.

(6) For each gas collection system at the facility report:

(i) A unique name or ID number for the gas collection system.

(ii) A description of the gas collection system (manufacturer, capacity, and number of wells).

(iii) The annual hours the gas collection system was operating normally. Do not include periods of shut down or poor operation, such as times when pressure, temperature, or other parameters indicative of operation are outside of normal variances, in the annual operating hours.

(iv) The number of measurement locations associated with the gas collection system.

(v) For each measurement location associated with the gas collection system, report:

(A) A unique name or ID number for the measurement location.

(B) Annual quantity of recovered CH_4 (metric tons CH_4) calculated using equation HH–4 to § 98.343.

(C) An indication of whether destruction occurs at the landfill facility, off-site, or both for the measurement location.

(D) If destruction occurs at the landfill facility for the measurement location (in full or in part), also report the number of destruction devices associated with the measurement location that are located at the landfill facility and the information in paragraphs (j)(6)(v)(D)(1) through (6) of this section for each destruction device located at the landfill facility.

(*1*) A unique name or ID number for the destruction device.

(*2*) The type of destruction device (flare, a landfill gas to energy project (*i.e.,* engine or turbine), off-site, or other (specify)).

(*3*) The destruction efficiency (decimal).

(*4*) The total annual hours where active gas flow was sent to the destruction device.

(*5*) The annual operating hours where active gas flow was sent to the destruction device and the destruction device was operating at its intended temperature or other parameter indicative of effective operation. For flares, times when there is no flame present must be excluded from the annual operating hours for the destruction device.

(*6*) The estimated fraction of the recovered CH4 reported for the measurement location directed to the destruction device based on best available data or engineering judgement (decimal, must total to 1 for each measurement location).

(*7*) The following information about the landfill.

(i) The surface area (square meters) and estimated waste depth (meters) for each area specified in table HH–3 to this subpart.

(ii) The estimated gas collection system efficiency for the landfill.

(iii) An indication of whether passive vents and/or passive flares (vents or flares that are not considered part of the gas collection system as defined in § 98.6) are present at the landfill.

* * * * *

■ 76. Revise table HH–1 to subpart HH to read as follows:

TABLE HH–1 TO SUBPART HH OF PART 98—EMISSIONS FACTORS, OXIDATION FACTORS AND METHODS

Factor	Default value	Units
DOC and k values—Bulk waste option:		
DOC (bulk waste) for disposal years prior to 2010	0.20	Weight fraction, wet basis.
DOC (bulk waste) for disposal years 2010 and later	0.17	Weight fraction, wet basis.
k (precipitation plus recirculated leachate [a] <20 inches/year) for disposal years prior to 2010.	0.02	yr^{-1}.
k (precipitation plus recirculated leachate [a] <20 inches/year) for disposal years 2010 and later.	0.033	yr^{-1}.
k (precipitation plus recirculated leachate [a] 20–40 inches/year) for disposal years prior to 2010.	0.038	yr^{-1}.
k (precipitation plus recirculated leachate [a] 20–40 inches/year) for disposal years 2010 and later.	0.067	yr^{-1}.
k (precipitation plus recirculated leachate [a] >40 inches/year) for disposal years prior to 2010.	0.057	yr^{-1}.
k (precipitation plus recirculated leachate [a] >40 inches/year) for disposal years 2010 and later.	0.098	yr^{-1}.
DOC and k values—Modified bulk MSW option:		
DOC (bulk MSW, excluding inerts and C&D waste) for disposal years prior to 2010.	0.31	Weight fraction, wet basis.
DOC (bulk MSW, excluding inerts and C&D waste) for disposal years 2010 and later.	0.27	Weight fraction, wet basis.
DOC (inerts, *e.g.,* glass, plastics, metal, concrete)	0.00	Weight fraction, wet basis.
DOC (C&D waste)	0.08	Weight fraction, wet basis.
k (bulk MSW, excluding inerts and C&D waste) for disposal years prior to 2010.	0.02 to 0.057 [b]	yr^{-1}.
k (bulk MSW, excluding inerts and C&D waste) for disposal years 2010 and later.	0.033 to 0.098 [b]	yr^{-1}.

TABLE HH–1 TO SUBPART HH OF PART 98—EMISSIONS FACTORS, OXIDATION FACTORS AND METHODS—Continued

Factor	Default value	Units
k (inerts, *e.g.,* glass, plastics, metal, concrete)	0.00	yr^{-1}.
k (C&D waste)	0.02 to 0.04 [b]	yr^{-1}.
DOC and k values—Waste composition option:		
DOC (food waste)	0.15	Weight fraction, wet basis.
DOC (garden)	0.2	Weight fraction, wet basis.
DOC (paper)	0.4	Weight fraction, wet basis.
DOC (wood and straw)	0.43	Weight fraction, wet basis.
DOC (textiles)	0.24	Weight fraction, wet basis.
DOC (diapers)	0.24	Weight fraction, wet basis.
DOC (sewage sludge)	0.05	Weight fraction, wet basis.
DOC (inerts, *e.g.,* glass, plastics, metal, cement)	0.00	Weight fraction, wet basis.
DOC (Uncharacterized MSW	0.32	Weight fraction, wet basis.
k (food waste)	0.06 to 0.185 [c]	yr^{-1}.
k (garden)	0.05 to 0.10 [c]	yr^{-1}.
k (paper)	0.04 to 0.06 [c]	yr^{-1}.
k (wood and straw)	0.02 to 0.03 [c]	yr^{-1}.
k (textiles)	0.04 to 0.06 [c]	yr^{-1}.
k (diapers)	0.05 to 0.10 [c]	yr^{-1}.
k (sewage sludge)	0.06 to 0.185 [c]	yr^{-1}.
k (inerts, *e.g.,* glass, plastics, metal, concrete)	0.00	yr^{-1}.
k (uncharacterized MSW)	0.033 to 0.098 [b]	yr^{-1}.
Other parameters—All MSW landfills:		
MCF	1.	
DOC_F	0.5.	
F	0.5.	
OX	See table HH–4 to this subpart.	
DE	0.99.	

[a] Recirculated leachate (in inches/year) is the total volume of leachate recirculated from company records or engineering estimates divided by the area of the portion of the landfill containing waste with appropriate unit conversions. Alternatively, landfills that use leachate recirculation can elect to use the k value of 0.098 rather than calculating the recirculated leachate rate.

[b] Use the lesser value when precipitation plus recirculated leachate is less than 20 inches/year. Use the greater value when precipitation plus recirculated leachate is greater than 40 inches/year. Use the average of the range of values when precipitation plus recirculated leachate is 20 to 40 inches/year (inclusive). Alternatively, landfills that use leachate recirculation can elect to use the greater value rather than calculating the recirculated leachate rate.

[c] Use the lesser value when the potential evapotranspiration rate exceeds the mean annual precipitation rate plus recirculated leachate. Use the greater value when the potential evapotranspiration rate does not exceed the mean annual precipitation rate plus recirculated leachate. Alternatively, landfills that use leachate recirculation can elect to use the greater value rather than assessing the potential evapotranspiration rate or recirculated leachate rate.

■ 77. Revise table HH–3 to subpart HH to read as follows:

TABLE HH–3 TO SUBPART HH OF PART 98—LANDFILL GAS COLLECTION EFFICIENCIES

Description	Term ID	Landfill gas collection efficiency
A1: Area with no waste in-place	Not applicable; do not use this area in the calculation.	
A2: Area without active gas collection, regardless of cover type	CE2	0%.
A3: Area with daily soil cover and active gas collection	CE3	50%.
A4: Area with an intermediate soil cover, or a final soil cover not meeting the criteria for A5 below, and active gas collection.	CE4	65%.
A5: Area with a final soil cover of 3 feet or thicker of clay or final cover (as approved by the relevant agency) and/or geomembrane cover system and active gas collection.	CE5	85%.
Area weighted average collection efficiency for landfills	CEave1 = (A2*CE2 + A3*CE3 + A4*CE4 + A5*CE5)/(A2 + A3 + A4 + A5).	

■ 78. Revise footnote ''b'' to table HH–4 to subpart HH to read as follows:

TABLE HH–4 TO SUBPART HH OF PART 98—LANDFILL METHANE OXIDATION FRACTIONS

Under these conditions:	Use this landfill methane oxidation fraction:
* * * * * * *	

* * * * * * *

[b] Methane flux rate (in grams per square meter per day; g/m²/d) is the mass flow rate of methane per unit area at the bottom of the surface soil prior to any oxidation and is calculated as follows:

For equation HH–5 to § 98.343, or for equation TT–6 to § 98.463,

$MF = K \times G_{CH4}/SArea$

For equation HH–6 to § 98.343,

$$MF = K \times \left(G_{CH4} - \sum_{n=1}^{N} R_n\right) \Big/ SArea$$

For equation HH–7 to § 98.343,

$$MF = K \times \left(\frac{1}{CE} \sum_{c=1}^{C} \left[\frac{\sum_{x=1}^{X} R_{x,c}}{f_{Rec,c}}\right]\right) \Big/ Sarea$$

For equation HH–8 to § 98.343,

$$MF = K \times \left(\frac{1}{CE} \sum_{c=1}^{C} \left[\frac{\sum_{x=1}^{X} R_{x,c}}{f_{Rec,c}}\right] - \sum_{n=1}^{N} R_n\right) \Big/ Sarea$$

Where:

MF = Methane flux rate from the landfill in the reporting year (grams per square meter per day, g/m²/d).

K = unit conversion factor = $10^6/365$ (g/metric ton per days/year) or $10^6/366$ for a leap year.

SArea = The surface area of the landfill containing waste at the beginning of the reporting year (square meters, m²).

G_{CH4} = Modeled methane generation rate in reporting year from equation HH–1 to § 98.343 or equation TT–1 to § 98.463, as applicable, except for application with equation HH–6 to § 98.343 (metric tons CH_4). For application with equation HH–6 to § 98.343, the greater of the modeled methane generation rate in reporting year from equation HH–1 to § 98.343 or equation TT–1 to § 98.463, as applicable, and the quantity of recovered CH_4 from equation HH–4 to § 98.343 (metric tons CH_4).

CE = Collection efficiency estimated at landfill, taking into account system coverage, operation, measurement practices, and cover system materials from table HH–3 to this subpart. If area by soil cover type information is not available, use applicable default value for CE4 in table HH–3 to this subpart for all areas under active influence of the collection system.

C = Number of landfill gas collection systems operated at the landfill.

X = Number of landfill gas measurement locations associated with landfill gas collection system ''c''.

N = Number of landfill gas measurement locations (associated with a destruction device or gas sent off-site). If a single monitoring location is used to monitor volumetric flow and CH_4 concentration of the recovered gas sent to one or multiple destruction devices, then N = 1. Note that $N = \Sigma_{c=1}{}^{C}[\Sigma_{x=1}{}^{X}[1]]$.

$R_{x,c}$ = Quantity of recovered CH_4 from equation HH–4 to § 98.343 for the xth measurement location for landfill gas collection system ''c'' (metric tons CH_4).

R_n = Quantity of recovered CH_4 from equation HH–4 to § 98.343 for the nth measurement location (metric tons CH_4).

$f_{Rec,c}$ = Fraction of hours the landfill gas collection system ''c'' was operating normally (annual operating hours/8,760 hours per year or annual operating hours/8,784 hours per year for a leap year). Do not include periods of shutdown or poor operation, such as times when pressure, temperature, or other parameters indicative of operation are outside of normal variances, in the annual operating hours.

Subpart OO—Suppliers of Industrial Greenhouse Gases

■ 79. Amend § 98.416 by revising paragraphs (c) introductory text, (c)(6) and (7), (d) introductory text, and (d)(4), and adding paragraph (k) to read as follows:

§ 98.416 Data reporting requirements.

* * * * *

(c) Each bulk importer of fluorinated GHGs, fluorinated heat transfer fluids (HTFs), or nitrous oxide shall submit an annual report that summarizes its imports at the corporate level, except importers may exclude shipments including less than twenty-five kilograms of fluorinated GHGs, fluorinated HTFs, or nitrous oxide; transshipments if the importer also excludes transshipments from reporting of exports under paragraph (d) of this section; and heels that meet the conditions set forth at § 98.417(e) if the importer also excludes heels from any reporting of exports under paragraph (d) of this section. The report shall contain

the following information for each import:

* * * * *

(6) Harmonized tariff system (HTS) code of the fluorinated GHGs, fluorinated HTFs, or nitrous oxide shipped.

(7) Customs entry number and importer number for each shipment.

* * * * *

(d) Each bulk exporter of fluorinated GHGs, fluorinated HTFs, or nitrous oxide shall submit an annual report that summarizes its exports at the corporate level, except reporters may exclude shipments including less than twenty-five kilograms of fluorinated GHGs, fluorinated HTFs, or nitrous oxide; transshipments if the exporter also excludes transshipments from reporting of imports under paragraph (c) of this section; and heels if the exporter also excludes heels from any reporting of imports under paragraph (c) of this section. The report shall contain the following information for each export:

* * * * *

(4) Harmonized tariff system (HTS) code of the fluorinated GHGs, fluorinated HTFs, or nitrous oxide shipped.

* * * * *

(k) For nitrous oxide, saturated perfluorocarbons, sulfur hexafluoride, and fluorinated heat transfer fluids as defined at § 98.6, report the end use(s) for which each GHG or fluorinated HTF is transferred and the aggregated annual quantity of that GHG or fluorinated HTF in metric tons that is transferred to that end use application, if known.

Subpart PP—Suppliers of Carbon Dioxide

■ 80. Amend § 98.420 by adding paragraph (a)(4) to read as follows:

§ 98.420 Definition of the source category.

(a) * * *

(4) Facilities with process units, including but not limited to direct air capture (DAC), that capture a CO_2 stream from ambient air for purposes of supplying CO_2 for commercial applications or that capture and maintain custody of a CO_2 stream in order to sequester or otherwise inject it underground.

* * * * *

■ 81. Amend § 98.422 by adding paragraph (e) to read as follows:

§ 98.422 GHGs to report.

* * * * *

(e) Mass of CO_2 captured from DAC process units.

(1) Mass of CO_2 captured from ambient air.

(2) Mass of CO_2 captured from any on-site heat and/or electricity generation, where applicable.

■ 82. Amend § 98.423 by revising paragraphs (a)(3)(i) introductory text and (a)(3)(ii) introductory text to read as follows:

§ 98.423 Calculating CO_2 supply.

(a) * * *

(3) * * *

(i) For facilities with production process units, DAC process units, or production wells that capture or extract a CO_2 stream and either measure it after segregation or do not segregate the flow, calculate the total CO_2 supplied in accordance with equation PP–3a to paragraph (a)(3)(i) of this section.

* * * * *

(ii) For facilities with production process units or DAC process units that capture a CO_2 stream and measure it ahead of segregation, calculate the total CO_2 supplied in accordance with equation PP–3b to paragraph (a)(3)(ii) of this section.

* * * * *

■ 83. Amend § 98.426 by:

■ a. Redesignating paragraphs (f)(12) and (13) as paragraphs (f)(13) and (14), respectively;

■ b. Adding new paragraph (f)(12);

■ c. Revising paragraph (h); and

■ d. Adding paragraph (i).

The additions and revision read as follows:

§ 98.426 Data reporting requirements.

* * * * *

(f) * * *

(12) Geologic sequestration of carbon dioxide with enhanced oil recovery that is covered by subpart VV of this part.

* * * * *

(h) If you capture a CO_2 stream from a facility that is subject to this part and transfer CO_2 to any facilities that are subject to subpart RR or VV of this part, you must:

(1) Report the facility identification number associated with the annual GHG report for the facility that is the source of the captured CO_2 stream;

(2) Report each facility identification number associated with the annual GHG reports for each subpart RR and subpart VV facility to which CO_2 is transferred; and

(3) Report the annual quantity of CO_2 in metric tons that is transferred to each subpart RR and subpart VV facility.

(i) If you capture a CO_2 stream at a facility with a DAC process unit, report the annual quantity of on-site and off-site electricity and heat generated for each DAC process unit as specified in paragraphs (i)(1) through (3) of this section. The quantities specified in paragraphs (i)(1) through (3) of this section must be provided per energy source if known and must represent the electricity and heat used for the DAC process unit starting with air intake and ending with the compressed CO_2 stream (*i.e.,* the CO_2 stream ready for supply for commercial applications or, if maintaining custody of the stream, sequestration or injection of the stream underground).

(1) *Electricity excluding combined heat and power (CHP).* If electricity is provided to a dedicated meter for the DAC process unit, report the annual quantity of electricity consumed, in megawatt hours (MWh), and the information in paragraph (i)(1)(i) or (ii) of this section.

(i) If the electricity is sourced from a grid connection, report the following information:

(A) State where the facility with the DAC process unit is located.

(B) County where the facility with the DAC process unit is located.

(C) Name of the electric utility company that supplied the electricity as shown on the last monthly bill issued by the utility company during the reporting period.

(D) Name of the electric utility company that delivered the electricity. In states with regulated electric utility markets, this will generally be the same utility reported under paragraph (i)(1)(i)(C) of this section, but in states with deregulated electric utility markets, this may be a different utility company.

(E) Annual quantity of electricity consumed in MWh, calculated as the sum of the total energy usage values specified in all billing statements received during the reporting year. Most customers will receive 12 monthly billing statements during the reporting year. Many utilities bill their customers per kilowatt-hour (kWh); usage values on bills that are based on kWh should be divided by 1,000 to report the usage in MWh as required under this paragraph (i)(1)(i)(E).

(ii) If electricity is sourced from on-site or through a contractual mechanism for dedicated off-site generation, for each applicable energy source specified in paragraphs (i)(1)(ii)(A) through (G) of this section, report the annual quantity of electricity consumed, in MWh. If the on-site electricity source is natural gas, oil, or coal, also indicate whether flue gas is also captured by the DAC process unit.

(A) Non-hydropower renewable sources including solar, wind, geothermal and tidal.

(B) Hydropower.

(C) Natural gas.
(D) Oil.
(E) Coal.
(F) Nuclear.
(G) Other.

(2) *Heat excluding CHP.* For each applicable energy source specified in paragraphs (i)(2)(i) through (vii) of this section, report the annual quantity of heat, steam, or other forms of thermal energy sourced from on-site or through a contractual mechanism for dedicated off-site generation, in megajoules (MJ). If the on-site heat source is natural gas, oil, or coal, also indicate whether flue gas is also captured by the DAC process unit.

(i) Solar.
(ii) Geothermal.
(iii) Natural gas.
(iv) Oil.
(v) Coal.
(vi) Nuclear.
(vii) Other.

(3) *CHP—(i) Electricity from CHP.* If electricity from CHP is sourced from on-site or through a contractual mechanism for dedicated off-site generation, for each applicable energy source specified in paragraphs (i)(3)(i)(A) through (G) of this section, report the annual quantity consumed, in MWh. If the on-site electricity source for CHP is natural gas, oil, or coal, also indicate whether flue gas is also captured by the DAC process unit.

(A) Non-hydropower renewable sources including solar, wind, geothermal and tidal.
(B) Hydropower.
(C) Natural gas.
(D) Oil.
(E) Coal.
(F) Nuclear.
(G) Other.

(ii) *Heat from CHP.* For each applicable energy source specified in paragraphs (i)(3)(ii)(A) through (G) of this section, report the quantity of heat, steam, or other forms of thermal energy from CHP sourced from on-site or through a contractual mechanism for dedicated off-site generation, in MJ. If the on-site heat source is natural gas, oil, or coal, also indicate whether flue gas is also captured by the DAC process unit.

(A) Solar.
(B) Geothermal.
(C) Natural gas.
(D) Oil.
(E) Coal.
(F) Nuclear.
(G) Other.

■ 84. Amend § 98.427 by revising paragraph (a) to read as follows:

§ 98.427 Records that must be retained.

* * * * *

(a) The owner or operator of a facility containing production process units or DAC process units must retain quarterly records of captured or transferred CO_2 streams and composition.

* * * * *

Subpart QQ—Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams

■ 85. Amend § 98.436 by adding paragraphs (a)(7) and (b)(7) to read as follows:

§ 98.436 Data reporting requirements.

(a) * * *

(7) The Harmonized tariff system (HTS) code for each type of pre-charged equipment or closed-cell foam imported.

(b) * * *

(7) The Schedule B code for each type of pre-charged equipment or closed-cell foam exported.

Subpart RR—Geologic Sequestration of Carbon Dioxide

■ 86. Amend § 98.449 by adding the definition ''Offshore'' in alphabetical order to read as follows:

§ 98.449 Definitions.

* * * * *

Offshore means seaward of the terrestrial borders of the United States, including waters subject to the ebb and flow of the tide, as well as adjacent bays, lakes or other normally standing waters, and extending to the outer boundaries of the jurisdiction and control of the United States under the Outer Continental Shelf Lands Act.

* * * * *

■ 87. Revise subpart SS consisting of §§ 98.450 through 98.458 to read as follows:

Subpart SS—Electrical Equipment Manufacture or Refurbishment

Sec.

98.450 Definition of the source category.
98.451 Reporting threshold.
98.452 GHGs to report.
98.453 Calculating GHG emissions.
98.454 Monitoring and QA/QC requirements.
98.455 Procedures for estimating missing data.
98.456 Data reporting requirements.
98.457 Records that must be retained.
98.458 Definitions.

§ 98.450 Definition of the source category.

The electrical equipment manufacturing or refurbishment category consists of processes that manufacture or refurbish gas-insulated substations, circuit breakers, other switchgear, gas-insulated lines, or power transformers (including gas-containing components of such equipment) containing fluorinated GHGs, including but not limited to sulfur-hexafluoride (SF_6) and perfluorocarbons (PFCs). The processes include equipment testing, installation, manufacturing, decommissioning and disposal, refurbishing, and storage in gas cylinders and other containers.

§ 98.451 Reporting threshold.

You must report GHG emissions under this subpart if your facility contains an electrical equipment manufacturing or refurbishing process and the facility meets the requirements of § 98.2(a)(2). To calculate total annual GHG emissions for comparison to the 25,000 metric ton CO_2e per year emission threshold in § 98.2(a)(2), follow the requirements of § 98.2(b), with one exception. Instead of following the requirement of § 98.453 to calculate emissions from electrical equipment manufacture or refurbishment, you must calculate emissions of each fluorinated GHG that is a component of a reportable insulating gas and then sum the emissions of each fluorinated GHG resulting from manufacturing and refurbishing electrical equipment using equation SS–1 to this section.

$$E = \sum_j \sum_i P_j * GHG_{i,w} * GWP_i * EF * 0.000453592 \qquad \text{(Eq. SS–1)}$$

Where:

E = Annual production process emissions for threshold applicability purposes (metric tons CO_2e).

P_j = Total annual purchases of reportable insulating gas j (lbs).

$GHG_{i,w}$ = The weight fraction of fluorinated GHG i in reportable insulating gas j if reportable insulating gas j is a gas mixture. If not a mixture, use 1.

GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.

EF = Emission factor for electrical transmission and distribution equipment (lbs emitted/lbs purchased). For all gases, use an emission factor of 0.1.

i = Fluorinated GHG contained in the electrical transmission and distribution equipment.
0.000453592 = Conversion factor from lbs to metric tons.

§ 98.452 GHGs to report.

(a) You must report emissions of each fluorinated GHG, including but not limited to SF6 and PFCs, at the facility level, except you are not required to report emissions of fluorinated GHGs that are components of insulating gases whose weighted average GWPs, as calculated in equation SS–2 to this section, are less than or equal to one. You are, however, required to report certain quantities of insulating gases whose weighted average GWPs are less than or equal to one as specified in § 98.456(f), (g), (k) and (q) through (s). Annual emissions from the facility must include fluorinated GHG emissions from equipment that is installed at an off-site electric power transmission or distribution location whenever emissions from installation activities (*e.g.,* filling) occur before the title to the equipment is transferred to the electric power transmission or distribution entity.

$$GWP_j = \sum_i GHG_{i,w} * GWP_i \qquad \text{(Eq. SS–2)}$$

Where:
GWP_j = Weighted average GWP of insulating gas j.
$GHG_{i,w}$ = The weight fraction of GHG i in insulating gas j, expressed as a decimal. fraction. If GHG i is not part of a gas mixture, use a value of 1.0.
GWP_i = Gas-appropriate GWP as provided in table A–1 to subpart A of this part.
i = GHG contained in the electrical transmission and distribution equipment.

(b) You must report CO_2, N_2O and CH_4 emissions from each stationary combustion unit. You must calculate and report these emissions under subpart C of this part by following the requirements of subpart C of this part.

§ 98.453 Calculating GHG emissions.

(a) For each electrical equipment manufacturer or refurbisher, estimate the annual emissions of each fluorinated GHG that is a component of any reportable insulating gas using the mass-balance approach in equation SS–3 to this section:

$$\text{User emissions}_i = \Sigma_j GHG_{i,w} * [(\text{Decrease in Inventory of Reportable Insulating Gas j Inventory}) + (\text{Acquisitions of Reportable Insulating Gas j}) - (\text{Disbursements of Reportable Insulating Gas j})] \qquad \text{(Eq. SS–3)}$$

Where:
User emissions_i = Annual emissions of each fluorinated GHG i (pounds).
$GHG_{i,w}$ = The weight fraction of fluorinated GHG i in reportable insulating gas j if insulating gas j is a gas mixture, expressed as a decimal fraction. If fluorinated GHG i is not part of a gas mixture, use a value of 1.0.
Decrease in Inventory of Reportable Insulating Gas j Inventory = (Pounds of reportable insulating gas j stored in containers at the beginning of the year)—(Pounds of reportable insulating gas j stored in containers at the end of the year).
Acquisitions of Reportable Insulating Gas j = (Pounds of reportable insulating gas j purchased from chemical producers or suppliers in bulk) + (Pounds of reportable insulating gas j returned by equipment users) + (Pounds of reportable insulating gas j returned to site after off-site recycling).
Disbursements of Reportable Insulating Gas j = (Pounds of reportable insulating gas j contained in new equipment delivered to customers) + (Pounds of reportable insulating gas j delivered to equipment users in containers) + (Pounds of reportable insulating gas j returned to suppliers) + (Pounds of reportable insulating gas j sent off site for recycling) + (Pounds of reportable insulating gas j sent off-site for destruction).

(b) [Reserved]

(c) Estimate the disbursements of reportable insulating gas j sent to customers in new equipment or cylinders or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers using equation SS–4 to this section:

$$D_{GHG} = \sum_{p=1}^{n} Q_p \qquad \text{(Eq. SS–4)}$$

Where:
D_{GHG} = The annual disbursement of reportable insulating gas j sent to customers in new equipment or cylinders or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers.
Q_p = The mass of reportable insulating gas j charged into equipment or containers over the period p sent to customers or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers.
n = The number of periods in the year.

(d) Estimate the mass of each insulating gas j disbursed to customers in new equipment or cylinders over the period p by monitoring the mass flow of each insulating gas j into the new equipment or cylinders using a flowmeter, or by weighing containers before and after gas from containers is used to fill equipment or cylinders, or by using the nameplate capacity of the equipment.

(e) If the mass of insulating gas j disbursed to customers in new equipment or cylinders over the period p is estimated by weighing containers before and after gas from containers is used to fill equipment or cylinders, estimate this quantity using equation SS–5 to this section:

$$Q_p = M_B - M_E - E_L \quad \text{(Eq. SS–5)}$$

Where:

Q_p = The mass of insulating gas j charged into equipment or containers over the period p sent to customers or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers.

M_B = The mass of the contents of the containers used to fill equipment or cylinders at the beginning of period p.

M_E = The mass of the contents of the containers used to fill equipment or cylinders at the end of period p.

E_L = The mass of insulating gas j emitted during the period p downstream of the containers used to fill equipment or cylinders and in cases where a flowmeter is used, downstream of the flowmeter during the period p (*e.g.,* emissions from hoses or other flow lines that connect the container to the equipment or cylinder that is being filled).

(f) If the mass of insulating gas j disbursed to customers in new equipment or cylinders over the period p is determined using a flowmeter, estimate this quantity using equation SS–6 to this section:

$$Q_p = M_{mr} - E_L \quad \text{(Eq. SS–6)}$$

Where:

Q_p = The mass of insulating gas j charged into equipment or containers over the period p sent to customers or sent off-site for other purposes including for recycling, for destruction or to be returned to suppliers.

M_{mr} = The mass of insulating gas j that has flowed through the flowmeter during the period p.

E_L = The mass of insulating gas j emitted during the period p downstream of the containers used to fill equipment or cylinders and in cases where a flowmeter is used, downstream of the flowmeter during the period p (*e.g.,* emissions from hoses or other flow lines that connect the container to the equipment that is being filled).

(g) Estimate the mass of insulating gas j emitted during the period p downstream of the containers used to fill equipment or cylinders (*e.g.,* emissions from hoses or other flow lines that connect the container to the equipment or cylinder that is being filled) using equation SS–7 to this section:

$$E_L = \sum_{j=0}^{n} F_{Ci} * EF_{Ci} \quad \text{(Eq. SS–7)}$$

Where:

E_L = The mass of insulating gas j emitted during the period p downstream of the containers used to fill equipment or cylinders and in cases where a flowmeter is used, downstream of the flowmeter during the period p (*e.g.,* emissions from hoses or other flow lines that connect the container to the equipment or cylinder that is being filled).

FC_i = The total number of fill operations over the period p for the valve-hose combination Ci.

EF_{Ci} = The emission factor for the valve-hose combination Ci.

n=The number of different valve-hose combinations C used during the period p.

(h) If the mass of insulating gas j disbursed to customers in new equipment or cylinders over the period p is determined by using the nameplate capacity, or by using the nameplate capacity of the equipment and calculating the partial shipping charge, use the methods in either paragraph (h)(1) or (2) of this section.

(1) Determine the equipment's actual nameplate capacity, by measuring the nameplate capacities of a representative sample of each make and model and calculating the mean value for each make and model as specified at § 98.454(f).

(2) If equipment is shipped with a partial charge, calculate the partial shipping charge by multiplying the nameplate capacity of the equipment by the ratio of the densities of the partial charge to the full charge.

(i) Estimate the annual emissions of reportable insulating gas j from the equipment that is installed at an off-site electric power transmission or distribution location before the title to the equipment is transferred by using equation SS–8 to this section:

$$EI = GHG_{i,w} * (M_F + M_C - N_I) \quad \text{Eq. SS–8}$$

Where:

EI = Total annual emissions of reportable insulating gas j from equipment installation at electric transmission or distribution facilities.

$GHG_{i,w}$ = The weight fraction of fluorinated GHG i in reportable insulating gas j if reportable insulating gas j is a gas mixture, expressed as a decimal fraction. If the GHG i is not part of a gas mixture, use a value of 1.0.

M_F = The total annual mass of reportable insulating gas j, in pounds, used to fill equipment during equipment installation at electric transmission or distribution facilities.

M_C = The total annual mass of reportable insulating gas j, in pounds, used to charge the equipment prior to leaving the electrical equipment manufacturer facility.

N_I = The total annual nameplate capacity of the equipment, in pounds, installed at electric transmission or distribution facilities.

§ 98.454 Monitoring and QA/QC requirements.

(a) [Reserved]

(b) Ensure that all the quantities required by the equations of this subpart have been measured using either flowmeters with an accuracy and precision of ±1 percent of full scale or better or scales with an accuracy and precision of ±1 percent of the filled weight (gas plus tare) of the containers of each reportable insulating gas that are typically weighed on the scale. For scales that are generally used to weigh cylinders containing 115 pounds of gas when full, this equates to ±1 percent of the sum of 115 pounds and approximately 120 pounds tare, or slightly more than ±2 pounds. Account for the tare weights of the containers. You may accept gas masses or weights provided by the gas supplier (*e.g.,* for the contents of cylinders containing

new gas or for the heels remaining in cylinders returned to the gas supplier) if the supplier provides documentation verifying that accuracy standards are met; however, you remain responsible for the accuracy of these masses and weights under this subpart.

(c) All flow meters, weigh scales, and combinations of volumetric and density measures that are used to measure or calculate quantities under this subpart must be calibrated using calibration procedures specified by the flowmeter, scale, volumetric or density measure equipment manufacturer. Calibration must be performed prior to the first reporting year. After the initial calibration, recalibration must be performed at the minimum frequency specified by the manufacturer.

(d) For purposes of equation SS–7 to § 98.453, the emission factor for the valve-hose combination (EFC) must be estimated using measurements and/or engineering assessments or calculations based on chemical engineering principles or physical or chemical laws or properties. Such assessments or calculations may be based on, as applicable, the internal volume of hose or line that is open to the atmosphere during coupling and decoupling activities, the internal pressure of the hose or line, the time the hose or line is open to the atmosphere during coupling and decoupling activities, the frequency with which the hose or line is purged and the flow rate during purges. You must develop a value for EFc (or use an industry-developed value) for each combination of hose and valve fitting, to use in equation SS–7 to § 98.453. The value for EFC must be determined for each combination of hose and valve fitting of a given diameter or size. The calculation must be recalculated annually to account for changes to the specifications of the valves or hoses that may occur throughout the year.

(e) Electrical equipment manufacturers and refurbishers must account for emissions of each reportable insulating gas that occur as a result of unexpected events or accidental losses, such as a malfunctioning hose or leak in the flow line, during the filling of equipment or containers for disbursement by including these losses in the estimated mass of each reportable insulating gas emitted downstream of the container or flowmeter during the period p.

(f) If the mass of each reportable insulating gas j disbursed to customers in new equipment over the period p is determined by assuming that it is equal to the equipment's nameplate capacity or, in cases where equipment is shipped with a partial charge, equal to its partial shipping charge, equipment samples for conducting the nameplate capacity tests must be selected using the following stratified sampling strategy in this paragraph (f). For each make and model, group the measurement conditions to reflect predictable variability in the facility's filling practices and conditions (*e.g.,* temperatures at which equipment is filled). Then, independently select equipment samples at random from each make and model under each group of conditions. To account for variability, a certain number of these measurements must be performed to develop a robust and representative average nameplate capacity (or shipping charge) for each make, model, and group of conditions. A Student T distribution calculation should be conducted to determine how many samples are needed for each make, model, and group of conditions as a function of the relative standard deviation of the sample measurements. To determine a sufficiently precise estimate of the nameplate capacity, the number of measurements required must be calculated to achieve a precision of one percent of the true mean, using a 95 percent confidence interval. To estimate the nameplate capacity for a given make and model, you must use the lowest mean value among the different groups of conditions, or provide justification for the use of a different mean value for the group of conditions that represents the typical practices and conditions for that make and model. Measurements can be conducted using SF6, another gas, or a liquid. Re-measurement of nameplate capacities should be conducted every five years to reflect cumulative changes in manufacturing methods and conditions over time.

(g) Ensure the following QA/QC methods are employed throughout the year:

(1) Procedures are in place and followed to track and weigh all cylinders or other containers at the beginning and end of the year.

(2) [Reserved]

(h) You must adhere to the following QA/QC methods for reviewing the completeness and accuracy of reporting:

(1) Review inputs to equation SS–3 to § 98.453 to ensure inputs and outputs to the company's system are included.

(2) Do not enter negative inputs and confirm that negative emissions are not calculated. However, the decrease in the inventory for each reportable insulating gas may be calculated as negative.

(3) Ensure that for each reportable insulating gas, the beginning-of-year inventory matches the end-of-year inventory from the previous year.

(4) Ensure that for each reportable insulating gas, in addition to the reportable insulating gas purchased from bulk gas distributors, the reportable insulating gas returned from equipment users with or inside equipment and the reportable insulating gas returned from off-site recycling are also accounted for among the total additions.

§ 98.455 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations is required. Replace missing data, if needed, based on data from similar manufacturing operations, and from similar equipment testing and decommissioning activities for which data are available.

§ 98.456 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the following information for each chemical at the facility level:

(a) Pounds of each reportable insulating gas stored in containers at the beginning of the year.

(b) Pounds of each reportable insulating gas stored in containers at the end of the year.

(c) Pounds of each reportable insulating gas purchased in bulk.

(d) Pounds of each reportable insulating gas returned by equipment users with or inside equipment.

(e) Pounds of each reportable insulating gas returned to site from off site after recycling.

(f) Pounds of each insulating gas inside new equipment delivered to customers.

(g) Pounds of each insulating gas delivered to equipment users in containers.

(h) Pounds of each reportable insulating gas returned to suppliers.

(i) Pounds of each reportable insulating gas sent off site for destruction.

(j) Pounds of each reportable insulating gas sent off site to be recycled.

(k) The nameplate capacity of the equipment, in pounds, delivered to customers with each insulating gas inside, if different from the quantity in paragraph (f) of this section.

(l) A description of the engineering methods and calculations used to determine emissions from hoses or other flow lines that connect the container to the equipment that is being filled.

(m) The values for EF_{ci} of equation SS–7 to § 98.453 for each hose and valve combination and the associated valve fitting sizes and hose diameters.

(n) The total number of fill operations for each hose and valve combination, or, FC_i of equation SS–7 to § 98.453.

(o) If the mass of each reportable insulating gas disbursed to customers in new equipment over the period p is determined according to the methods required in § 98.453(h), report the mean value of nameplate capacity in pounds for each make, model, and group of conditions.

(p) If the mass of each reportable insulating gas disbursed to customers in new equipment over the period p is determined according to the methods required in § 98.453(h), report the number of samples and the upper and lower bounds on the 95-percent confidence interval for each make, model, and group of conditions.

(q) Pounds of each insulating gas used to fill equipment at off-site electric power transmission or distribution locations, or MF, of equation SS–8 to § 98.453.

(r) Pounds of each insulating gas used to charge the equipment prior to leaving the electrical equipment manufacturer or refurbishment facility, or MC, of equation SS–8 to § 98.453.

(s) The nameplate capacity of the equipment, in pounds, installed at off-site electric power transmission or distribution locations used to determine emissions from installation, or N_I, of equation SS–8 to § 98.453.

(t) For any missing data, you must report the reason the data were missing, the parameters for which the data were missing, the substitute parameters used to estimate emissions in their absence, and the quantity of emissions thereby estimated.

(u) For each insulating gas reported in paragraphs (a) through (j) and (o) through (r) of this section, an ID number or other appropriate descriptor unique to that insulating gas.

(v) For each ID number or descriptor reported in paragraph (u) of this section for each unique insulating gas, the name (as required in § 98.3(c)(4)(iii)(G)(*1*)) and weight percent of each fluorinated gas in the insulating gas.

§ 98.457 Records that must be retained.

In addition to the information required by § 98.3(g), you must retain the following records:

(a) All information reported and listed in § 98.456.

(b) Accuracy certifications and calibration records for all scales and monitoring equipment, including the method or manufacturer's specification used for calibration.

(c) Certifications of the quantity of gas, in pounds, charged into equipment at the electrical equipment manufacturer or refurbishment facility as well as the actual quantity of gas, in pounds, charged into equipment at installation.

(d) Check-out and weigh-in sheets and procedures for cylinders.

(e) Residual gas amounts, in pounds, in cylinders sent back to suppliers.

(f) Invoices for gas purchases and sales.

(g) GHG Monitoring Plans, as described in § 98.3(g)(5), must be completed by April 1, 2011.

§ 98.458 Definitions.

Except as specified in this section, all terms used in this subpart have the same meaning given in the CAA and subpart A of this part.

Insulating gas, for the purposes of this subpart, means any fluorinated GHG or fluorinated GHG mixture, including but not limited to SF_6 and PFCs, that is used as an insulating and/or arc-quenching gas in electrical equipment.

Reportable insulating gas, for purposes of this subpart, means an insulating gas whose weighted average GWP, as calculated in equation SS–2 to § 98.452, is greater than one. A fluorinated GHG that makes up either part or all of a reportable insulating gas is considered to be a component of the reportable insulating gas.

Subpart UU—Injection of Carbon Dioxide

■ 88. Revise and republish § 98.470 to read as follows:

§ 98.470 Definition of the source category.

(a) The injection of carbon dioxide (CO_2) source category comprises any well or group of wells that inject a CO_2 stream into the subsurface.

(b) If you report under subpart RR of this part for a well or group of wells, you shall not report under this subpart for that well or group of wells.

(c) If you report under subpart VV of this part for a well or group of wells, you shall not report under this subpart for that well or group of wells. If you previously met the source category definition for subpart UU of this part for a project where CO_2 is injected in enhanced recovery operations for oil and other hydrocarbons (CO_2–EOR) and then began using the standard designated as CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7) such that you met the definition of the source category for subpart VV during a reporting year, you must report under subpart UU for the portion of the year before you began using CSA/ANSI ISO 27916:19 and report under subpart VV for the portion of the year after you began using CSA/ANSI ISO 27916:19.

(d) A facility that is subject to this part only because it is subject to subpart UU of this part is not required to report emissions under subpart C of this part or any other subpart listed in § 98.2(a)(1) or (2).

■ 89. Add subpart VV consisting of §§ 98.480 through 98.489, subpart WW consisting of §§ 98.490 through 98.498, subpart XX consisting of §§ 98.500 through 98.508, subpart YY consisting of §§ 98.510 through 98.518, and subpart ZZ consisting of §§ 98.520 through 98.528 to part 98 to read as follows:

Subpart VV—Geologic Sequestration of Carbon Dioxide With Enhanced Oil Recovery Using ISO 27916

Sec.

98.480 Definition of the source category.
98.481 Reporting threshold.
98.482 GHGs to report.
98.483 Calculating CO_2 geologic sequestration.
98.484 Monitoring and QA/QC requirements.
98.485 Procedures for estimating missing data.
98.486 Data reporting requirements.
98.487 Records that must be retained.
98.488 EOR Operations Management Plan.
98.489 Definitions.

§ 98.480 Definition of the source category.

(a) This source category pertains to carbon dioxide (CO_2) that is injected in enhanced recovery operations for oil and other hydrocarbons (CO_2–EOR) in which all of the following apply:

(1) You are using the standard designated as CSA/ANSI ISO 27916:19, (incorporated by reference, see § 98.7) as a method of quantifying geologic sequestration of CO_2 in association with EOR operations.

(2) You are not reporting under subpart RR of this part.

(b) This source category does not include wells permitted as Class VI under the Underground Injection Control program.

(c) If you are subject to only this subpart, you are not required to report emissions under subpart C of this part or any other subpart listed in § 98.2(a)(1) or (2).

§ 98.481 Reporting threshold.

(a) You must report under this subpart if your CO_2–EOR project uses CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7) as a method of quantifying geologic sequestration of CO_2 in association with CO_2–EOR operations. There is no threshold for reporting.

(b) The requirements of § 98.2(i) do not apply to this subpart. Once a CO_2–EOR project becomes subject to the

requirements of this subpart, you must continue for each year thereafter to comply with all requirements of this subpart, including the requirement to submit annual reports until the facility has met the requirements of paragraphs (b)(1) and (2) of this section and submitted a notification to discontinue reporting according to paragraph (b)(3) of this section.

(1) Discontinuation of reporting under this subpart must follow the requirements set forth under Clause 10 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

(2) CO_2–EOR project termination is completed when all of the following occur:

(i) Cessation of CO_2 injection.

(ii) Cessation of hydrocarbon production from the project reservoir; and

(iii) Wells are plugged and abandoned unless otherwise required by the appropriate regulatory authority.

(3) You must notify the Administrator of your intent to cease reporting and provide a copy of the CO_2–EOR project termination documentation.

(c) If you previously met the source category definition for subpart UU of this part for your CO_2–EOR project and then began using CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7) as a method of quantifying geologic sequestration of CO_2 in association with CO_2–EOR operations during a reporting year, you must report under subpart UU of this part for the portion of the year before you began using CSA/ANSI ISO 27916:19 and report under subpart VV for the portion of the year after you began using CSA/ANSI ISO 27916:19.

§ 98.482 GHGs to report.

You must report the following from Clause 8 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7):

(a) The mass of CO_2 received by the CO_2–EOR project.

(b) The mass of CO_2 loss from the CO_2–EOR project operations.

(c) The mass of native CO_2 produced and captured.

(d) The mass of CO_2 produced and sent off-site.

(e) The mass of CO_2 loss from the EOR complex.

(f) The mass of CO_2 stored in association with CO_2–EOR.

§ 98.483 Calculating CO_2 geologic sequestration.

You must calculate CO_2 sequestered using the following quantification principles from Clause 8.2 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

(a) You must calculate the mass of CO_2 stored in association with CO_2–EOR (m_{stored}) in the reporting year by subtracting the mass of CO_2 loss from operations and the mass of CO_2 loss from the EOR complex from the total mass of CO_2 input (as specified in equation 1 to this paragraph (a)).

Equation 1 to paragraph (a)

$$m_{stored} = m_{input} - m_{loss\ operations} - m_{loss\ EOR\ complex}$$

Where:

m_{stored} = The annual quantity of associated storage in metric tons of CO_2 mass.

m_{input} = The total mass of CO_2 $m_{received}$ by the EOR project plus m_{native} (see Clause 8.3 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7) and paragraph (c) of this section), metric tons. Native CO_2 produced and captured in the CO_2–EOR project (m_{native}) can be quantified and included in m_{input}.

$m_{loss\ operations}$ = The total mass of CO_2 loss from project operations (see Clauses 8.4.1 through 8.4.5 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7) and paragraph (d) of this section), metric tons.

$m_{loss\ EOR\ complex}$ = The total mass of CO_2 loss from the EOR complex (see Clause 8.4.6 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)), metric tons.

(b) The manner by which associated storage is quantified must assure completeness and preclude double counting. The annual mass of CO_2 that is recycled and reinjected into the EOR complex must not be quantified as associated storage. Loss from the CO_2 recycling facilities must be quantified.

(c) You must quantify the total mass of CO_2 input (m_{input}) in the reporting year according to paragraphs (g)(1) through (3) of this section.

(1) You must include the total mass of CO_2 received at the custody transfer meter by the CO_2–EOR project ($m_{received}$).

(2) The CO_2 stream received (including CO_2 transferred from another CO_2–EOR project) must be metered.

(i) The native CO_2 recovered and included as m_{native} must be documented.

(ii) CO_2 delivered to multiple CO_2–EOR projects must be allocated among those CO_2–EOR projects.

(3) The sum of the quantities of allocated CO_2 must not exceed the total quantities of CO_2 received.

(d) You must calculate the total mass of CO_2 from project operations ($m_{loss\ operations}$) in the reporting year as specified in equation 2 to this paragraph (d).

Equation 2 to paragraph (d)

$$m_{\text{loss operations}} = m_{\text{loss leakage facilites}} + m_{\text{loss}\frac{\text{vent}}{\text{flare}}} + m_{\text{loss entrained}} + m_{\text{loss transfer}}$$

Where:

$m_{loss\ leakage\ facilities}$ = Loss of CO_2 due to leakage from production, handling, and recycling CO_2–EOR facilities (infrastructure including wellheads), metric tons.

$m_{loss\ vent/flare}$ = Loss of CO_2 from venting/flaring from production operations, metric tons.

$m_{loss\ entrained}$ = Loss of CO_2 due to entrainment within produced gas/oil/water when this CO_2 is not separated and reinjected, metric tons.

$m_{loss\ transfer}$=Loss of CO_2 due to any transfer of CO_2 outside the CO_2–EOR project, metric tons. You must quantify any CO_2 that is subsequently produced from the EOR complex and transferred offsite.

§ 98.484 Monitoring and QA/QC requirements.

You must use the applicable monitoring and quality assurance requirements set forth in Clause 6.2 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

§ 98.485 Procedures for estimating missing data.

Whenever the value of a parameter is unavailable or the quality assurance procedures set forth in § 98.484 cannot be followed, you must follow the procedures set forth in Clause 9.2 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

§ 98.486 Data reporting requirements.

In addition to the information required by § 98.3(c), the annual report shall contain the following information, as applicable:

(a) The annual quantity of associated storage in metric tons of CO_2 (m_{stored}).

(b) The density of CO_2 if volumetric units are converted to mass in order to be reported for annual quantity of CO_2 stored.

(c) The annual quantity of CO_2 input (m_{input}) and the information in paragraphs (c)(1) and (2) of this section.

(1) The annual total mass of CO_2 received at the custody transfer meter by the CO_2–EOR project, including CO_2

transferred from another CO_2–EOR project ($m_{received}$).

(2) The annual mass of native CO_2 produced and captured in the CO_2–EOR project (m_{native}).

(d) The annual mass of CO_2 that is recycled and reinjected into the EOR complex.

(e) The annual total mass of CO_2 loss from project operations ($m_{loss\ operations}$), and the information in paragraphs (e)(1) through (4) of this section.

(1) Loss of CO_2 due to leakage from production, handling, and recycling CO_2–EOR facilities (infrastructure including wellheads) ($m_{loss\ leakage\ facilities}$).

(2) Loss of CO_2 from venting/flaring from production operations ($m_{loss\ vent/flare}$).

(3) Loss of CO_2 due to entrainment within produced gas/oil/water when this CO2 is not separated and reinjected ($m_{loss\ entrained}$).

(4) Loss of CO_2 due to any transfer of CO_2 outside the CO_2–EOR project ($m_{loss\ transfer}$).

(f) The total mass of CO_2 loss from the EOR complex ($m_{loss\ EOR\ complex}$).

(g) Annual documentation that contains the following components as described in Clause 4.4 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7):

(1) The formulas used to quantify the annual mass of associated storage, including the mass of CO_2 delivered to the CO_2–EOR project and losses during the period covered by the documentation (see Clause 8 and Annex B of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)).

(2) The methods used to estimate missing data and the amounts estimated as described in Clause 9.2 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

(3) The approach and method for quantification utilized by the operator, including accuracy, precision, and uncertainties (see Clause 8 and Annex B of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)).

(4) A statement describing the nature of validation or verification including the date of review, process, findings, and responsible person or entity.

(5) Source of each CO_2 stream quantified as associated storage (see Clause 8.3 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)).

(6) A description of the procedures used to detect and characterize the total CO_2 leakage from the EOR complex.

(7) If only the mass of anthropogenic CO_2 is considered for mstored, a description of the derivation and application of anthropogenic CO_2 allocation ratios for all the terms described in Clauses 8.1 to 8.4.6 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

(8) Any documentation provided by a qualified independent engineer or geologist, who certifies that the documentation provided, including the mass balance calculations as well as information regarding monitoring and containment assurance, is accurate and complete.

(h) Any changes made within the reporting year to containment assurance and monitoring approaches and procedures in the EOR operations management plan.

§ 98.487 Records that must be retained.

You must follow the record retention requirements specified by § 98.3(g). In addition to the records required by § 98.3(g), you must comply with the record retention requirements in Clause 9.1 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

§ 98.488 EOR Operations Management Plan.

(a) You must prepare and update, as necessary, a general EOR operations management plan that provides a description of the EOR complex and engineered system (see Clause 4.3(a) of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)), establishes that the EOR complex is adequate to provide safe, long-term containment of CO_2, and includes site-specific and other information including:

(1) Geologic characterization of the EOR complex.

(2) A description of the facilities within the CO_2–EOR project.

(3) A description of all wells and other engineered features in the CO_2–EOR project.

(4) The operations history of the project reservoir.

(5) The information set forth in Clauses 5 and 6 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

(b) You must prepare initial documentation at the beginning of the quantification period, and include the following as described in the EOR operations management plan:

(1) A description of the EOR complex and engineered systems (see Clause 5 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)).

(2) The initial containment assurance (see Clause 6.1.2 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)).

(3) The monitoring program (see Clause 6.2 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)).

(4) The quantification method to be used (see Clause 8 and Annex B of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)).

(5) The total mass of previously injected CO_2 (if any) within the EOR complex at the beginning of the CO_2–EOR project (see Clause 8.5 and Annex B of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7)).

(c) The EOR operation management plan in paragraph (a) of this section and initial documentation in paragraph (b) of this section must be submitted to the Administrator with the annual report covering the first reporting year that the facility reports under this subpart. In addition, any documentation provided by a qualified independent engineer or geologist, who certifies that the documentation provided is accurate and complete, must also be provided to the Administrator.

(d) If the EOR operations management plan is updated, the updated EOR management plan must be submitted to the Administrator with the annual report covering the first reporting year for which the updated EOR operation management plan is applicable.

§ 98.489 Definitions.

Except as provided in paragraphs (a) and (b) of this section, all terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

Additional terms and definitions are provided in Clause 3 of CSA/ANSI ISO 27916:19 (incorporated by reference, see § 98.7).

Subpart WW—Coke Calciners

Sec.

98.490 Definition of the source category.
98.491 Reporting threshold.
98.492 GHGs to report.
98.493 Calculating GHG emissions.
98.494 Monitoring and QA/QC requirements.
98.495 Procedures for estimating missing data.
98.496 Data reporting requirements.
98.497 Records that must be retained.
98.498 Definitions.

§ 98.490 Definition of the source category.

(a) A coke calciner is a process unit that heats petroleum coke to high temperatures for the purpose of removing impurities or volatile substances in the petroleum coke feedstock.

(b) This source category consists of rotary kilns, rotary hearth furnaces, or similar process units used to calcine petroleum coke and also includes afterburners or other emission control systems used to treat the coke calcining unit's process exhaust gas.

§ 98.491 Reporting threshold.

You must report GHG emissions under this subpart if your facility contains a coke calciner and the facility meets the requirements of either § 98.2(a)(1) or (2).

§ 98.492 GHGs to report.

You must report:

(a) CO_2, CH_4, and N_2O emissions from each coke calcining unit under this subpart.

(b) CO_2, CH_4, and N_2O emissions from auxiliary fuel used in the coke calcining unit and afterburner, if applicable, or other control system used to treat the coke calcining unit's process off-gas under subpart C of this part by following the requirements of subpart C.

§ 98.493 Calculating GHG emissions.

(a) Calculate GHG emissions required to be reported in § 98.492(a) using the applicable methods in paragraph (b) of this section.

(b) For each coke calcining unit, calculate GHG emissions according to the applicable provisions in paragraphs (b)(1) through (4) of this section.

(1) If you operate and maintain a CEMS that measures CO_2 emissions according to subpart C of this part, you must calculate and report CO_2 emissions under this subpart by following the Tier 4 Calculation Methodology specified in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part. Auxiliary fuel use CO_2 emissions should be calculated in accordance with subpart C of this part and subtracted from the CO_2 CEMS emissions to determine process CO_2 emissions. Other coke calcining units must either install a CEMS that complies with the Tier 4 Calculation Methodology in subpart C of this part or follow the requirements of paragraph (b)(2) of this section.

(2) Calculate the CO_2 emissions from the coke calcining unit using monthly measurements and equation 1 to this paragraph (b)(2).

Equation 1 to paragraph (b)(2)

$$CO_2 = \frac{44}{12} \times \sum_{m=1}^{12}\left(M_{in,m} \times CC_{GC,m} - \left(M_{out,m} + M_{dust,m}\right) \times CC_{MPC,m}\right)$$

Where:

CO_2 = Annual CO_2 emissions (metric tons CO_2/year).

m = Month index.

$M_{in,m}$ = Mass of green coke fed to the coke calcining unit in month ''m'' from facility records (metric tons/year).

$CC_{GC,m}$ = Mass fraction carbon content of green coke fed to the coke calcining unit from facility measurement data in month ''m'' (metric ton carbon/metric ton green coke). If measurements are made more frequently than monthly, determine the monthly average as the arithmetic average for all measurements made during the calendar month.

$M_{out,m}$ = Mass of marketable petroleum coke produced by the coke calcining unit in month ''m'' from facility records (metric tons petroleum coke/year).

$M_{dust,m}$ = Mass of petroleum coke dust removed from the process through the dust collection system of the coke calcining unit in month ''m'' from facility records (metric ton petroleum coke dust/year). For coke calcining units that recycle the collected dust, the mass of coke dust removed from the process is the mass of coke dust collected less the mass of coke dust recycled to the process.

$CC_{MPC,m}$ = Mass fraction carbon content of marketable petroleum coke produced by the coke calcining unit in month ''m'' from facility measurement data (metric ton carbon/metric ton petroleum coke). If measurements are made more frequently than monthly, determine the monthly average as the arithmetic average for all measurements made during the calendar month.

44 = Molecular weight of CO_2 (kg/kg-mole).

12 = Atomic weight of C (kg/kg-mole).

(3) Calculate CH4 emissions using equation 2 to this paragraph (b)(3).

Equation 2 to paragraph (b)(3)

$$CH_4 = \left(CO_2 \times \frac{EmF_2}{EmF_1}\right)$$

Where:

CH_4 = Annual methane emissions (metric tons CH_4/year).

CO_2 = Annual CO_2 emissions calculated in paragraph (b)(1) or (2) of this section, as applicable (metric tons CO_2/year).

EmF_1 = Default CO_2 emission factor for petroleum coke from table C–1 to subpart C of this part (kg CO_2/MMBtu).

EmF_2 = Default CH_4 emission factor for ''Petroleum Products (All fuel types in table C–1)'' from table C–2 to subpart C of this part (kg CH_4/MMBtu).

(4) Calculate N_2O emissions using equation 3 to this paragraph (b)(4).

Equation 3 to paragraph (b)(4)

$$N_2O = \left(CO_2 \times \frac{EmF_3}{EmF_1}\right)$$

Where:

N_2O = Annual nitrous oxide emissions (metric tons N_2O/year).

CO_2 = Annual CO_2 emissions calculated in paragraph (b)(1) or (2) of this section, as applicable (metric tons CO_2/year).

EmF_1 = Default CO_2 emission factor for petroleum coke from table C–1 to subpart C of this part (kg CO_2/MMBtu).

EmF_3 = Default N_2O emission factor for ''Petroleum Products (All fuel types in table C–1)'' from table C–2 to subpart C of this part (kg N_2O/MMBtu).

§ 98.494 Monitoring and QA/QC requirements.

(a) Flow meters, gas composition monitors, and heating value monitors that are associated with sources that use a CEMS to measure CO_2 emissions according to subpart C of this part or that are associated with stationary combustion sources must meet the applicable monitoring and QA/QC requirements in § 98.34.

(b) Determine the mass of petroleum coke monthly as required by equation 1 to § 98.493(b)(2) using mass measurement equipment meeting the requirements for commercial weighing equipment as described in NIST HB 44–2023 (incorporated by reference, see § 98.7). Calibrate the measurement device according to the procedures specified by NIST HB 44–2023 (incorporated by reference, see § 98.7) or the procedures specified by the

manufacturer. Recalibrate either biennially or at the minimum frequency specified by the manufacturer.

(c) Determine the carbon content of petroleum coke as required by equation 1 § 98.493(b)(2) using any one of the following methods. Calibrate the measurement device according to procedures specified by the method or procedures specified by the measurement device manufacturer.

(1) ASTM D3176–15 (incorporated by reference, see § 98.7).

(2) ASTM D5291–16 (incorporated by reference, see § 98.7).

(3) ASTM D5373–21 (incorporated by reference, see § 98.7).

(d) The owner or operator must document the procedures used to ensure the accuracy of the monitoring systems used including but not limited to calibration of weighing equipment, flow meters, and other measurement devices. The estimated accuracy of measurements made with these devices must also be recorded.

§ 98.495 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations is required (*e.g.,* concentrations, flow rates, fuel heating values, carbon content values). Therefore, whenever a quality-assured value of a required parameter is unavailable (*e.g.,* if a CEMS malfunctions during unit operation or if a required sample is not taken), a substitute data value for the missing parameter must be used in the calculations.

(a) For missing auxiliary fuel use data, use the missing data procedures in subpart C of this part.

(b) For each missing value of mass or carbon content of coke, substitute the arithmetic average of the quality-assured values of that parameter immediately preceding and immediately following the missing data incident. If the ''after'' value is not obtained by the end of the reporting year, you may use the ''before'' value for the missing data substitution. If, for a particular parameter, no quality-assured data are available prior to the missing data incident, the substitute data value must be the first quality-assured value obtained after the missing data period.

(c) For missing CEMS data, you must use the missing data procedures in § 98.35.

§ 98.496 Data reporting requirements.

In addition to the reporting requirements of § 98.3(c), you must report the information specified in paragraphs (a) through (i) of this section for each coke calcining unit.

(a) The unit ID number (if applicable).

(b) Maximum rated throughput of the unit, in metric tons coke calcined/stream day.

(c) The calculated CO_2, CH_4, and N_2O annual process emissions, expressed in metric tons of each pollutant emitted.

(d) A description of the method used to calculate the CO_2 emissions for each unit (*e.g.,* CEMS or equation 1 to § 98.493(b)(2)).

(e) Annual mass of green coke fed to the coke calcining unit from facility records (metric tons/year).

(f) Annual mass of marketable petroleum coke produced by the coke calcining unit from facility records (metric tons/year).

(g) Annual mass of petroleum coke dust removed from the process through the dust collection system of the coke calcining unit from facility records (metric tons/year) and an indication of whether coke dust is recycled to the unit (*e.g.,* all dust is recycled, a portion of the dust is recycled, or none of the dust is recycled).

(h) Annual average mass fraction carbon content of green coke fed to the coke calcining unit from facility measurement data (metric tons C per metric ton green coke).

(i) Annual average mass fraction carbon content of marketable petroleum coke produced by the coke calcining unit from facility measurement data (metric tons C per metric ton petroleum coke).

§ 98.497 Records that must be retained.

In addition to the records required by § 98.3(g), you must retain the records specified in paragraphs (a) and (b) of this section.

(a) The records of all parameters monitored under § 98.494.

(b) The applicable verification software records as identified in this paragraph (b). You must keep a record of the file generated by the verification software specified in § 98.5(b) for the applicable data specified in paragraphs (b)(1) through (5) of this section. Retention of this file satisfies the recordkeeping requirement for the data in paragraphs (b)(1) through (5) of this section.

(1) Monthly mass of green coke fed to the coke calcining unit from facility records (metric tons/year) (equation 1 to § 98.493(b)(2)).

(2) Monthly mass of marketable petroleum coke produced by the coke calcining unit from facility records (metric tons/year) (equation 1 to § 98.493(b)(2)).

(3) Monthly mass of petroleum coke dust removed from the process through the dust collection system of the coke calcining unit from facility records (metric tons/year) (equation 1 to § 98.493(b)(2)).

(4) Average monthly mass fraction carbon content of green coke fed to the coke calcining unit from facility measurement data (metric tons C per metric ton green coke) (equation 1 to § 98.493(b)(2)).

(5) Average monthly mass fraction carbon content of marketable petroleum coke produced by the coke calcining unit from facility measurement data (metric tons C per metric ton petroleum coke) (equation 1 to § 98.493(b)(2)).

§ 98.498 Definitions.

All terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

Subpart XX—Calcium Carbide Production

Sec.

98.500 Definition of the source category.
98.501 Reporting threshold.
98.502 GHGs to report.
98.503 Calculating GHG emissions.
98.504 Monitoring and QA/QC requirements.
98.505 Procedures for estimating missing data.
98.506 Data reporting requirements.
98.507 Records that must be retained.
98.508 Definitions.

§ 98.500 Definition of the source category.

The calcium carbide production source category consists of any facility that produces calcium carbide.

§ 98.501 Reporting threshold.

You must report GHG emissions under this subpart if your facility contains a calcium carbide production process and the facility meets the requirements of either § 98.2(a)(1) or (2).

§ 98.502 GHGs to report.

You must report:

(a) Process CO_2 emissions from each calcium carbide process unit or furnace used for the production of calcium carbide.

(b) CO_2, CH_4, and N_2O emissions from each stationary combustion unit following the requirements of subpart C of this part. You must report these emissions under subpart C of this part by following the requirements of subpart C.

§ 98.503 Calculating GHG emissions.

You must calculate and report the annual process CO_2 emissions from each calcium carbide process unit not subject to paragraph (c) of this section using the procedures in either paragraph (a) or (b) of this section.

(a) Calculate and report under this subpart the combined process and

combustion CO_2 emissions by operating and maintaining CEMS according to the Tier 4 Calculation Methodology in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part.

(b) Calculate and report under this subpart the annual process CO_2 emissions from the calcium carbide process unit using the carbon mass balance procedure specified in paragraphs (b)(1) and (2) of this section.

(1) For each calcium carbide process unit, determine the annual mass of carbon in each carbon-containing input and output material for the calcium carbide process unit and estimate annual process CO_2 emissions from the calcium carbide process unit using equation 1 to this paragraph (b)(1). Carbon-containing input materials include carbon electrodes and carbonaceous reducing agents. If you document that a specific input or output material contributes less than 1 percent of the total carbon into or out of the process, you do not have to include the material in your calculation using equation 1.

Equation 1 to paragraph (b)(1)

$$E_{CO2} = \frac{44}{12} \times \frac{2000}{2205} \times \sum_1^i \left(M_{reducing\ agent_i} \times C_{reducing\ agent_i}\right)$$

$$+ \frac{44}{12} \times \frac{2000}{2205} \times \sum_1^m \left(M_{electrode_m} \times C_{electrode_m}\right)$$

$$- \frac{44}{12} \times \frac{2000}{2205} \times \sum_1^k \left(M_{product\ outgoing_k} \times C_{product\ outgoing_k}\right)$$

$$- \frac{44}{12} \times \frac{2000}{2205} \times \sum_1^l \left(M_{non-product\ outgoing_l} \times C_{non-product\ outgoing_l}\right)$$

Where:

E_{CO2} = Annual process CO_2 emissions from an individual calcium carbide process unit (metric tons).

44/12 = Ratio of molecular weights, CO_2 to carbon.

2000/2205 = Conversion factor to convert tons to metric tons.

$M_{reducing\ agent_i}$ = Annual mass of reducing agent i fed, charged, or otherwise introduced into the calcium carbide process unit (tons).

$C_{reducing\ agent_i}$ = Carbon content in reducing agent i (percent by weight, expressed as a decimal fraction).

$M_{electrode_m}$ = Annual mass of carbon electrode m consumed in the calcium carbide process unit (tons).

$C_{electrode_m}$ = Carbon content of the carbon electrode m (percent by weight, expressed as a decimal fraction).

$M_{product\ outgoing_k}$ = Annual mass of alloy product k tapped from the calcium carbide process unit (tons).

$C_{product\ outgoing_k}$ = Carbon content in alloy product k (percent by weight, expressed as a decimal fraction).

$M_{non-product\ outgoing_l}$ = Annual mass of non-product outgoing material l removed from the calcium carbide unit (tons).

$C_{non-product\ outgoing}$ = Carbon content in non-product outgoing material l (percent by weight, expressed as a decimal fraction).

(2) Determine the combined annual process CO_2 emissions from the calcium carbide process units at your facility using equation 2 to this paragraph (b)(2).

Equation 2 to paragraph (b)(2)

$$CO_2 = \Sigma 1^k E_{CO2_k}$$

Where:

CO_2 = Annual process CO_2 emissions from calcium carbide process units at a facility used for the production of calcium carbide (metric tons).

E_{CO2_k} = Annual process CO_2 emissions calculated from calcium carbide process unit k calculated using equation 1 to paragraph (b)(1) of this section (metric tons).

k = Total number of calcium carbide process units at facility.

(c) If all GHG emissions from a calcium carbide process unit are vented through the same stack as any combustion unit or process equipment that reports CO_2 emissions using a CEMS that complies with the Tier 4 Calculation Methodology in subpart C of this part, then the calculation methodology in paragraph (b) of this section must not be used to calculate process emissions. The owner or operator must report under this subpart the combined stack emissions according to the Tier 4 Calculation Methodology in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part.

§ 98.504 Monitoring and QA/QC requirements.

If you determine annual process CO_2 emissions using the carbon mass balance procedure in § 98.503(b), you must meet the requirements specified in paragraphs (a) and (b) of this section.

(a) Determine the annual mass for each material used for the calculations of annual process CO_2 emissions using equation 1 to § 98.503(b)(1) by summing the monthly mass for the material determined for each month of the calendar year. The monthly mass may be determined using plant instruments used for accounting purposes, including either direct measurement of the quantity of the material placed in the unit or by calculations using process operating information.

(b) For each material identified in paragraph (a) of this section, you must determine the average carbon content of the material consumed, used, or produced in the calendar year using the methods specified in either paragraph (b)(1) or (2) of this section. If you document that a specific process input or output contributes less than one percent of the total mass of carbon into or out of the process, you do not have to determine the monthly mass or annual carbon content of that input or output.

(1) Information provided by your material supplier.

(2) Collecting and analyzing at least three representative samples of the material inputs and outputs each year. The carbon content of the material must be analyzed at least annually using the standard methods (and their QA/QC procedures) specified in paragraphs (b)(2)(i) and (ii) of this section, as applicable.

(i) ASTM D5373–08 (incorporated by reference, see § 98.7), for analysis of carbonaceous reducing agents and carbon electrodes.

(ii) ASTM C25–06 (incorporated by reference, see § 98.7) for analysis of materials such as limestone or dolomite.

§ 98.505 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions

calculations in § 98.503 is required. Therefore, whenever a quality-assured value of a required parameter is unavailable, a substitute data value for the missing parameter must be used in the calculations as specified in the paragraphs (a) and (b) of this section. You must document and keep records of the procedures used for all such estimates.

(a) If you determine CO_2 emissions for the calcium carbide process unit at your facility using the carbon mass balance procedure in § 98.503(b), 100 percent data availability is required for the carbon content of the input and output materials. You must repeat the test for average carbon contents of inputs according to the procedures in § 98.504(b) if data are missing.

(b) For missing records of the monthly mass of carbon-containing inputs and outputs, the substitute data value must be based on the best available estimate of the mass of the inputs and outputs from all available process data or data used for accounting purposes, such as purchase records.

§ 98.506 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) through (h) of this section, as applicable:

(a) Annual facility calcium carbide production capacity (tons).

(b) The annual facility production of calcium carbide (tons).

(c) Total number of calcium carbide process units at facility used for production of calcium carbide.

(d) Annual facility consumption of petroleum coke (tons).

(e) Each end use of any calcium carbide produced and sent off site.

(f) If the facility produces acetylene on site, provide the information in paragraphs (f)(1) through (3) of this section.

(1) The annual production of acetylene at the facility (tons).

(2) The annual quantity of calcium carbide used for the production of acetylene at the facility (tons).

(3) Each end use of any acetylene produced on-site.

(g) If a CEMS is used to measure CO_2 emissions, then you must report under this subpart the relevant information required by § 98.36 for the Tier 4 Calculation Methodology and the information specified in paragraphs (g)(1) and (2) of this section.

(1) Annual CO_2 emissions (in metric tons) from each CEMS monitoring location measuring process emissions from the calcium carbide process unit.

(2) Identification number of each process unit.

(h) If a CEMS is not used to measure CO_2 process emissions, and the carbon mass balance procedure is used to determine CO_2 emissions according to the requirements in § 98.503(b), then you must report the information specified in paragraphs (h)(1) through (3) of this section.

(1) Annual process CO_2 emissions (in metric tons) from each calcium carbide process unit.

(2) List the method used for the determination of carbon content for each input and output material included in the calculation of annual process CO_2 emissions for each calcium carbide process unit (*i.e.,* supplier provided information, analyses of representative samples you collected).

(3) If you use the missing data procedures in § 98.505(b), you must report for each calcium carbide production process unit how monthly mass of carbon-containing inputs and outputs with missing data were determined and the number of months the missing data procedures were used.

§ 98.507 Records that must be retained.

In addition to the records required by § 98.3(g), you must retain the records specified in paragraphs (a) through (d) of this section for each calcium carbide process unit, as applicable.

(a) If a CEMS is used to measure CO_2 emissions according to the requirements in § 98.503(a), then you must retain under this subpart the records required for the Tier 4 Calculation Methodology in § 98.37 and the information specified in paragraphs (a)(1) through (3) of this section.

(1) Monthly calcium carbide process unit production quantity (tons).

(2) Number of calcium carbide processing unit operating hours each month.

(3) Number of calcium carbide processing unit operating hours in a calendar year.

(b) If the carbon mass balance procedure is used to determine CO_2 emissions according to the requirements in § 98.503(b)(2), then you must retain records for the information specified in paragraphs (b)(1) through (5) of this section.

(1) Monthly calcium carbide process unit production quantity (tons).

(2) Number of calcium carbide process unit operating hours each month.

(3) Number of calcium carbide process unit operating hours in a calendar year.

(4) Monthly material quantity consumed, used, or produced for each material included for the calculations of annual process CO_2 emissions (tons).

(5) Average carbon content determined and records of the supplier provided information or analyses used for the determination for each material included for the calculations of annual process CO_2 emissions.

(c) You must keep records that include a detailed explanation of how company records of measurements are used to estimate the carbon input and output to each calcium carbide process unit, including documentation of specific input or output materials excluded from equation 1 to § 98.503(b)(1) that contribute less than 1 percent of the total carbon into or out of the process. You also must document the procedures used to ensure the accuracy of the measurements of materials fed, charged, or placed in a calcium carbide process unit including, but not limited to, calibration of weighing equipment and other measurement devices. The estimated accuracy of measurements made with these devices must also be recorded, and the technical basis for these estimates must be provided.

(d) The applicable verification software records as identified in this paragraph (d). You must keep a record of the file generated by the verification software specified in § 98.5(b) for the applicable data specified in paragraphs (d)(1) through (8) of this section. Retention of this file satisfies the recordkeeping requirement for the data in paragraphs (d)(1) through (8) of this section.

(1) Carbon content in reducing agent (percent by weight, expressed as a decimal fraction) (equation 1 to § 98.503(b)(1)).

(2) Annual mass of reducing agent fed, charged, or otherwise introduced into the calcium carbide process unit (tons) (equation 1 to § 98.503(b)(1)).

(3) Carbon content of carbon electrode (percent by weight, expressed as a decimal fraction) (equation 1 to § 98.503(b)(1)).

(4) Annual mass of carbon electrode consumed in the calcium carbide process unit (tons) (equation 1 to § 98.503(b)(1)).

(5) Carbon content in product (percent by weight, expressed as a decimal fraction) (equation 1 to § 98.503(b)(1)).

(6) Annual mass of product produced/tapped in the calcium carbide process unit (tons) (equation 1 to § 98.503(b)(1)).

(7) Carbon content in non-product outgoing material (percent by weight, expressed as a decimal fraction) (equation 1 to § 98.503(b)(1)).

(8) Annual mass of non-product outgoing material removed from calcium carbide process unit (tons) (equation 1 to § 98.503(b)(1)).

§ 98.508 Definitions.

All terms used of this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

Subpart YY—Caprolactam, Glyoxal, and Glyoxylic Acid Production

Sec.
98.510 Definition of the source category.
98.511 Reporting threshold.
98.512 GHGs to report.
98.513 Calculating GHG emissions.
98.514 Monitoring and QA/QC requirements.
98.515 Procedures for estimating missing data.
98.516 Data reporting requirements.
98.517 Records that must be retained.
98.518 Definitions.
Table 1 to Subpart YY of Part 98—N_2O Generation Factors

§ 98.510 Definition of the source category.

This source category includes any facility that produces caprolactam, glyoxal, or glyoxylic acid. This source category excludes the production of glyoxal through the LaPorte process (*i.e.,* the gas-phase catalytic oxidation of ethylene glycol with air in the presence of a silver or copper catalyst).

§ 98.511 Reporting threshold.

You must report GHG emissions under this subpart if your facility meets the requirements of either § 98.2(a)(1) or (2) and the definition of source category in § 98.510.

§ 98.512 GHGs to report.

(a) You must report N_2O process emissions from the production of caprolactam, glyoxal, and glyoxylic acid as required by this subpart.

(b) You must report under subpart C of this part the emissions of CO_2, CH_4, and N_2O from each stationary combustion unit by following the requirements of subpart C of this part.

§ 98.513 Calculating GHG emissions.

(a) You must determine annual N_2O process emissions from each caprolactam, glyoxal, and glyoxylic acid process line using the appropriate default N_2O generation factor(s) from table 1 to this subpart, the site-specific N_2O destruction factor(s) for each N_2O abatement device, and site-specific production data according to paragraphs (b) through (e) of this section.

(b) You must determine the total annual amount of product *i* (caprolactam, glyoxal, or glyoxylic acid) produced on each process line *t* (metric tons product), according to § 98.514(b).

(c) If process line *t* exhausts to any N_2O abatement technology *j*, you must determine the destruction efficiency for each N_2O abatement technology according to paragraph (c)(1) or (2) of this section.

(1) Use the control device manufacturer's specified destruction efficiency.

(2) Estimate the destruction efficiency through process knowledge. Examples of information that could constitute process knowledge include calculations based on material balances, process stoichiometry, or previous test results provided the results are still relevant to the current vent stream conditions. You must document how process knowledge (if applicable) was used to determine the destruction efficiency.

(d) If process line *t* exhausts to any N_2O abatement technology *j*, you must determine the abatement utilization factor for each N_2O abatement technology according to paragraph (d)(1) or (2) of this section.

(1) If the abatement technology *j* has no downtime during the year, use 1.

(2) If the abatement technology *j* was not operational while product *i* was being produced on process line *t*, calculate the abatement utilization factor according to equation 1 to this paragraph (d)(2).

Equation 1 to paragraph (d)(2)

$$AF_j = \frac{T_{i,j}}{T_i}$$

Where:

AF_j = Monthly abatement utilization factor of N_2O abatement technology *j* from process unit *t* (fraction of time that abatement technology is operating).

$T_{i,j}$ = Total number of hours during month that product *i* (caprolactam, glyoxal, or glyoxylic acid), was produced from process unit *t* during which N_2O abatement technology *j* was operational (hours).

T_i = Total number of hours during month that product *i* (caprolactam, glyoxal, or glyoxylic acid), was produced from process unit *t* (hours).

(e) You must calculate N_2O emissions for each product *i* from each process line *t* and each N_2O control technology *j* according to equation 2 to this paragraph (e).

Equation 2 to paragraph (e)

$$E_{N2Ot} = \sum_{i,j}\left[EF_i * P_i * \left(1 - \left(DE_j * AF_j\right)\right)\right] * 0.001$$

Where:

E_{N2Ot} = Monthly process emissions of N_2O, metric tons from process line *t*.

EF_i = N_2O generation factor for product *i* (caprolactam, glyoxal, or glyoxylic acid), kg N_2O/metric ton of product produced, as shown in table 1 to this subpart.

P_i = Monthly production of product *i*, (caprolactam, glyoxal, or glyoxylic acid), metric tons.

DE_j = Destruction efficiency of N_2O abatement technology type *j*, fraction (decimal fraction of N_2O removed from vent stream).

AF_j = Monthly abatement utilization factor for N_2O abatement technology type *j*, fraction, calculated using equation 1 to paragraph (d)(2) of this section.

0.001 = Conversion factor from kg to metric tons.

(f) You must determine the annual emissions combined from each process line at your facility using equation 3 to this paragraph (f):

Equation 3 to paragraph (f)

$$N_2O = \sum_{1}^{12} E_{N2Ot}$$

Where:

N_2O = Annual process N_2O emissions from each process line for product *i* (caprolactam, glyoxal, or glyoxylic acid) (metric tons).

E_{N2Ot} = Monthly process emissions of N_2O from each process line for product *i* (caprolactam, glyoxal, or glyoxylic acid) (metric tons).

§ 98.514 Monitoring and QA/QC requirements.

(a) You must determine the total monthly amount of caprolactam, glyoxal, and glyoxylic acid produced. These monthly amounts are determined according to the methods in paragraph (a)(1) or (2) of this section.

(1) Direct measurement of production (such as using flow meters, weigh scales, etc.).

(2) Existing plant procedures used for accounting purposes (*i.e.,* dedicated tank-level and acid concentration measurements).

(b) You must determine the annual amount of caprolactam, glyoxal, and glyoxylic acid produced. These annual amounts are determined by summing the respective monthly quantities determined in paragraph (a) of this section.

§ 98.515 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations is required. Therefore, whenever a quality-assured value of a required parameter is unavailable, a substitute data value for the missing parameter must be used in the calculations as specified in paragraphs (a) and (b) of this section.

(a) For each missing value of caprolactam, glyoxal, or glyoxylic acid production, the substitute data must be the best available estimate based on all available process data or data used for accounting purposes (such as sales records).

(b) For missing values related to the N_2O abatement device, assuming that the operation is generally constant from year to year, the substitute data value should be the most recent quality-assured value.

§ 98.516 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) through (j) of this section.

(a) Process line identification number.

(b) Annual process N_2O emissions from each process line according to paragraphs (b)(1) through (3) of this section.

(1) N_2O from caprolactam production (metric tons).

(2) N_2O from glyoxal production (metric tons).

(3) N_2O from glyoxylic acid production (metric tons).

(c) Annual production quantities from all process lines at the caprolactam, glyoxal, or glyoxylic acid production facility according to paragraphs (c)(1) through (3) of this section.

(1) Caprolactam production (metric tons).

(2) Glyoxal production (metric tons).

(3) Glyoxylic acid production (metric tons).

(d) Annual production capacity from all process lines at the caprolactam, glyoxal, or glyoxylic acid production facility, as applicable, in paragraphs (d)(1) through (3) of this section.

(1) Caprolactam production capacity (metric tons).

(2) Glyoxal production capacity (metric tons).

(3) Glyoxylic acid production capacity (metric tons).

(e) Number of process lines at the caprolactam, glyoxal, or glyoxylic acid production facility, by product, in paragraphs (e)(1) through (3) of this section.

(1) Total number of process lines producing caprolactam.

(2) Total number of process lines producing glyoxal.

(3) Total number of process lines producing glyoxylic acid.

(f) Number of operating hours in the calendar year for each process line at the caprolactam, glyoxal, or glyoxylic acid production facility (hours).

(g) N_2O abatement technologies used (if applicable) and date of installation of abatement technology at the caprolactam, glyoxal, or glyoxylic acid production facility.

(h) Monthly abatement utilization factor for each N_2O abatement technology for each process line at the caprolactam, glyoxal, or glyoxylic acid production facility.

(i) Number of times in the reporting year that missing data procedures were followed to measure production quantities of caprolactam, glyoxal, or glyoxylic acid (months).

(j) Annual percent N_2O emission reduction per chemical produced at the caprolactam, glyoxal, or glyoxylic acid production facility, as applicable, in paragraphs (j)(1) through (3) of this section.

(1) Annual percent N_2O emission reduction for all caprolactam production process lines.

(2) Annual percent N_2O emission reduction for all glyoxal production process lines.

(3) Annual percent N_2O emission reduction for all glyoxylic acid production process lines.

§ 98.517 Records that must be retained.

In addition to the information required by § 98.3(g), you must retain the records specified in paragraphs (a) through (d) of this section for each caprolactam, glyoxal, or glyoxylic acid production facility:

(a) Documentation of how accounting procedures were used to estimate production rate.

(b) Documentation of how process knowledge was used to estimate abatement technology destruction efficiency (if applicable).

(c) Documentation of the procedures used to ensure the accuracy of the measurements of all reported parameters, including but not limited to, calibration of weighing equipment, flow meters, and other measurement devices. The estimated accuracy of measurements made with these devices must also be recorded, and the technical basis for these estimates must be provided.

(d) The applicable verification software records as identified in this paragraph (d). You must keep a record of the file generated by the verification software specified in § 98.5(b) for the applicable data specified in paragraphs (d)(1) through (4) of this section. Retention of this file satisfies the recordkeeping requirement for the data in paragraphs (d)(1) through (4) of this section.

(1) Monthly production quantity of caprolactam from each process line at the caprolactam, glyoxal, or glyoxylic acid production facility (metric tons).

(2) Monthly production quantity of glyoxal from each process line at the caprolactam, glyoxal, or glyoxylic acid production facility (metric tons).

(3) Monthly production quantity of glyoxylic acid from each process line at the caprolactam, glyoxal, or glyoxylic acid production facility (metric tons).

(4) Destruction efficiency of N_2O abatement technology from each process line, fraction (decimal fraction of N_2O removed from vent stream).

§ 98.518 Definitions.

All terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

TABLE 1 TO SUBPART YY OF PART 98—N_2O GENERATION FACTORS

Product	N_2O generation factor [a]
Caprolactam	9.0
Glyoxal	520

TABLE 1 TO SUBPART YY OF PART 98—N_2O GENERATION FACTORS—Continued

Product	N_2O generation factor [a]
Glyoxylic acid	100

[a] Generation factors in units of kilograms of N_2O emitted per metric ton of product produced.

Subpart ZZ—Ceramics Manufacturing

Sec.
98.520 Definition of the source category.
98.521 Reporting threshold.
98.522 GHGs to report.
98.523 Calculating GHG emissions.
98.524 Monitoring and QA/QC requirements.
98.525 Procedures for estimating missing data.
98.526 Data reporting requirements.
98.527 Records that must be retained.
98.528 Definitions.
Table 1 to Subpart ZZ of Part 98—CO_2 Emission Factors for Carbonate-Based Raw Materials

§ 98.520 Definition of the source category.

(a) The ceramics manufacturing source category consists of any facility that uses nonmetallic, inorganic materials, many of which are clay-based, to produce ceramic products such as bricks and roof tiles, wall and floor tiles, table and ornamental ware (household ceramics), sanitary ware, refractory products, vitrified clay pipes, expanded clay products, inorganic bonded abrasives, and technical ceramics (*e.g.,* aerospace, automotive, electronic, or biomedical applications). For the purposes of this subpart, ceramics manufacturing processes include facilities that annually consume at least 2,000 tons of carbonates, either as raw materials or as a constituent in clay, which is heated to a temperature sufficient to allow the calcination reaction to occur, and operate a ceramics manufacturing process unit.

(b) A ceramics manufacturing process unit is a kiln, dryer, or oven used to calcine clay or other carbonate-based materials for the production of a ceramics product.

§ 98.521 Reporting threshold.

You must report GHG emissions under this subpart if your facility contains a ceramics manufacturing process and the facility meets the requirements of either § 98.2(a)(1) or (2).

§ 98.522 GHGs to report.

You must report:

(a) CO_2 process emissions from each ceramics process unit (*e.g.,* kiln, dryer, or oven).

(b) CO_2 combustion emissions from each ceramics process unit.

(c) CH_4 and N_2O combustion emissions from each ceramics process unit. You must calculate and report these emissions under subpart C of this part by following the requirements of subpart C of this part.

(d) CO_2, CH_4, and N_2O combustion emissions from each stationary fuel combustion unit other than kilns, dryers, or ovens. You must report these emissions under subpart C of this part by following the requirements of subpart C of this part.

§ 98.523 Calculating GHG emissions.

You must calculate and report the annual process CO_2 emissions from each ceramics process unit using the procedures in paragraphs (a) through (c) of this section.

(a) For each ceramics process unit that meets the conditions specified in § 98.33(b)(4)(ii) or (iii), you must calculate and report under this subpart the combined process and combustion CO_2 emissions by operating and maintaining a CEMS to measure CO_2 emissions according to the Tier 4 Calculation Methodology specified in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part.

(b) For each ceramics process unit that is not subject to the requirements in paragraph (a) of this section, calculate and report the process and combustion CO_2 emissions from the ceramics process unit separately by using the procedures specified in paragraphs (b)(1) through (6) of this section, except as specified in paragraph (c) of this section.

(1) For each carbonate-based raw material (including clay) charged to the ceramics process unit, either obtain the mass fractions of any carbonate-based minerals from the supplier of the raw material or by sampling the raw material, or use a default value of 1.0 as the mass fraction for the raw material.

(2) Determine the quantity of each carbonate-based raw material charged to the ceramics process unit.

(3) Apply the appropriate emission factor for each carbonate-based raw material charged to the ceramics process unit. Table 1 to this subpart provides emission factors based on stoichiometric ratios for carbonate-based minerals.

(4) Use equation 1 to this paragraph (b)(4) to calculate process mass emissions of CO_2 for each ceramics process unit:

Equation 1 to paragraph (b)(4)

$$E_{CO2} = \sum_j \left[\left(M_j \bullet \frac{2000}{2205} \right) \bullet \sum_i (MF_i \bullet EF_i \bullet F_i) \right]$$

Where:

E_{CO2} = Annual process CO_2 emissions (metric tons/year).

M_j = Annual mass of the carbonate-based raw material *j* consumed (tons/year).

2000/2205 = Conversion factor to convert tons to metric tons.

MF_i = Annual average decimal mass fraction of carbonate-based mineral *i* in carbonate-based raw material *j*.

EF_i = Emission factor for the carbonate-based mineral *i*, (metric tons CO_2/metric ton carbonate, see table 1 to this subpart).

F_i = Decimal fraction of calcination achieved for carbonate-based mineral *i*, assumed to be equal to 1.0.

i = Index for carbonate-based mineral in each carbonate-based raw material.

j = Index for carbonate-based raw material.

(5) Determine the combined annual process CO_2 emissions from the ceramic process units at your facility using equation 2 to this paragraph (b)(5):

Equation 2 to paragraph (b)(5)

$$CO_2 = \Sigma^{k}{}_{1}\, E_{CO2_k}$$

Where:

CO_2 = Annual process CO_2 emissions from ceramic process units at a facility (metric tons).

E_{CO2_k} = Annual process CO_2 emissions calculated from ceramic process unit k calculated using equation 1 to paragraph (b)(4) of this section (metric tons).

k = Total number of ceramic process units at facility.

(6) Calculate and report under subpart C of this part the combustion CO_2 emissions in the ceramics process unit according to the applicable requirements in subpart C of this part.

(c) A value of 1.0 can be used for the mass fraction (MF_i) of carbonate-based mineral i in each carbonate-based raw material *j* in equation 1 to paragraph (b)(4) of this section. The use of 1.0 for the mass fraction assumes that the carbonate-based raw material comprises 100% of one carbonate-based mineral. As an alternative to the default value, you may use data provided by either the raw material supplier or a lab analysis.

§ 98.524 Monitoring and QA/QC requirements.

(a) You must measure annual amounts of carbonate-based raw materials charged to each ceramics process unit from monthly measurements using plant instruments used for accounting purposes, such as calibrated scales or weigh hoppers. Total annual mass charged to ceramics process units at the facility must be compared to records of raw material purchases for the year.

(b) You must use the default value of 1.0 for the mass fraction of a carbonate-based mineral, or you may opt to obtain the mass fraction of any carbonate-based materials from the supplier of the raw material or by sampling the raw material. If you opt to obtain the mass fractions of any carbonate-based minerals from the supplier of the raw material or by sampling the raw material, you must measure the carbonate-based mineral mass fractions at least annually to verify the mass fraction data. You may conduct the sampling and chemical analysis using any x-ray fluorescence test, x-ray diffraction test, or other enhanced testing method published by an industry consensus standards organization (*e.g.,* ASTM, ASME, API). If it is determined that the mass fraction of a carbonate based raw material is below the detection limit of available industry testing standards, you may use a default value of 0.005.

(c) You must use the default value of 1.0 for the mass fraction of a carbonate-based mineral, or you may opt to obtain the mass fraction of any carbonate-based materials from the supplier of the raw material or by sampling the raw material. If you obtain the mass fractions of any carbonate-based minerals from the supplier of the raw material or by sampling the raw material, you must determine the annual average mass fraction for the carbonate-based mineral in each carbonate-based raw material at least annually by calculating an arithmetic average of the data obtained from raw material suppliers or sampling and chemical analysis.

(d) You must use the default value of 1.0 for the calcination fraction of a carbonate-based mineral. Alternatively, you may opt to obtain the calcination fraction of any carbonate-based mineral by sampling. If you opt to obtain the calcination fraction of any carbonate-based minerals from sampling, you must determine on an annual basis the calcination fraction for each carbonate-based mineral consumed based on sampling and chemical analysis. You may conduct the sampling and chemical analysis using any x-ray fluorescence test, x-ray diffraction test, or other enhanced testing method published by an industry consensus standards organization (*e.g.,* ASTM, ASME, API).

§ 98.525 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations in § 98.523 is required. If the monitoring and quality assurance procedures in § 98.524 cannot be followed and data is unavailable, you must use the most appropriate of the missing data procedures in paragraphs (a) and (b) of this section in the calculations. You must document and keep records of the procedures used for all such missing value estimates.

(a) If the CEMS approach is used to determine combined process and combustion CO_2 emissions, the missing data procedures in § 98.35 apply.

(b) For missing data on the monthly amounts of carbonate-based raw materials charged to any ceramics process unit, use the best available estimate(s) of the parameter(s) based on all available process data or data used for accounting purposes, such as purchase records.

(c) For missing data on the mass fractions of carbonate-based minerals in the carbonate-based raw materials, assume that the mass fraction of a carbonate-based mineral is 1.0, which assumes that one carbonate-based mineral comprises 100 percent of the carbonate-based raw material.

§ 98.526 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) through (c) of this section, as applicable:

(a) The total number of ceramics process units at the facility and the number of units that operated during the reporting year.

(b) If a CEMS is used to measure CO_2 emissions from ceramics process units, then you must report under this subpart the relevant information required under § 98.36 for the Tier 4 Calculation Methodology and the following information specified in paragraphs (b)(1) through (3) of this section.

(1) The annual quantity of each carbonate-based raw material (including clay) charged to each ceramics process unit and for all units combined (tons).

(2) Annual quantity of each type of ceramics product manufactured by each ceramics process unit and by all units combined (tons).

(3) Annual production capacity for each ceramics process unit (tons).

(c) If a CEMS is not used to measure CO_2 emissions from ceramics process units and process CO_2 emissions are calculated according to the procedures specified in § 98.523(b), then you must report the following information specified in paragraphs (c)(1) through (7) of this section.

(1) Annual process emissions of CO_2 (metric tons) for each ceramics process unit and for all units combined.

(2) The annual quantity of each carbonate-based raw material (including clay) charged to each ceramics process unit and for all units combined (tons).

(3) Results of all tests used to verify each carbonate-based mineral mass fraction for each carbonate-based raw material charged to a ceramics process unit, as specified in paragraphs (c)(3)(i) through (iii) of this section.

(i) Date of test.

(ii) Method(s) and any variations used in the analyses.

(iii) Mass fraction of each sample analyzed.

(4) Method used to determine the decimal mass fraction of carbonate-based mineral, unless you used the default value of 1.0 (*e.g.,* supplier provided information, analyses of representative samples you collected, or use of a default value of 0.005 as specified by § 98.524(b)).

(5) Annual quantity of each type of ceramics product manufactured by each ceramics process unit and by all units combined (tons).

(6) Annual production capacity for each ceramics process unit (tons).

(7) If you use the missing data procedures in § 98.525(b), you must report for each applicable ceramics process unit the number of times in the reporting year that missing data procedures were followed to measure monthly quantities of carbonate-based raw materials or mass fraction of the carbonate-based minerals (months).

§ 98.527 Records that must be retained.

In addition to the records required by § 98.3(g), you must retain the records specified in paragraphs (a) through (d) of this section for each ceramics process unit, as applicable.

(a) If a CEMS is used to measure CO_2 emissions according to the requirements in § 98.523(a), then you must retain under this subpart the records required under § 98.37 for the Tier 4 Calculation Methodology and the information specified in paragraphs (a)(1) and (2) of this section.

(1) Monthly ceramics production rate for each ceramics process unit (tons).

(2) Monthly amount of each carbonate-based raw material charged to each ceramics process unit (tons).

(b) If process CO_2 emissions are calculated according to the procedures

specified in § 98.523(b), you must retain the records in paragraphs (b)(1) through (6) of this section.

(1) Monthly ceramics production rate for each ceramics process unit (metric tons).

(2) Monthly amount of each carbonate-based raw material charged to each ceramics process unit (metric tons).

(3) Data on carbonate-based mineral mass fractions provided by the raw material supplier for all raw materials consumed annually and included in calculating process emissions in equation 1 to § 98.523(b)(4), if applicable.

(4) Results of all tests, if applicable, used to verify the carbonate-based mineral mass fraction for each carbonate-based raw material charged to a ceramics process unit, including the data specified in paragraphs (b)(4)(i) through (v) of this section.

(i) Date of test.

(ii) Method(s), and any variations of methods, used in the analyses.

(iii) Mass fraction of each sample analyzed.

(iv) Relevant calibration data for the instrument(s) used in the analyses.

(v) Name and address of laboratory that conducted the tests.

(5) Each carbonate-based mineral mass fraction for each carbonate-based raw material, if a value other than 1.0 is used to calculate process mass emissions of CO_2.

(6) Number of annual operating hours of each ceramics process unit.

(c) All other documentation used to support the reported GHG emissions.

(d) The applicable verification software records as identified in this paragraph (d). You must keep a record of the file generated by the verification software specified in § 98.5(b) for the applicable data specified in paragraphs (d)(1) through (3) of this section. Retention of this file satisfies the recordkeeping requirement for the data in paragraphs (d)(1) through (3) of this section.

(1) Annual average decimal mass fraction of each carbonate-based mineral in each carbonate-based raw material for each ceramics process unit (specify the default value, if used, or the value determined according to § 98.524) (percent by weight, expressed as a decimal fraction) (equation 1 to § 98.523(b)(4)).

(2) Annual mass of each carbonate-based raw material charged to each ceramics process unit (tons) (equation 1 to § 98.523(b)(4)).

(3) Decimal fraction of calcination achieved for each carbonate-based raw material for each ceramics process unit (specify the default value, if used, or the value determined according to § 98.524) (percent by weight, expressed as a decimal fraction) (equation 1 to § 98.523(b)(4)).

§ 98.528 Definitions.

All terms used of this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

TABLE 1 TO SUBPART ZZ OF PART 98—CO_2 EMISSION FACTORS FOR CARBONATE-BASED RAW MATERIALS

Carbonate	Mineral name(s)	CO_2 emission factor [a]
$BaCO_3$	Witherite, Barium carbonate	0.223
$CaCO_3$	Limestone, Calcium Carbonate, Calcite, Aragonite	0.440
$Ca(Fe,Mg,Mn)(CO_3)_2$	Ankerite [b]	0.408–0.476
$CaMg(CO_3)_2$	Dolomite	0.477
$FeCO_3$	Siderite	0.380
K_2CO_3	Potassium carbonate	0.318
Li_2CO_3	Lithium carbonate	0.596
$MgCO_3$	Magnesite	0.522
$MnCO_3$	Rhodochrosite	0.383
Na_2CO_3	Sodium carbonate, Soda ash	0.415
$SrCO_3$	Strontium carbonate, Strontianite	0.298

[a] Emission factors are in units of metric tons of CO_2 emitted per metric ton of carbonate-based material.
[b] Ankerite emission factors are based on a formula weight range that assumes Fe, Mg, and Mn are present in amounts of at least 1.0 percent.

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Part III

Department of Agriculture

Food and Nutrition Service

7 CFR Parts 210, 215, 220, et al.

Child Nutrition Programs: Meal Patterns Consistent With the 2020–2025 Dietary Guidelines for Americans; Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 215, 220, 225, and 226

[FNS–2022–0043]

RIN 0584–AE88

Child Nutrition Programs: Meal Patterns Consistent With the 2020–2025 Dietary Guidelines for Americans

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

ACTION: Final rule.

SUMMARY: This rulemaking finalizes long-term school nutrition requirements based on the goals of the *Dietary Guidelines for Americans, 2020–2025,* robust stakeholder input, and lessons learned from prior rulemakings. Notably, this rulemaking gradually phases in added sugars limits for the school lunch and breakfast programs and in the Child and Adult Care Food Program, updates total sugars limits for breakfast cereals and yogurt to added sugars limits. As a reflection of feedback from stakeholders, this final rule implements a single sodium reduction in the school lunch and breakfast programs and commits to studying the potential associations between sodium reduction and student participation in the school lunch and breakfast programs. This rulemaking addresses a variety of other school meal requirements, including establishing long-term milk and whole grain requirements. Finally, this rule includes provisions that strengthen Buy American requirements. While this rulemaking takes effect school year 2024–2025, the Department is gradually phasing in required changes over time. Program operators are not required to make any changes to their menus as a result of this rulemaking until school year 2025–2026 at the earliest.

DATES: This final rule is effective July 1, 2024. Phased-in implementation dates for required changes are addressed in the **SUPPLEMENTARY INFORMATION** section of this rule.

ADDRESSES: *Docket:* Go to the Federal eRulemaking Portal at *https://www.regulations.gov* for access to the rulemaking docket, including any background documents.

FOR FURTHER INFORMATION CONTACT: Andrea Farmer, Director, School Meals Policy Division—4th floor, Food and Nutrition Service, 1320 Braddock Place, Alexandria, VA 22314; telephone: 703–305–2054.

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Table of Abbreviations

AFHK—Action for Healthy Kids
ADA—Americans with Disabilities Act
CACFP—Child and Adult Care Food Program
CNA—Child Nutrition Act
CN–OPS—Child Nutrition Operations Study
FAR—Federal Acquisitions Regulations
FDA—U.S. Food and Drug Administration
FNS—Food and Nutrition Service
HEI—Healthy Eating Index
HMI—Healthy Meals Incentives
ICN—Institute of Child Nutrition
NASEM—National Academies of Science, Engineering, and Medicine
NSLA—National School Lunch Act
NSLP—National School Lunch Program
SBP—School Breakfast Program
SFSP—Summer Food Service Program
SNAP—Supplemental Nutrition Assistance Program
SMP—Special Milk Program
SY—School Year
USDA—U.S. Department of Agriculture

Section 1: Background

On February 7, 2023, the U.S. Department of Agriculture (USDA) published *Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans* [1] (''2023 proposed rule'') to update the school meal pattern requirements based on a comprehensive review of the *Dietary Guidelines for Americans, 2020–2025* (Dietary Guidelines), robust stakeholder input on the school meal patterns, and lessons learned from prior rulemakings.[2] USDA is finalizing that proposed rule, with some modifications based on public input. This final rule is the next step in an ongoing effort toward healthier school meals that USDA and the broader school meals community have been partnering on for well over a decade.

Separately, on January 23, 2020, USDA published a proposed rule, *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs* (''the 2020 proposed rule'').[3] As noted in the 2023 proposed meal pattern rule, based on public comment, USDA is finalizing certain meal pattern provisions from the 2020 proposed rule in this final rule.[4] The following sections address rule provisions that were included in the 2020 proposed rule:

- Section 6: Meats/Meat Alternates at Breakfast
- Section 12: Beans, Peas, and Lentils at Lunch
- Section 14: Meal Modifications
- Section 15: Clarification on Potable Water Requirements
- Section 16: Synthetic *Trans* Fats

Through this rulemaking, USDA is exercising broad discretion authorized by Congress to administer the school

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[1] *Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans* (88 FR 8050, February 7, 2023). Available at: *https://www.federalregister.gov/documents/2023/02/07/2023-02102/child-nutrition-programs-revisions-to-meal-patterns-consistent-with-the-2020-dietary-guidelines-for.*

[2] U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[3] *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs* (85 FR 4094, January 23, 2020). Available at: *https://www.federalregister.gov/documents/2020/01/23/2020-00926/simplifying-meal-service-and-monitoring-requirements-in-the-national-school-lunch-and-school.*

[4] Other provisions of the 2020 proposed rule related to program monitoring were finalized in *Child Nutrition Program Integrity* (88 FR 57792, August 23, 2023). Available at: *https://www.federalregister.gov/documents/2023/08/23/2023-17992/child-nutrition-program-integrity.*

lunch and breakfast programs and ensure meal patterns ''are consistent with the goals of the most recent'' *Dietary Guidelines.*[5] See 42 U.S.C. 1752, 1758(a)(1)(B), 1758(k)(1)(B), 1758(f)(1)(A), and 1758(a)(4)(B). Consistent with its historical position, USDA interprets ''consistent with the goals of'' the *Dietary Guidelines* to be a broad, deferential phrase that requires consistency with the ultimate objectives of *Dietary Guidelines* but not necessarily the adoption of the specific consumption requirements or specific quantitative recommendations in the *Dietary Guidelines.* Accordingly, through this final rule, USDA is working to ensure an appropriate degree of consistency between school meal patterns and the *Dietary Guidelines* by considering operational feasibility and the ongoing recovery from the impacts of COVID–19, while also ensuring schools can plan appealing meals that encourage consumption and intake of key nutrients that are essential for children's growth and development.

This rulemaking updates current meal pattern requirements, which were most recently updated in SY 2022–2023 through the final rule, *Child Nutrition Programs: Transitional Standards for Milk, Whole Grains, and Sodium* (''the transitional standards rule''). USDA intended for the transitional standards rule to serve as a bridge, providing immediate relief as schools returned to traditional school meal service following extended use of COVID–19 meal pattern flexibilities. A detailed overview of the transitional standards rule, USDA's stakeholder engagement campaign, and other factors considered in the proposed rule development can be found in the 2023 proposed rule preamble.[6] With this rule, USDA intends to further align school meal nutrition requirements with the goals of the *Dietary Guidelines, 2020–2025.* This effort is described in greater detail, as informed by public comments on the proposed rule, throughout this preamble.

Phased-In Implementation

For most children, school meals are the healthiest meals they consume in a day,[7] and USDA research has found that school meals contribute positively to the diet quality of all participating students.[8] However, there is still room for improvement. For example, the *Dietary Guidelines for Americans, 2020–2025* indicates that about 70 to 80 percent of school children exceed the recommended daily limit of added sugars.[9] Research suggests that among adolescents, certain poor dietary behaviors—such as skipping breakfast and infrequent consumption of fruits and vegetables—worsened during the COVID–19 pandemic.[10] Updating the school meal patterns is one strategy to increase healthy dietary behaviors among school children for the long term. Many children rely on school meals for more than half of their food each school day, so even small nutritional improvements can make a difference.[11]

At the same time, USDA understands that changes to the meal patterns need to be gradual and predictable to give child nutrition program operators and children time to adapt, and to allow industry time to develop new products. This final rule responds to stakeholder input by building in plenty of time for State agencies, school nutrition professionals, and other program operators to successfully implement the required changes. For example, as discussed in *Section 2: Added Sugars,* USDA is gradually phasing in the product-based and weekly limits for added sugars in the school meal programs. As discussed in *Section 5: Sodium,* this final rule gives schools and manufacturers even more time to reduce sodium compared to the proposed rule. As recommended by numerous stakeholders, it also commits to examining sodium reduction in school meals and assessing the potential impact of these reductions on program operations and student participation. This rulemaking does not make changes to the current whole grain requirements for school meals and continues to allow schools to offer flavored milk, subject to new added sugars limits, to all K–12 students. Although USDA considered alternatives for the whole grain and flavored milk requirements, based on stakeholder input, USDA determined that maintaining the current requirements would best position schools and students for success.

Other changes in this rule simplify program regulations and provide child nutrition program operators more flexibility to successfully plan and prepare meals. These changes will be implemented on a quicker timeline, as they provide optional administrative or operational flexibilities but do not require operators to change menus or operations. For example, this rulemaking makes it easier for schools to offer meats/meat alternates at breakfast by removing the minimum grains requirement. It removes the limit for nut and seed crediting at breakfast, lunch, and supper in the child nutrition programs, making it easier for operators to offer vegetarian meals. This rulemaking also makes it easier for program operators to purchase local foods for the child nutrition programs by allowing ''locally grown, raised, or caught'' to be used as procurement specifications for unprocessed or minimally processed food items.

Each provision of this rule, along with its implementation date, is discussed in greater detail throughout this preamble. A chart outlining each regulatory change and its implementation date is included in *Section 21: Summary of Changes.*

[5] The *Dietary Guidelines, 2020–2025* provide four overarching recommendations: (1) Follow a healthy dietary pattern at every life stage. (2) Customize and enjoy nutrient-dense food and beverage choices to reflect personal preferences, cultural traditions, and budgetary considerations. (3) Focus on meeting food group needs with nutrient-dense foods and beverages and stay within calorie limits. (4) Limit foods and beverages higher in added sugars, saturated fat, and sodium, and limit alcoholic beverages.

[6] *Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans* (88 FR 8050, February 7, 2023). Available at: *https://www.federalregister.gov/documents/2023/02/07/2023-02102/child-nutrition-programs-revisions-to-meal-patterns-consistent-with-the-2020-dietary-guidelines-for.*

[7] Liu J, Micha R, Li Y, Mozaffarian D. *Trends in Food Sources and Diet Quality Among US Children and Adults, 2003–2018.* JAMA. April 12, 2021. Available at: *https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2778453?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=040921.*

[8] ''While USDA school meals were bigger contributors to the caloric intakes of students from less food-secure households, they contributed positively to the diet quality of all participating students . . . For both food-insecure and food-secure students, the average HEI scores for non-school foods were between 55 and 57, whereas school foods scored between 79 and 81. School foods were particularly noteworthy as sources of fruit, dairy, and whole grains.'' U.S. Department of Agriculture. USDA School Meals Support Food Security and Good Nutrition. May 3, 2021. Available at: *https://www.ers.usda.gov/amber-waves/2021/may/usda-school-meals-support-food-security-and-good-nutrition/.*

[9] See ''Percent Exceeding Limits of Added Sugars, Saturated Fat, and Sodium'' on pages 79, 82, and 85. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[10] Michael SL, Jones SE, Merlo CL, et al. *Dietary and Physical Activity Behaviors in 2021 and Changes from 2019 to 2021 Among High School Students—Youth Risk Behavior Survey, United States, 2021.* MMWR Suppl 2023;72(Suppl-1):75–83. DOI: *http://dx.doi.org/10.15585/mmwr.su7201a9.*

[11] Karen Weber Cullen, Tzu-An Chen, *The contribution of the USDA school breakfast and lunch program meals to student daily dietary intake,* Preventive Medicine Reports. March 2017. Available at: *https://www.sciencedirect.com/science/article/pii/S2211335516301516.*

USDA Support for Child Nutrition Programs

USDA is incredibly grateful for the dedication of child nutrition program operators who serve children healthy meals with kindness and care. USDA understands that some program operators continue to face high food costs and supply chain issues. The Department is committed to continuing to provide program operators with support to help them succeed.

USDA is making a $100 million [12] investment in the Healthy Meals Incentives (HMI) Initiative, which is dedicated to improving the nutritional quality of school meals through food systems transformation, school food authority recognition and technical assistance, the generation and sharing of innovative ideas and tested practices, and grants. As part of a cooperative agreement to develop and implement USDA's HMI Initiative, Action for Healthy Kids (AFHK) has awarded nearly $30 million in grants to 264 small and/or rural school food authorities across 44 States and the District of Columbia. These school food authorities will use funding to modernize their operations and provide more nutritious meals to students. Additionally, AFHK is offering Recognition Awards to celebrate and spotlight school food authorities who use innovative practices, student and community engagement activities, and other strategies to provide meals that are consistent with the *Dietary Guidelines for Americans, 2020–2025.*

USDA also provides support to schools through its annual Patrick Leahy Farm to School Grant Program. These funds support a wide range of farm to school activities designed to improve access to local foods in eligible schools from training, planning, and developing partnerships to creating new menu items, expanding local supply chains, offering taste tests to children, purchasing equipment, planting school gardens, and organizing field trips to agricultural operations.

Finally, USDA will continue to provide technical assistance to State agencies, schools, and other program operators to ensure they have the guidance and support they need to successfully implement this rule. USDA will release updated policy guidance and will host a series of webinars to provide a detailed overview of this rulemaking. In addition, communications resources related to this rulemaking are available on the USDA Food and Nutrition Service website.[13]

Federal Strategies To Reduce Sodium and Added Sugars in the Food Supply

USDA recognizes that schools and child and adult care institutions are part of the broader food environment. In order to successfully make improvements to the child nutrition program meal patterns, stakeholders have emphasized that similar improvements must be made to the broader food environment. For example, stakeholders have suggested that children are more likely to accept lower sodium school meals if the meals they consume outside of school are lower in sodium. Research has shown that consumer preferences and expectations for salty tastes can adjust as dietary intake changes.[14]

To that end, other Federal agencies are supporting efforts to improve dietary behaviors among the U.S. population. For example, the Food and Drug Administration (FDA) is taking an iterative approach to gradually reduce sodium in the U.S. food supply that includes establishing voluntary sodium targets for industry, monitoring and evaluating progress, and engaging with stakeholders. The FDA is especially encouraging adoption of the voluntary targets by food manufacturers whose products make up a significant proportion of national sales in one or more food categories and restaurant chains that are national and regional in scope.[15] These efforts are discussed in greater detail in *Section 5: Sodium.*

The FDA is also committed to reducing added sugars in the U.S. food supply and in individual's diets. In 2016, FDA issued a final rule [16] updating the Nutrition Facts label, which requires, in part, a declaration of the added sugars in a serving of a product and the percent Daily Value (% DV) for added sugars. Manufacturers with $10 million or more in annual sales were required to update their labels by January 1, 2020; manufacturers with less than $10 million in annual food sales were required to update their labels by January 1, 2021.

Additionally, following the 2022 White House Conference on Hunger, Nutrition, and Health, the White House released a National Strategy [17] that highlighted that the intake of added sugars for most Americans is higher than what is recommended by the *Dietary Guidelines* and included several FDA initiatives to accelerate efforts to empower individuals with information and create a healthier food supply. In November 2023, FDA, in collaboration with USDA and the U.S. Department of Health and Human Services, held a virtual public meeting and listening sessions entitled, ''Strategies to Reduce Added Sugars Consumption in the United States.'' This public meeting was a commitment made in the National Strategy and connected Federal agencies, communities, and private industry to explore different tactics for reducing added sugars in the U.S. food supply and in individuals diets. Presentations during this meeting provided a background on added sugars, discussed strategies for reducing added sugars by other countries, and highlighted approaches to increase engagement and education on added sugars. This meeting was accompanied by two days of facilitated listening sessions where participants offered feedback and recommendations for next steps on proposed strategies.

The U.S. Department of Health and Human Service's Office of Disease Prevention and Health Promotion's Healthy People 2030 initiative also includes a focus on reducing consumption of added sugars and sodium in individuals aged 2 years and older.[18] As detailed in *Section 2: Added Sugars* and *Section 5: Sodium,* the *Dietary Guidelines,* which are updated and jointly released by the USDA and the Department of Health and Human Services, recommend limiting foods and beverages higher in added sugars and sodium. Specifically, the *Dietary Guidelines* recommend that added sugars make up less than 10 percent of calories per day for individuals age 2 years and older. The *Dietary Guidelines* also recommend consuming less than 2,300 milligrams of sodium per day—

[12] U.S. Department of Agriculture. *USDA Launches $100 Million Healthy School Meals Initiative, Announces Grant Program for Rural Schools.* September 23, 2022. Available at: *https://www.fns.usda.gov/news-item/fns-0010.22.*

[13] U.S. Department of Agriculture Food and Nutrition Service. Available at: *https://www.fns.usda.gov/.*

[14] The Food and Drug Administration. *Memo: Salt Taste Preference and Sodium Alternatives.* 2016. Available at: *https://www.regulations.gov/document/FDA-2014-D-0055-0152.*

[15] The Food and Drug Administration. *Sodium Reduction.* Available at: *www.fda.gov/SodiumReduction.*

[16] *Food Labeling: Revision of the Nutrition and Supplement Facts Labels* (81 FR 33742, May 27, 2016). Available at: *https://www.federalregister.gov/documents/2016/05/27/2016-11867/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels.*

[17] *Biden-Harris Administration National Strategy on Hunger, Nutrition, and Health,* September 2022. Available at: *https://www.whitehouse.gov/wp-content/uploads/2022/09/White-House-National-Strategy-on-Hunger-Nutrition-and-Health-FINAL.pdf.*

[18] U.S. Department of Health and Human Service's Office of Disease Prevention and Health Promotion. *Health People 2030.* Available at: *https://health.gov/healthypeople.*

and even less for children younger than age 14.[19]

In addition, the historic White House Conference on Hunger, Nutrition, and Health inspired actions to support a whole of society approach to improving nutrition and health. Over $8 billion in public- and private-sector commitments were made to improve food and nutrition security, promote healthy choices, and improve physical activity. USDA expects that, when carried through, the commitments made as part of the White House Conference will support improvements to the broader food environment, thereby supporting efforts to improve nutrition in school and child and adult care settings.

For example, the private sector made the following commitments in fall 2022:[20]

- Danone North America committed to prioritizing new reduced-sugar, low-sugar, and no-added-sugar options in its children's products and pledged that 95 percent of these products will contain less than 10 grams of total sugar per 100 grams of food product by 2030.
- The National Restaurant Association committed to expand its Kids Live Well program to 45,000 additional restaurants and food service locations. Kids Live Well is a voluntary initiative to help restaurants offer healthier meal options for children that meet added sugars, sodium, and calories thresholds established by the latest nutrition science.
- Tyson Foods committed to reformulating and improving the nutritional value of its prepared foods portfolio, with a focus on reducing sodium.
- Walgreens committed to increasing the selection of fresh food in its stores by 20 percent, including a greater variety of fresh produce, and implementing new solutions to highlight healthy ingredients and further reduce harmful ones.

The strides made in school nutrition over the past decade demonstrate that healthier school meals are possible when everyone who plays a part—food industry, school nutrition professionals, USDA, and others—work together toward the common goal of improving children's health. This includes USDA continuing to do its part to ensure schools and other child nutrition program operators have the support they need to successfully implement this rulemaking. USDA recognizes that child nutrition program operators have a challenging job and appreciates their tireless dedication to the children in their care. USDA is continually looking for ways to better support program operators who provide our Nation's children with nutritious meals and snacks. The Department welcomes input from stakeholders on what additional guidance and support State agencies, schools, and other program operators will need to successfully implement this rulemaking.

Overview of Public Comments and USDA Response

USDA appreciates public interest in the proposed rule. USDA initially provided a 60-day public comment period (February 7, 2023, through April 10, 2023). Based on stakeholder requests[21] for additional time to review the rule and assess its impact, USDA extended the public comment period by 30 days. During the 90-day comment period (February 7, 2023, through May 10, 2023), USDA received more than 136,000 comments. Of the total, about 125,000 were form letters from 46 form letter campaigns, and about 5,000 were unique submissions. An additional 6,400 were duplicate or non-germane submissions. USDA received public comments from State agencies, school nutrition professionals, advocacy groups, industry respondents, professional associations, school districts, CACFP sponsoring organizations, dietitians, and individuals, including students, parents and guardians, grandparents, and other caregivers. Overall, over 23,000 respondents, including over 700 unique submissions, supported the proposed rule in its entirety. Over 6,000 respondents, including over 1,000 unique submissions, opposed the proposed rule in its entirety.

Many school nutrition professionals supported provisions of the rule that provide menu planners more flexibility, and provisions that maintain requirements that menu planners have already successfully implemented. For example, a national organization representing tens of thousands of school nutrition professionals offered support for the following provisions that USDA ultimately finalized or committed to in this final rule:

- Maintaining the current requirement allowing all schools to offer fat-free and low-fat milk, flavored and unflavored, to K–12 students.
- Maintaining the current requirement that at least 80 percent of weekly grains offered in school meals are whole grain-rich.
- Committing to conducting a study on potential associations between sodium reduction and student participation.
- Allowing schools more flexibility to offer meats/meat alternates in place of grains at breakfast.
- Allowing tribally operated schools, schools operated by the Bureau of Indian Education, and schools serving primarily American Indian or Alaska Native children to serve vegetables to meet the grains requirement.
- Codifying in regulation that traditional Indigenous foods may be served in reimbursable school meals.
- Allowing nuts and seeds to credit for the full meats/meat alternates component in all child nutrition programs and meals.
- Exempting bean dip from the total fat standard in Smart Snacks regulations.
- Allowing State agencies discretion to make exceptions to the degree requirement for school nutrition directors hired in medium and large districts.

USDA worked in collaboration with a data analysis company to code and analyze the public comments using a commercial, web-based software product. The Summary of Public Comments report is available under the Browse Documents tab in docket FNS–2022–0043. All comments are posted online at *https://www.regulations.gov*.[22]

The following paragraphs describe general themes from the public comments. Many respondents also provided feedback on the specific proposals. This specific feedback is included in the subsequent sections of the preamble, as applicable.

Public Comments: Dedication of School Nutrition Professionals

Several respondents expressed appreciation for the efforts of school

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[19] U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[20] The White House. *FACT SHEET: The Biden-Harris Administration Announces More Than $8 Billion in New Commitments as Part of Call to Action for White House Conference on Hunger, Nutrition, and Health.* September 28, 2022. Available at: *https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/28/fact-sheet-the-biden-harris-administration-announces-more-than-8-billion-in-new-commitments-as-part-of-call-to-action-for-white-house-conference-on-hunger-nutrition-and-health/.*

[21] USDA received requests to extend the proposed rule comment period from the American Commodity Distribution Association and the Urban School Food Alliance and from Senator Boozman and Representative Foxx. The letters are available at: *https://www.regulations.gov/comment/FNS-2022-0043-2915* and *https://www.regulations.gov/comment/FNS-2022-0043-12391.*

[22] See: Docket FNS–2022–0043. *Child Nutrition Programs: Revisions to Meal Patterns Consistent with the 2020 Dietary Guidelines* for Americans. Available at: *https://www.regulations.gov/docket/FNS-2022-0043.*

nutrition professionals. An advocacy group noted that school nutrition professionals provide balanced, nutritious meals to children, promoting academic success and supporting the entire school community's efforts to enrich the lives of students. Another respondent emphasized that school nutrition professionals are deeply caring people who are invested in children's health and wellbeing. An advocacy group agreed, noting that school nutrition professionals go ''above and beyond'' to keep children nourished; as an example, one respondent described efforts at their school to create menus that are nutritionally balanced, flavorful, and cater to student preferences. When considering options for the final rule, one dietitian urged USDA to listen to the school nutrition professionals who ''do the work'' every day by providing meals to children.

Respondents also commended successful implementation of school meal pattern improvements established under the Healthy Hunger-Free Kids Act. For example, one advocacy group reported that the updated nutrition standards enhanced the nutritional quality of meals and increased student participation. Another advocacy group noted that school nutrition professionals have worked tirelessly to reduce sodium, calories, and fat; to introduce students to whole grain foods; and to increase fruits and vegetables in school meals. Another respondent was proud of efforts made by school nutrition professionals thus far, emphasizing that school meals are the healthiest meals that most students receive each day. A joint response from several elected officials stated that strong school nutrition requirements are ''one of the most important public health achievements in a generation.'' This response also noted that school cafeterias across the country are ''leading the way to serving healthy, delicious, and culturally relevant foods'' to children.

USDA Response: USDA appreciates and agrees with public comments that cited the important work of school nutrition professionals. The Department values the vital work that school nutrition professionals and other child nutrition program operators do every day to keep our Nation's children nourished and healthy. In this final rule, USDA incorporated feedback from individuals with firsthand experience operating the child nutrition programs. For example, this feedback is reflected in *Section 3A: Flavored Milk,* where USDA considered operational challenges that respondents raised in response to the proposal that would have applied different milk requirements across grade levels. USDA also considered child nutrition program operator feedback when determining implementation dates for the provisions of this rule, including in *Section 5: Sodium.*

Public Comments: Nutrition and Health

Over 11,000 respondents cited the need for strong nutrition requirements. For example, an advocacy group suggested that aligning the school meal nutrition requirements with the goals of the *Dietary Guidelines* ''sets our students up for lifelong success.'' Other respondents emphasized the importance of strong nutrition requirements to children's academic achievement and overall wellbeing. A form letter campaign stated that strong nutrition requirements can help to address health disparities and improve nutrition equity. Another respondent agreed, maintaining that the child nutrition programs are important tools in addressing health disparities and advancing nutrition security among communities of color. An advocacy group emphasized the importance of nutritious meals in schools and child care settings, noting that these meals often represent a significant portion of children's food intake. This respondent argued that continued improvement in the meal patterns could reduce children's risk for diet-related diseases. Another advocacy group agreed, stating that the school meal programs provide more than half of some students' calories and are often the healthiest sources of food for school children. An industry respondent described school meals as a nutrition ''success story'' and stated that good nutrition is essential to children's growth, learning, and development. An advocacy group emphasized that the proposed evidence-based standards will ''make school meals even healthier.''

Some respondents, including a form letter campaign, encouraged USDA to go further; for example, by implementing sodium reductions beyond those proposed in the rule. Respondents also encouraged USDA to strengthen the whole grains proposal, by requiring all grains offered in school meals to be whole grain-rich.[23] Others urged USDA to adopt a swifter timeline for implementation; for example, one advocacy group recommended that USDA ''implement the strongest nutrition standards on the fastest timeline possible.'' A few respondents, including an advocacy group, encouraged USDA to update the Summer Food Service Program meal patterns to more closely align with the goals of the *Dietary Guidelines,* including by serving more fruits, vegetables, and whole grains. These respondents emphasized the importance of providing children with healthy, high-quality meals year-round.

USDA Response: USDA appreciates public comments that discussed the importance of strong, science-based nutrition requirements and the positive impact on children's health. The Department agrees with respondents that asserted that meals served in child nutrition programs contribute to healthy dietary patterns and improved dietary outcomes. In this final rule, USDA has considered these important factors, along with the importance of ensuring that the meal patterns are practical and achievable for schools. For example, this final rule will continue to reduce sodium in school meals, while taking a gradual approach to implementation to give schools, students, and the food industry time to adapt to the changes. The Department also acknowledges comments that requested more whole grains in school meals; instead, this final rule continues the requirement that the majority of grains offered be whole grain-rich, while providing schools some flexibility to offer other grains. USDA remains committed to its statutory obligation to establish nutrition requirements for school meals that are consistent with the goals of the *Dietary Guidelines* in efforts to improve the nutritional quality of program meals serve to the Nation's children. While USDA appreciates public comments regarding the Summer Food Service Program, extensive updates to the Summer Food Service Program meal pattern are outside the scope of this rulemaking.

Public Comments: Student Participation

Many respondents expressed concern that the proposed changes could negatively impact student participation and consumption of meals. Some respondents suggested that, if the proposed rule was finalized, students would choose to consume a lunch from home or elsewhere instead of participating in the school meal programs. These respondents argued that this would result in non-participating students consuming a meal that is less nutritious than school meals offered under the current requirements. Other respondents maintained that school nutrition programs would suffer if student participation declines.

[23] To meet USDA's whole grain-rich criteria, a product must contain at least 50 percent whole grains, and the remaining grain content of the product must be enriched.

Respondents also raised concerns that the proposed limits for added sugars and sodium could make school meals less appealing to students. For example, an industry respondent asserted that the proposed added sugars and sodium limits would negatively impact the taste of foods that children enjoy. However, an advocacy group noted that students and families support improving the nutritional quality of school meals, citing the role school meals play in student academic achievement and health. A joint comment from several elected officials suggested that children enjoy healthier school meals, and that the amount of food wasted in schools has not changed since the nutrition requirements were updated in 2012.

USDA Response: Although USDA does not expect that updated nutrition requirements would negatively impact student participation in the school meal programs,[24] the Department acknowledges respondent concerns about the importance of maintaining student participation. The Department strives to advance nutrition security while also ensuring that school meals are appealing and enjoyable to students. The changes finalized in this rule thoughtfully consider both concerns by gradually phasing in required changes, such as the added sugars limits and sodium reduction. This phased-in approach will give program operators and children time to implement and adapt to the changes. Additionally, as noted in *Section 5: Sodium,* as part of this rulemaking, USDA has committed to conducting a study on potential associations between sodium reduction and student participation.

Public Comments: Product Availability

Numerous respondents argued that the proposed meal pattern changes would force vendors out of the child nutrition market, making it more difficult for schools to find products needed to comply with USDA meal requirements. Several respondents expressed concern about increased costs, procurement challenges, and reduced options for school breakfast under the proposed rule. A joint comment from a group of elected officials agreed, arguing that the proposed changes could lead to ''increased complexity'' in school food purchasing, decreasing the number of options available to schools and forcing schools to compete for a limited supply of specialized foods. Respondents also expressed concern about ongoing supply chain issues and food-price inflation. One industry respondent suggested that rather than implementing new requirements, USDA should maintain the current requirements and teach students how to make healthy choices through nutrition education.

A school food service director stated that procurement would be a challenge under the proposed rule and suggested that it takes ''a few years'' for manufacturers to catch up with new regulations. This respondent also suggested manufacturers do not dedicate as much space to school-specific items in their warehouses, which impacts product availability. An advocacy group argued that it takes industry three to five years, and a significant amount of money, to reformulate ''any given product.'' This respondent also pointed out that the K–12 sector tends to be the least lucrative market for the food industry. Another advocacy group agreed, arguing that the cost of producing and stocking specialized K–12 menu items is ''too high,'' and the demand for these products on the commercial market is ''too low.'' A State agency also expressed concern about proposed implementation timeframes, noting that manufacturer and distributor capabilities have not yet returned to pre-pandemic levels. A form letter campaign encouraged USDA to work with the food industry to ensure product availability, particularly for lower sodium products. One respondent stated that school kitchens are understaffed, and school nutrition professionals rely heavily on food manufacturers to provide meals for students. A school district raised concerns about increased pressure for scratch cooking; while this respondent acknowledged they would ''love for more scratch options to be served,'' they did not view this as a realistic option given current staffing challenges.

Respondents also cited the importance of supporting local farmers and producers and helping children learn about where their food comes from. One advocacy group cited the benefits of local food systems, which they argued stimulate local economies and provide reliable product availability during supply chain disruptions. Respondents encouraged USDA to consider equity and inclusion in establishing regulatory requirements; for example, an advocacy group suggested that USDA consider the broader food system and supply chains, including farm workers and other people employed in the food system. This respondent supported efforts to create a fair and sustainable agricultural economy. Another respondent advocated for policies that encourage child nutrition operators to source from socially disadvantaged producers. An advocacy group suggested that purchases made through the child nutrition programs should prioritize respect, equity, and inclusion across the food supply chain. This respondent asserted that supporting local and regional foods systems, including by strengthening support for locally owned agricultural and food processing operations, may create more diversified and resilient supply chains. While offering support for the proposed geographic preference provision, some respondents suggested operators would need more financial support to purchase local foods, especially in the CACFP.

USDA Response: USDA recognizes that many stakeholders expressed concerns about product availability and understands the impact of product availability and cost on the operation of the child nutrition programs, as well as challenges posed by staffing constraints. At the same time, the Department appreciates public comments that cited continuous industry efforts to develop nutritious foods for child nutrition programs, and many of the provisions of this rule incorporate input from industry respondents. For example, USDA agrees with public comments that stated there are products already available that meet the product-based limits for added sugars, which aligns with data collected by USDA.[25] USDA expects that ongoing industry efforts to develop nutritious foods will support product availability for child nutrition programs. USDA considered each of these factors when developing this final rule; for example, by moving forward with important changes while providing ample time for implementation. As detailed in *Section 2: Added Sugars* and *Section 5: Sodium,* USDA is providing about three years for implementation of the weekly added sugars limit and sodium reduction in response to public comments that suggested it takes about

[24] According to USDA research conducted following implementation of the 2012 final rule, ''There was a positive and statistically significant association between student participation in the NSLP and the nutritional quality of NSLP lunches, as measured by the HEI–2010. Rates of student participation were significantly higher in schools with HEI–2010 scores in the third and highest quartiles (that is, the top half) of the distribution compared to the lowest quartile.'' See page 38. U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, *School Nutrition and Meal Cost Study Summary of Findings.* Available at: *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

[25] U.S. Department of Agriculture Food and Nutrition Service, Office of Policy Support data collection of nutrition label information from major cereal and yogurt manufacturer K–12 and food service catalogs. Data were collected on 191 total cereal products and 110 total yogurt products. See *Regulatory Impact Analysis.*

three years for manufacturers to reformulate products.

Public Comments: Financial Challenges

Many respondents emphasized the importance of investing in school nutrition programs financially. For example, respondents cited concerns about food cost, inflation, meal debt, and supply chain challenges. An advocacy group noted that many stakeholder concerns about the proposed rule are related to resource constraints. This respondent suggested financial pressures undermine the program's goals. Another advocacy group expressed appreciation for the HMI Initiative to support small and rural schools, and supported USDA's plans to provide technical assistance, share best practices, and encourage collaboration with the food industry. One State agency supported increased meal reimbursements, investments in kitchen equipment and infrastructure, and more training opportunities. Another respondent agreed, stating that the program reimbursement rates are ''simply not enough'' to cover food and labor costs, while others suggested schools would need extra supplies or funding to implement the updated meal patterns.

USDA Response: USDA acknowledges public comments from program operators that emphasized that financial sustainability is critical for successful child nutrition program operations. USDA understands that schools and other program operators need support to succeed in implementing updated requirements. As part of this effort, USDA continues to provide high-quality, cost-effective foods through USDA Foods and various grant-funded opportunities. USDA has also provided significant additional financial resources to address specific needs, such as the $3.8 billion in supply chain assistance funds provided in fiscal years 2021, 2022, and 2023 to address product shortages and price increases experienced after the pandemic.[26] While increasing the Federal reimbursement rates is beyond USDA's authority and would require Congressional action, the Department remains committed to providing support to child nutrition program operators.

Public Comments: Practical and Durable Standards

Numerous respondents discussed the need for attainable nutrition requirements. Some respondents asserted that certain proposals are impractical, or that the school nutrition programs cannot move beyond current meal pattern requirements. A handful of respondents suggested maintaining the transitional standards as the permanent school nutrition requirements, suggesting the transitional standards represent a ''middle ground.'' Many respondents recommended that USDA study the impact of the current meal pattern requirements prior to making any further changes.

Respondents cited concerns about the broader food environment, arguing that schools are not solely to blame for children's excess consumption of added sugars and sodium. One respondent pointed out that when considering the full calendar year, many children consume more meals outside of school than in school. This respondent agreed that school meals contribute to children's health but emphasized the importance of improving food choices in other settings. Another respondent recommended that USDA focus on the ''food system as a whole'' and engage in a public health initiative to reduce added sugars and sodium in grocery store foods.

Regarding implementation dates, one dietitian recommended that USDA delay implementation of any new requirements until 2027. This respondent suggested that additional time would allow school nutrition directors to educate staff on upcoming changes and allow industry to develop new food products. A school district agreed, describing the implementation timeframes for added sugars and sodium as ''a little rushed.'' Several respondents specifically recommended delaying implementation of any provisions that would impact CACFP. These respondents raised concerns about a lack of CACFP stakeholder engagement and the importance of providing the CACFP community ample time to prepare for the changes.

Other respondents felt the proposed implementation timeframes were adequate. An advocacy group argued that the food industry could adapt to incremental implementation, which they noted was built into the proposed rule. A State agency agreed, suggesting that the proposed phased-in implementation would provide the opportunity to revise menu offerings, manage inventory, and offer technical assistance. A second State agency affirmed that the proposed implementation dates provide adequate lead time; however, this respondent also noted that timely publication of the final rule would be ''critical'' to allow for product reformulation, procurement, and menu planning. An advocacy group described USDA's phased-in approach as ''reasonable,'' stating that the proposed rule would improve school meals ''in a practical way.'' This respondent suggested that the proposed sodium limits, for example, would give schools time to plan, source, and test meals that meet the proposed limits. Another advocacy group that described the rule as ''scientifically sound and practical'' argued that the proposed rule would give schools time to implement the new requirements while also prioritizing children's health. A joint response from several elected officials maintained that the proposed rule included a ''common-sense incremental approach to implementation, making it feasible for schools and the food industry to have success.'' An advocacy group supported the phased-in implementation for sodium but noted it would be ''incumbent'' upon manufacturers to reformulate products to ensure the limits would be effective.

USDA Response: USDA recognizes that meaningful improvement in the nutritional quality of school meals is best achieved by nutrition requirements that are both ambitious and feasible. The Department also acknowledges public comments that suggested child nutrition program operators need time to successfully implement new requirements, and that feedback is reflected in this final rule. For example, this final rule gradually phases in certain requirements, such as the added sugars limits, to provide program operators time to make menu changes. Additionally, this final rule includes several provisions that provide menu planners with more options to create healthy meals; for example, by making it easier for schools to offer meats/meat alternates at breakfast (see *Section 6: Meats/Meat Alternates at Breakfast*). By incorporating valuable feedback from stakeholders into this final rule, the Department continues to put children's health at the forefront while also ensuring that the program requirements are achievable and set up schools and child and adult care institutions for success.

Public Comments: Other School Nutrition Comments

Some respondents recommended other meal pattern requirements or offered suggestions for USDA to consider. One respondent suggested adding a requirement for ''healthy fats'' in school meals, while another recommended establishing a minimum fiber standard. Another respondent encouraged USDA to provide recipes, training, and nutrition education to

[26] U.S. Department of Agriculture. *FNS Actions to Address COVID–19 Related Supply Chain Disruptions.* Available at: *https://www.fns.usda.gov/supply-chain.*

encourage schools to offer more seafood in school meals. Numerous respondents recommended that USDA restrict or limit the use of artificial or non-nutritive sweeteners in school meals. Others encouraged USDA to provide incentives for fresh fruits and vegetables, rather than restricting certain foods. A form letter campaign and numerous other respondents supported expanding access to vegetarian, vegan, or plant-based school meals. One respondent suggested implementing a plant-based protein requirement in school meals, while another encouraged schools to adopt a ''meat-free day.'' A few respondents noted that Black, Indigenous, and other People of Color (BIPOC) are three times as likely to follow a plant-based diet than white people and suggested that providing more plant-based meals would support equity in the school meal programs. Respondents also cited the importance of meeting cultural food preferences. For example, one advocacy group noted that food is ''socially and emotionally nurturing'' and emphasized the importance of meeting nutrition requirements as well as food preferences. Another advocacy group cited a research brief that suggested that ''enhancing the palatability and cultural appropriateness of meals'' offered would improve meal consumption.

A few respondents, particularly those who operate multiple child nutrition programs, supported stronger alignment of the nutrition requirements for all program meal patterns. A student encouraged USDA to seek student perspectives on meal pattern requirements. This respondent suggested students who participate in the school meal programs would provide important perspectives on food waste, cultural relevance, and nutrition. Although outside the scope of this rulemaking, several respondents supported expanding access to free school meals and providing students with more time to eat school lunch. For example, one respondent noted that studies have shown that even modest increases in time to eat result in ''improved consumption, particularly of fruit and vegetables, and reduced food waste.''

USDA Response: USDA appreciates public comments that provided additional feedback and suggestions for new requirements beyond what was proposed. Certain suggestions, such as adjusting the eligibility requirements for free meals or providing more time for children to eat their meals, are beyond USDA's authority. While USDA does not have authority to regulate the length of school meal periods, USDA encourages schools to provide children adequate seat time to consume their meals. USDA acknowledges public comments encouraging more plant-based meals as a strategy to support equity in school meals. Meal pattern requirements are established to provide the foundation of well-balanced meals, and USDA encourages program operators to develop menus that meet the needs of their diverse communities. This rulemaking provides more opportunities for schools to offer plant-based meals. In response to requests to streamline program requirements, USDA has endeavored to better align child nutrition program requirements in this rulemaking; for example, by aligning nut and seed crediting across all child nutrition programs and meals (see *Section 11: Nuts and Seeds*). While other suggestions outside the scope of this rulemaking, such as developing requirements for ''healthy fats'' and artificial sweeteners, are not included in the final rule, the Department remains committed to providing the technical assistance needed to enable schools to serve diverse, culturally diverse meals to meet the unique needs and preferences of their students.

Public Comments: Child and Adult Care Food Program

Although the proposed rule primarily focused on revisions to the school meal patterns, the following proposals applied to CACFP:

• *Added Sugars:* USDA proposed updating the current CACFP *total* sugars limits for breakfast cereals and yogurt to *added* sugars limits, consistent with the proposed limits for breakfast cereals and yogurt in the school meal programs.

• *Whole grains definition:* USDA proposed adding a definition of ''whole grain-rich'' to CACFP regulations, consistent with the definition USDA proposed adding in school meal regulations.

• *Menu Planning Options for American Indian and Alaska Native Students:* USDA proposed to allow CACFP institutions and facilities serving primarily American Indian or Alaska Native children to substitute vegetables for grains. This proposal also applied to NSLP, SBP, and SFSP.

• *Nuts and Seeds:* USDA proposed to allow nuts and seeds to credit for the full meats/meat alternates component in all child nutrition program meals and snacks. This proposal applied to NSLP, SBP, SFSP, and CACFP.

• *Geographic Preference:* USDA proposed to expand geographic preference options by allowing ''locally grown, raised, or caught'' as procurement specifications for unprocessed or minimally processed food items in the child nutrition programs. This proposal applied to NSLP, SBP, SFSP, and CACFP.

• *Miscellaneous Changes:* USDA proposed to change the name of the ''meats/meat alternates'' meal component to ''protein sources'' in CACFP, consistent with the proposed change in NSLP and SBP. USDA also proposed a few other minor terminology changes and meal pattern table revisions that impact CACFP.

• *Proposals from Prior USDA Rulemaking:* USDA signaled its intent to finalize a prior proposal that would update meal modification regulations for disability and non-disability reasons, impacting NSLP, SBP, and CACFP. USDA signaled its intent to finalize a prior proposal regarding a technical correction for nutrient requirements for fluid milk substitutes, impacting NSLP, SMP, SBP, and CACFP.

With the exception of the proposal to change the name of the ''meats/meat alternates'' meal component to ''protein sources'' in CACFP, which is not finalized, all of the proposed changes to CACFP are finalized in this rulemaking.

USDA received over 90 comments from CACFP sponsoring organizations. USDA also received comments from advocacy groups representing the CACFP community, and hundreds of form letters from individuals who are a part of the CACFP community. An advocacy group recommended that USDA engage CACFP stakeholders before finalizing and implementing the rule. This respondent argued such engagement is necessary to understand the rule's impacts on CACFP, including costs, product availability, and nutritional quality. Another advocacy group emphasized the importance of supporting efforts to stabilize the CACFP workforce. This respondent recommended delaying implementation to ensure that the CACFP community has time to prepare for implementation and provide input on the proposed changes.

Specific feedback from the CACFP community is detailed in the relevant sections throughout this preamble. At a high level, concerns raised by the CACFP community include:

• Potential impact on training, technical assistance, and resource development, especially related to the proposed terminology change for the meats/meat alternates component.

• Potential costs associated with updating websites, materials, menus, and recipes.

• The need for implementation support for the proposed changes, such as the need for tools and resources to

successfully implement the proposed added sugars limits for yogurt and cereal. Specifically, one advocacy group recommended USDA develop an ''approved'' list of products that could be offered under the added sugars limits.

- An overall concern that the proposed rule lacked a ''CACFP lens,'' and therefore did not adequately consider its potential impact on the CACFP community.

The CACFP community also raised concerns about other challenges facing operators that were outside the scope of the proposed rule. For example, respondents noted ongoing pandemic recovery, staff shortages, and vendor losses, and the loss of pandemic-era funding and flexibilities. Respondents emphasized the importance of supporting CACFP, which one advocacy group described as a ''financial and nutritional lifeline'' for many children and families. Other respondents agreed, noting that CACFP plays a ''vital role in supporting good nutrition'' and providing ''quality affordable child care'' for families.

USDA Response: USDA appreciates public comments received on behalf of the CACFP community and agrees that CACFP operators play a vital role in supporting the goals of child nutrition programs. USDA acknowledges that the listening sessions conducted prior to the development of the proposed rule were primarily focused on nutrition requirements for school meal programs, given that the majority of the provisions in the proposed rule relate to NSLP and SBP. However, many of the organizations that USDA engaged with through these listening sessions also advocate on behalf of CACFP and/or SFSP operators, in addition to school meals. USDA also received over 8,000 comments on the transitional standards rule, including comments related to CACFP, which were considered in the development of the proposed rule. Public comments submitted in response to the 2023 proposed rule, including those submitted by the CACFP community, were also crucially important to the development of this final rule. As emphasized throughout the proposed rule, USDA greatly values this feedback. USDA has responded to the CACFP community's feedback in the subsequent sections of the rule, especially *Section 2: Added Sugars* and *Section 20: Miscellaneous Changes.*

Public Comments: Supplemental Nutrition Assistance Program

Several respondents raised concerns about the Supplemental Nutrition Assistance Program, or SNAP, a USDA Federal assistance program. While comments related to SNAP are outside the scope of this rulemaking, USDA is providing a summary of the comments here. Respondents were concerned that SNAP does not impose the same nutrition requirements as USDA's child nutrition programs. These respondents asserted that students, including those participating in SNAP, are exposed to unhealthy food outside of school. Some respondents argued that all Federal nutrition programs, including SNAP, should have the same nutrition requirements. For example, a dietitian suggested that if USDA finalizes added sugars limits for school meals, those limits should also apply to SNAP.

USDA Response: USDA appreciates public comments about SNAP and its relation to the Department's other Federal assistance programs, including the child nutrition programs. USDA's mission is to increase food security and reduce hunger by providing children and income eligible people access to food, a healthful diet, and nutrition education in a way that supports American agriculture and inspires public confidence. Within that mission, USDA administers 16 critical nutrition assistance programs, one of which is SNAP, the Nation's largest domestic food and nutrition assistance program for income eligible Americans. SNAP is the primary source of nutrition assistance for millions of people each month, and SNAP participants can purchase a variety of eligible foods items, as defined by statute.[27] USDA is committed to helping SNAP participants and all Americans make healthier food choices through evidenced-based nutrition education. SNAP-Ed is an evidenced-based, federally funded grant program that supports SNAP participants with nutrition education to help participants maximize benefits and make healthy food choices to promote nutrition security. In USDA's most recent analysis of food purchases by SNAP and non-SNAP households,[28] SNAP households and non-SNAP households purchased similar types of foods, such as fruit, vegetables, and milk. This affirms that SNAP households are purchasing similar types of nutrient-dense foods compared to non-SNAP households. Additionally, USDA encourages healthy eating for SNAP participants through incentive programs, which provide additional ways to make healthy choices, such as purchasing fruits and vegetables, easier for SNAP participants. Recent research [29] shows that participants of the Gus Schumacher Nutrition Incentive Program (GusNIP) reported greater fruit and vegetable intake and improvements in food security. Similarly, in a Healthy Incentive Pilot (HIP) report,[30] participants spent more SNAP benefits on fruits and vegetables than non-HIP households. SNAP incentive programs, along with all USDA Federal nutrition assistance programs, play an important role in making nutritious foods more accessible and affordable. While there are differences across the programs, each of USDA's Federal nutrition assistance programs are critical to advancing nutrition security and promoting healthy dietary patterns.

Section 2: Added Sugars

Current Requirement

Currently, there are no added sugars limits in the school meal programs. Under the current regulations, schools may choose to serve some menu items and meals that are high in added sugars, provided they meet average weekly calorie limits (7 CFR 210.10(f)(1) and 220.8(f)(1)).

The *Dietary Guidelines for Americans, 2020–2025* recommends limiting intake of added sugars to less than 10 percent of calories per day. School meal data from school year (SY) 2014–2015 found that the average percentage of calories from added sugars in school meals was approximately 11 percent in school lunch and 17 percent in school breakfast.[31] The *Dietary Guidelines* further indicate that 70 to 80 percent of all school-aged children exceed the recommended limit for added sugars.[32] The current calorie requirements for the school meal programs are intended to encourage schools to choose nutrient-dense foods and beverages. However,

[27] See: Section 3(k) of the Food and Nutrition Act of 2008 (7 U.S.C. 2012(k)).

[28] U.S. Department of Agriculture. *Foods Typically Purchased by Supplemental Nutrition Assistance Program (SNAP) Households.* November 18, 2016. Available at: *https://www.fns.usda.gov/snap/foods-typically-purchased-supplemental-nutrition-assistance-program-snap-households.*

[29] *GusNIP NTAE. Gus Schumacher Nutrition Incentive Program (GusNIP): Impact Findings Y3: September 1, 2021 to August 31, 2022.* Prepared for U.S. Department of Agriculture, National Institute of Food and Agriculture; 2023. Available at: *https://nutritionincentivehub.org/gusnip-ntae-y3-impact-findings.*

[30] U.S. Department of Agriculture. *Evaluation of the Healthy Incentives Pilot (HIP) Final Report.* September 2014. Available at: *https://www.fns.usda.gov/snap/hip/final-evaluation-report.*

[31] Fox MK, Gearan EC, Schwartz C. *Added Sugars in School Meals and the Diets of School-Age Children.* Nutrients. 2021; 13(2):471. Available at: *https://doi.org/10.3390/nu13020471.*

[32] U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

USDA determined that a specific added sugars requirement would more effectively reduce added sugars in school meals, consistent with the goals of the *Dietary Guidelines.*

Proposed Rule

USDA proposed to reduce added sugars in school meals through a gradual, phased-in, two-step approach: *product-based limits* followed by a *weekly dietary limit.* First, beginning in SY 2025–2026, USDA proposed to implement quantitative limits for leading sources of added sugars in school meals. The proposed product-based limits were as follows:

- *Grain-based desserts:* would be limited to no more than 2 ounce equivalents per week in school breakfast, consistent with the current limit for school lunch. Examples of grain-based desserts include cereal bars, doughnuts, sweet rolls, toaster pastries, coffee cakes, and fruit turnovers.[33]
- *Breakfast cereals:* would be limited to no more than 6 grams of added sugars per dry ounce.
- *Yogurt:* would be limited to no more than 12 grams of added sugars per 6 ounces.
- *Flavored milk:* would be limited to no more than 10 grams of added sugars per 8 fluid ounces or, for flavored milk sold as a competitive food[34] for middle and high schools, 15 grams of added sugars per 12 fluid ounces.[35]

For the second step, beginning in SY 2027–2028, USDA proposed to implement a dietary specification for added sugars. The dietary specification would limit added sugars to less than 10 percent of calories per week in the school lunch and breakfast programs. This weekly limit would be in addition to the product-based limits described above.

USDA requested public input on both steps as well as the following questions:

- USDA is proposing product-specific limits on the following foods to improve the nutritional quality of meals served to children: grain-based desserts, breakfast cereals, yogurt, and flavored milk. Do stakeholders have input on the products and specific limits included in this proposal?
- Do the proposed implementation timeframes provide appropriate lead time for food manufacturers and schools to successfully implement the new added sugars standards? Why or why not?
- What impact will the proposed added sugars standards have on school meal menu planning and the foods schools serve at breakfast and lunch, including the overall nutrition of meals served to children?

For consistency across child nutrition programs, USDA also proposed to apply the product-based added sugars limits to breakfast cereals and yogurt served in the CACFP; under the proposed rule, the *added* sugars limits would replace the current *total* sugars limits for breakfast cereals and yogurt in CACFP. The proposed product-based limits for CACFP aligned with the proposed limits for school breakfast and lunch, and were as follows:

- *Breakfast cereals:* would be limited to no more than 6 grams of added sugars per dry ounce.
- *Yogurt:* would be limited to no more than 12 grams of added sugars per 6 ounces.

Public Comments

USDA received tens of thousands of comments on added sugars, with most in support of reducing added sugars in school meals. State agencies, school nutrition professionals, advocacy groups, industry respondents, professional organizations, CACFP sponsoring organizations, dietitians, and individual respondents, such as parents and students, provided input on the proposals for added sugars. At a high-level, respondents provided the following feedback on added sugars requirements:

- Limiting added sugars in school meals is important for children's health and academic performance.
- Product-based limits would incentivize the food industry to reformulate products to help schools meet the weekly added sugars limit.
- Many respondents expressed a preference for one type of limit over the other:
- Some respondents suggested that product-based limits would be easier and less burdensome for program operators to implement compared to the weekly limit.
- Other respondents asserted that weekly limits align with recommendations from the *Dietary Guidelines* and would allow more flexibility for menu planners compared to the product-based limits.

The following paragraphs describe specific feedback on the proposal as well as feedback on each step of the proposal: product-based limits and weekly limits.

Reducing Added Sugars and Children's Health

Numerous respondents, including advocacy groups, school districts, school nutrition professionals, parents, and a few form letter campaigns, supported added sugars limits in school meals. Several advocacy groups justified limits on added sugars based on the recommendations from the *Dietary Guidelines.* One advocacy group asserted that reducing added sugars is "urgent" because children's current intake of added sugars is high. Other proponents reasoned that implementing added sugars limits in school meals would be beneficial to children's health. An advocacy group applauded the proposal because it makes a distinction between naturally occurring and added sugars and creates an incentive to reduce added sugars in "hyper-processed products." A few parents emphasized that reducing added sugars is a top health priority. One parent strongly supported the proposed limits, stating that currently, "children who rely on school meals [have] no option but to eat sugary breakfasts." An individual cited multiple studies demonstrating the negative impacts of added sugars on health, and an advocacy group noted that consuming too many added sugars can increase the risk of type 2 diabetes and heart disease. A few individuals and a form letter campaign affirmed that reducing added sugars may help address health disparities by improving the overall nutritional quality of school meals.

Challenges With Reducing Added Sugars

Other respondents cited challenges with reducing added sugars in school meals. A school district appreciated USDA's efforts but voiced concerns that an added sugars limit would drastically reduce schools' buying options. One school food service director claimed that school meals are already low in sugar and that tracking added sugars would be another standard to monitor. An industry respondent noted that if the proposed rule is finalized, added sugars would be the only element in the meal pattern "with two prongs of compliance monitoring," as it would be subject to both product-based and weekly limits. A dietitian expressed concern about the palatability of meals, adding that

[33] U.S. Department of Agriculture, *Food Buying Guide for Child Nutrition Programs.* Available at: *https://foodbuyingguide.fns.usda.gov/Appendix/DownLoadFBG.* See: Section 4—Grains, Exhibit A: Grain Requirements for Child Nutrition Programs, for a list of grain-based desserts.

[34] Competitive food is a term to define all food and beverages that are available for sale to students on the school campus during the school day. (7 CFR 210.11(a)(2))

[35] For clarification, USDA proposed a higher added sugars limit for flavored milk sold as a competitive food in middle and high schools due to the larger serving size. The serving size for milk offered as part of a reimbursable meal is 8 fluid ounces. Milks sold to middle and high school students as a competitive food may be up to 12 fluid ounces.

limiting added sugars could negatively impact student participation. One individual supported reducing added sugars, but expressed concern that students will not like the food, which could increase food waste.

One industry respondent argued that the existing calorie ranges ''adequately control for sugar'' and schools ''should not be further regulated'' with added sugars limits. Another industry respondent opposed the proposed added sugars limits due to the cost of product reformulation. An advocacy group also raised concerns about product reformulation, noting that each time a food producer needs to change the specifications of a product, it can take up to three years and cost as much as $750,000 per item. This respondent was concerned that some manufacturers may choose to stop making school-specific items instead of reformulating their products.

Proposed Approach: Product-Based Limits

Over 86,000 respondents, including 96 unique comments, supported the proposed product-based limits in general; comment counts specific to each product-based limit are detailed in each product-based comment summary section, below. A school district suggested that product-based limits would provide helpful benchmarks for initial added sugars reductions. An industry respondent asserted that product-based limits would help reduce added sugars in breakfast items. An individual agreed, stating that limiting high-sugar breakfast items would support children in the classroom as well. This respondent explained that breakfasts that are high in sugar do not provide sustainable energy for students to focus in the classroom. A professional organization stated that product-based limits would promote ''progress toward more nutrient dense'' foods, and that the phased-in approach would allow schools and manufacturers time to ''learn and adapt.''

Other respondents supported the product-based limits but did not support the weekly limit. For example, an advocacy group affirmed that the product-based limits would be easier for schools operationally, noting that CACFP sponsoring organizations have successfully implemented product-based limits for breakfast cereals and yogurt. This advocacy group stated that product-based limits would better align child nutrition program requirements and reduce administrative burden. A State agency suggested that the proposed product-based limits would help to educate the public about the health impacts of added sugars. However, this State agency did not support the weekly limit, asserting that it may be burdensome for schools. A school district also preferred the product-based limits over the weekly limit, suggesting that product-based limits would be easier to implement after schools overcome the initial burden of identifying compliant products. An advocacy group agreed, maintaining that the product-based limits are necessary to reduce added sugars at breakfast, but noting that the weekly limit would ''negatively impact school meal menu planning.'' An industry respondent described the product-based limits as ''appropriate tools to reduce consumption of added sugars,'' and argued that an additional weekly limit would be ''duplicative.''

About 100 respondents, including 81 unique comments, opposed proposed product-based limits in general; comment counts specific to each product-based limit are detailed in each product-based comment summary section, below. A food service director opposed the proposed limits for school breakfast specifically, describing breakfast as an important meal and suggesting that some added sugar encourages students to eat breakfast. An individual stated that product-based limits would decrease the availability of grab-and-go meals and would reduce overall breakfast participation. Several respondents, including industry respondents, school districts, and dietitians, added that product-based limits would hinder alternative breakfast models (*e.g.,* breakfast in the classroom) because pre-packaged, grain-based desserts are more commonly offered in these models. A dietitian claimed that even though some popular whole grain products served at breakfast contain added sugars, the nutritional benefits of these foods ''outweigh the sugar content.'' A State agency agreed that breakfast cereals, yogurt, and flavored milks provide ''numerous essential nutrients'' and raised concerns about the potential negative impacts of decreased consumption under the product-based limits. A few school districts expressed concerns about increased costs. An industry respondent asserted that product-based limits are ''too prescriptive and unnecessarily complicate the nutrition standards.'' Instead of requiring the product-based limits, a State agency suggested USDA partner with K–12 food manufacturers to work toward implementation of voluntary, product-based added sugars limits.

Proposed Product-Based Limit: Grain-Based Desserts at Breakfast

Over 900 respondents supported the proposed limit for grain-based desserts in school breakfast, including 20 unique comments. A parent applauded limits for grain-based desserts at breakfast, suggesting that they would ''encourage more nutrient-dense choices.'' An individual supported limits on grain-based desserts, asserting that schools can ''find healthier ways to serve breakfast.'' A school nutrition professional agreed, supporting a limit on ''desserts [and] sweet entrées during breakfast.'' An advocacy group explained that applying the current school lunch limit for grain-based desserts to school breakfasts (*i.e.,* the ability to offer up to 2 ounce equivalents of grain-based desserts per week) would help simplify menu requirements.

Over 700 respondents opposed the proposed limit for grain-based desserts in school breakfast, including 85 unique comments. Many opponents stated that grain-based desserts are popular among students and that limiting these foods may impact student breakfast participation. An individual raised concerns that schools have few options at breakfast and reducing grain-based desserts would further limit menus. An advocacy group noted that currently, schools offer a variety of grain items at breakfast to promote participation, for example, by including whole grain-rich toaster pastries and whole grain-rich cereal bars daily, along with whole grain donuts and whole grain cinnamon rolls on occasion. This respondent maintained that the proposed rule would severely limit schools' ability to serve these popular items at breakfast. A school district noted that convenient, on-the-go grain items are important options for students who attend morning tutoring to recover from learning loss following the COVID–19 pandemic.

Several respondents cited confusion about the definition of ''grain-based dessert'' as described in *Exhibit A: Grain Requirements for Child Nutrition Programs* of the *Food Buying Guide.*[36] An industry respondent argued that under current policy, grain-based desserts are a ''list of foods with no explanation of what sets them apart from other grain foods.'' This respondent noted this list includes a wide range of foods that can differ

[36] U.S. Department of Agriculture, *Food Buying Guide for Child Nutrition Programs.* Available at: *https://foodbuyingguide.fns.usda.gov/Appendix/DownLoadFBG.* See: Section 4—Grains, Exhibit A: Grain Requirements for Child Nutrition Programs, for a list of grain-based desserts.

vastly in added sugars content. Additionally, this respondent suggested that under the proposed rule, manufacturers would have little incentive to reduce added sugars in grain-based desserts, since these products would still face ''strict limitations,'' regardless of their added sugars content. A State agency noted that items such as cereal bars are not typically identified as ''desserts'' outside of the child nutrition programs and encouraged USDA to reevaluate the food items that are considered grain-based desserts. A form letter campaign agreed, pointing out that many items considered to be grain-based desserts are offered as part of a balanced breakfast at school or at home. A State agency requested clarification on what the proposed grain-based dessert limit for school breakfast would mean for preschool meals, noting that the meal pattern currently does not allow any grain-based desserts to be offered to preschoolers.

Proposed Product-Based Limit: Breakfast Cereals

Over 900 respondents supported the proposed product-based added sugars limit for breakfast cereals, including 20 unique comments. Many respondents supported the proposal for breakfast cereals without providing additional rationale. A State agency affirmed that there are plenty of breakfast cereals that already meet the proposed product-based limit. This State agency also suggested that the implementation date would provide sufficient time for manufacturers to decrease added sugars in non-compliant breakfast cereals. Another State agency supported limiting added sugars in breakfast cereals but recommended increasing the limit to 8 or 9 grams per dry ounce, instead of the proposed 6 grams per dry ounce.

About 50 respondents opposed the proposed product-based limit for breakfast cereals, including 33 unique comments. A school nutrition professional and several school districts expressed concern that the product-based limit for breakfast cereals would severely limit variety. An industry respondent claimed that they provide numerous breakfast cereal options that are inexpensive, convenient, and popular with students, and argued that the product-based limit is not necessary because the weekly limit would effectively limit breakfast cereals that are high in added sugars. This respondent stated that their school breakfast cereals provide less than 8 grams of added sugars per serving, but that the product-based limit would limit their options for schools to only two cereals. A school district argued that the breakfast cereals that meet the proposed product-based limit are not preferred by students.

Proposed Product-Based Limit: Yogurt

Nearly 1,000 respondents supported the proposed product-based added sugars limit for yogurt, including 24 unique comments. An industry respondent suggested that ''many options on the market meet the proposed limit'' for yogurt (12 grams of added sugars per 6 ounces). This respondent noted that manufacturers have greater ability to formulate yogurts that meet a product-based limit, as opposed to a weekly limit. Another industry respondent suggested that some yogurts would meet the proposed product-based limit, while others would not, potentially requiring reformulation. A parent who supported the product-based limit suggested that yogurt could be sweetened with fruit instead of added sugars. A professional organization noted that most yogurt served in their program already meets the proposed product-based limit and described it as ''realistic for manufacturers and programs.''

Forty respondents opposed the proposed product-based added sugars limit for yogurt, including 21 unique comments. A CACFP sponsoring organization asserted that it would limit the yogurt that program operators can offer and only allow varieties that ''children will not want to eat.'' A State agency described the proposed limit as ''confusing,'' noting that most yogurt comes in 4-ounce packages and schools would need to ''do culinary math'' to determine how to apply the limit, which was for 6-ounce packages. An industry respondent suggested that yogurt products should be allowed to have various levels of sugars so that schools have more flexibility in selecting products. One school district shared that yogurt varieties that are currently popular with students at breakfast would not meet the product-based limit. This respondent raised concerns that, under the proposed limit, certain varieties of yogurt would be eliminated from their menus and there would be ''limited choices for replacements.''

Proposed Product-Based Limit: Flavored Milk

Over 900 respondents supported the proposed product-based limit for flavored milks, including 44 unique comments. A State agency maintained that they did not expect the flavored milk limit to be an issue, as dairy suppliers are already working to reduce added sugars in flavored milks. Another State agency and two professional associations also supported the proposed limits, and one of these professional associations noted that most milk producers already meet the proposed limit. A school district confirmed that flavored milks currently offered in their district meet the proposed added sugars limit. An industry respondent suggested that the proposed product-based limit for flavored milks is ''likely achievable'' but cautioned that some reformulation efforts to reduce added sugars have started to impact palatability. An advocacy group recommended applying the added sugars limits for flavored milks to SMP and CACFP ''to ensure maximum positive impact on child health.''

Fifty respondents opposed the proposed product-based limit for flavored milks, all of which were unique comments. A State agency suggested that the product-based limit for flavored milks ''may not be necessary and may cause difficulties for schools lacking access to multiple options.'' This State agency pointed to existing efforts in the dairy industry to reduce added sugars in flavored milks, including the International Dairy Foods Association's recent commitment to lower added sugars in flavored milks available in schools.[37] While acknowledging the great improvement, the State agency noted that, depending on their location, some rural schools may not have access to flavored milk options that meet the proposed limit. Another State agency expressed concern about the proposed limit, noting that producers in their State currently offer a fat-free, flavored milk with 11 grams of added sugars per 8 fluid ounces. This State agency questioned whether it would be worth the financial burden for this producer to reformulate their product to reduce added sugars by 1 gram and meet the proposed 10 grams of added sugars per 8 fluid ounces limit. Another State agency mentioned a milk distributor

[37] In April 2023, the International Dairy Foods Association announced its ''Healthy School Milk Commitment.'' According to a press release from the International Dairy Foods Association, ''[b]eginning with the 2025–2026 school year, 37 school milk processors representing more than 90% of the school milk volume in the United States commit to provide healthy, nutritious school milk options with no more than 10 grams of added sugar per 8 fluid ounce serving.'' See: International Dairy Foods Association. *IDFA Announces 'Healthy School Milk Commitment' to Provide Nutritious Milk with Less Added Sugar for Students in Public Schools, Surpassing USDA Standards.* April 5, 2023. Available at: *https://www.idfa.org/news/idfa-announces-healthy-school-milk-commitment-to-provide-nutritious-milk-with-less-added-sugar-for-students-in-public-schools-surpassing-usda-standards.*

that currently has a flavored milk option with 13 grams of added sugars per 8 fluid ounces. Numerous respondents provided additional input on flavored milks, which is detailed in *Section 3A: Flavored Milk.*

Product-Based Limits: Impact on Child and Adult Care Food Program

USDA also received feedback from the CACFP community about how the proposed product-based limits for breakfast cereals and yogurt would affect CACFP. Several respondents opposed any changes to current CACFP total sugars limits, citing the potential burden of implementing the change and the operational differences between school meals and CACFP. For example, an advocacy group suggested that USDA's review of breakfast cereals and yogurt, which focused on products for K–12 schools, did not necessarily reflect the yogurt products available to CACFP operators. An industry respondent agreed, adding that there may be ''little to no demand for these products in grocery stores,'' and products that are commonly served in schools may not be available in the broader food supply. Another industry respondent suggested that the proposed change for yogurt could impact the type of yogurt available in CACFP, resulting in ''less preferred yogurt types'' offered in the Program.

An advocacy group asserted that making major changes to CACFP nutrition requirements to ''streamline'' work for schools is ''a mistake'' and recommended USDA further engage the CACFP community prior to finalizing the proposed breakfast cereal and yogurt added sugars limits in CACFP. This respondent added that CACFP providers use other Federal assistance programs, rather than school meals, as their point of reference. Another advocacy group noted that for breakfast cereals, the proposed change from 6 grams of *total* sugars per dry ounce to 6 grams of *added* sugars per dry ounce would effectively increase the total sugar allowance. This respondent raised concerns about children's health and did not support what they considered to be a more lenient requirement. A State agency suggested applying the current CACFP total sugars limits for breakfast cereals and yogurt to school meals, instead of finalizing the proposed changes.

Other respondents supported applying the added sugars limits for breakfast cereals and yogurt to CACFP. An industry respondent supported transitioning total sugars limits to added sugars limits, arguing that it ''appropriately reflects updated nutrition guidance.'' A dietitian noted that CACFP operators have successfully implemented total sugars limits and supported updating to added sugars limits because added sugars are now consistently listed on the Nutrition Facts label. An advocacy group agreed, suggesting that the updated Nutrition Facts label provides the information CACFP providers would need to select products, adding that there are numerous products in the marketplace that meet the proposed added sugars limits. Another advocacy group suggested that applying the proposed change to CACFP ''will simplify standards for both industry and program operators.''

A form letter campaign supported the product-based limit for breakfast cereals only if CACFP providers can continue to use a list of allowable products provided by the Women, Infant and Children (WIC) Program to identify breakfast cereals that are allowed in the CACFP. Respondents explained that each State agency administering the WIC program provides a list of allowable foods (WIC list) that meet program nutrition requirements. A few advocacy groups highlighted the importance of the WIC list, with one noting that the majority of CACFP providers shop in retail stores and use the WIC list to easily identify cereals that meet CACFP total sugars requirements. A State agency agreed, describing the WIC list of approved breakfast cereals as ''an important resource used by both the State agency and CACFP sponsoring organizations.'' An advocacy group also highlighted the importance of collaboration between CACFP and WIC, including shared materials and messaging. An individual suggested that USDA develop its own ''approved list'' of breakfast cereals and yogurt that child care providers participating in CACFP could use to easily identify compliant products.

Respondents also offered additional suggestions for how USDA could support the CACFP community in implementing the proposed changes, if finalized. An advocacy group recommended that USDA provide tools and resources to help CACFP providers identify allowable products. A CACFP sponsoring organization encouraged USDA to provide flexibility to operators and sites as they transition from current total sugars limits to the proposed added sugars limits. An advocacy group noted that CACFP sponsoring organizations would need ample time to retrain providers and suggested that USDA provide additional funding to support nutrition education, training, and material revisions at the local level. Another advocacy group noted that family child care providers often run small programs where they take on multiple roles including owner, caregiver, meal preparer, and more. This respondent suggested that child care providers may need additional time to implement the added sugars limits for breakfast cereals and yogurt, noting that the changes will require time, training, money, and technical assistance. However, a State agency suggested that the proposed rule would provide adequate lead time for CACFP operators to successfully implement the changes, noting that the State would have time to train sponsoring organizations and update technical assistance resources. However, the State agency recommended that USDA implement the CACFP changes at the beginning of the fiscal year, rather than the beginning of the school year, to match the start of the CACFP program year.

Proposed Approach: Weekly Limits

Over 76,000 respondents, including 114 unique comments, supported a weekly added sugars limit in the school lunch and breakfast programs—the second step of USDA's proposal to reduce added sugars. A dietitian supported the weekly limit, stating that it gives ''menu planners creative freedom'' to develop a menu that incorporates foods that are currently available in the K–12 market. Another respondent explained that the weekly limit would give schools flexibility to occasionally offer foods that are higher in added sugars, provided they are balanced with foods that are lower in added sugars throughout the week.

Some respondents supported a weekly limit only and did not support the product-based limits. For example, an advocacy group suggested that a weekly limit would be easier to monitor, require less training, and provide more flexibility for operators, while still reducing overall intake of added sugars. This respondent suggested that all foods can fit into a healthy diet, just in different amounts and frequencies. An industry respondent also supported the weekly limit only, claiming that product-based limits would cause additional burden to monitor and limit student choice, which could reduce participation. Another industry respondent agreed, suggesting that a 10 percent weekly limit in lunch and breakfast programs provides flexibility for operators, maintains options for students, and gives manufacturers time to reformulate. This respondent argued that the product-based limits would ''reduce opportunities for whole grain intake'' due to the limitation of popular

grains items that contain added sugars, such as granola bars. A school district indicated that the weekly limit would be easier to implement and track and allow schools to decide ''where to spend'' their added sugars in lunch and breakfast menus. An advocacy group supported the weekly limit and suggested the two-step approach would ''cause a lot of confusion and be difficult to manage and document.''

Forty-eight respondents opposed the weekly limit, the majority of which were unique comments. A school district argued that the weekly limit would ''significantly increase administrative burden.'' A State agency agreed, citing specific concern about the potential burden on small, rural districts that do not use menu planning software and may not have the staff capacity to calculate additional dietary specifications. An industry respondent suggested that a weekly limit may ''inadvertently lower the amount of yogurt and dairy'' offered in school meals, which they asserted could decrease ''the nutritiousness of meals.''

Two-Step Approach: Product-Based and Weekly Limits

Some respondents supported both steps of USDA's phased-in approach to reduce added sugars in school meals and emphasized the importance of the product-based and weekly limits. An advocacy group strongly supported both proposals, noting that product-based limits alone would not achieve dietary recommendations for added sugars. This respondent emphasized the importance of implementing a weekly limit, while also pointing out the benefits of product-based added sugars limits—particularly for foods that are commonly served in school meals. A professional association also supported the two-step approach, suggesting that it would allow ''schools, food manufacturers, and distributors time to learn and adapt.'' An advocacy group supported both added sugars proposals, but acknowledged that between the two, a weekly limit would be ''more effective'' to meet the *Dietary Guidelines* recommendations. Another advocacy group described USDA's two-step approach as ''balanced and practical'' and supported phasing in the product-based limits, followed by the weekly limit. A group of Federal elected officials applauded USDA's proposed ''gradual, phased-in approach'' to reducing added sugars in school meals. An advocacy group added that the ''combination of product-based and weekly limits are especially important'' given children's current, excessive intake of added sugars.

Proposed Implementation Timeframes

Over 300 respondents addressed the proposed implementation timeframes, including 96 unique comments. Several respondents suggested that USDA provide schools and industry more time for implementation. A dietitian and a school nutrition director asserted that the product-based limits do not provide manufacturers enough lead time and emphasized that reformulating products takes time and money. A school district stated that they ''have faith'' that manufacturers can reduce added sugars over time and students will adapt, but they do not think two years is adequate. This respondent was concerned about the potential impact on student participation, noting the importance of providing breakfast cereals and other food items that students enjoy. A respondent who supported the proposals expressed concern that the implementation timeline may not be long enough for small or rural school districts that rely on smaller food distributors. One State agency conducted a survey of child nutrition directors and NSLP stakeholders and found that 75 percent of respondents did not feel the proposed implementation dates were sufficient due to limited product availability, supply chain challenges, and student acceptance.

A dietitian recommended lengthening the implementation timeline and providing funding to manufacturers. This respondent was concerned that manufacturers would ''quit the K–12 segment if they cannot comply'' with the limits. An industry respondent argued that, if manufacturers do not have additional lead time, student participation may decrease due to ''inadequate options.'' This respondent added that ''the school nutrition ecosystem is simply too fragile'' to follow the proposed timeline. A joint response from three industry respondents argued that the proposed implementation dates would not provide enough time for reformulation that ensures product quality and safety, given the functional role sugar plays as an ingredient (*e.g.,* preventing spoilage, improving texture, and adding bulk). This response raised concerns about student acceptability, student participation, and food waste under the proposed implementation timeline. A dietitian suggested that if manufacturers are not able to create products to meet the proposed product-based limits, then the implementation dates should be delayed.

An industry respondent maintained that added sugar reductions must be tailored for each individual product, suggesting that timelines can range from 12 to 16 months. This respondent added that schools typically solicit bids for products one year in advance, adding at least 12 months to the process. This industry respondent noted that additional time for implementation would allow schools to update meal planning databases, provide time to develop menu planning tools, and help students gradually adjust to foods containing less added sugars. A State agency relayed that manufacturers have expressed that SY 2027–2028 would be a more realistic timeframe to implement breakfast cereal and yogurt limits. An advocacy group acknowledged that timelines for research and development vary and suggested that K–12 food companies typically report needing 3 years to reformulate products. A State agency also recommended providing at least 3 years after release of the final rule to allow adequate time to update trainings, materials, product formulations, and school menus. An individual suggested that industry would need a minimum of 3–5 years to reformulate or develop food items that meet the proposed limits. A State agency and an industry respondent expected product reformulation to take up to 5 years. Another industry respondent asserted that the proposed implementation dates for added sugars are too short and suggested the reductions occur more gradually over the next 20 years or more.

Other respondents suggested the proposed implementation timeframes were adequate, and some recommended accelerating timeframes in the interest of children's health. An advocacy group affirmed that phased-in implementation would allow adequate time to implement the new requirements. Another advocacy group recommended implementing the weekly added sugars limit alongside the product-based limits in SY 2025–2026. A State agency also suggested implementing the product-based limits and the weekly limit at the same time, suggesting that 12–18 months would be a reasonable amount of time for industry and schools to prepare for changes. A parent suggested implementing the added sugars limits on a quicker timeframe, suggesting that the limits ''need to happen now'' due to what they consider to be an excessive amount of sugar in school meals. An advocacy group agreed, suggesting that USDA implement the added sugars limits ''as soon as is feasible,'' noting that these updates will be beneficial to children's health. Similarly, a second advocacy group stated that USDA

should implement the weekly limit in the school year immediately following release of the final rule. A local government supported both added sugars limits and the proposed implementation timeline; this respondent did not recommend extensions ''due to the urgency needed in reducing consumption of added sugars among children.'' An advocacy group and a few individuals asserted that ''there is no credible reason for USDA to delay achieving the reduction in sugar consumption,'' requesting implementation of the added sugars limits by fall 2023.

A school nutrition professional suggested that the proposed implementation date for the product-based limits would provide ''plenty of time'' but claimed the weekly limit would be ''much harder'' to achieve. This respondent noted that many rural districts currently do not have nutrition software to facilitate implementation of a weekly limit for added sugars. Similarly, a dietitian suggested that the implementation date for product-based limits is achievable, provided that the final rule is published at least one year in advance of implementation (by July 1, 2024). The respondent suggested that this timing would allow USDA and State agencies to provide technical assistance and training. However, this respondent recommended delaying implementation of the weekly added sugars limit to allow additional time for product reformulation and menu revisions.

One respondent encouraged USDA to remove the product-based limits and implement the weekly limit no later than 2025. By accelerating implementation of the weekly limit in school lunch and breakfast programs, this respondent suggested USDA could support healthier meals for children who are currently in school. An industry respondent also recommended removing the product-based limits while maintaining the proposed implementation of SY 2027–2028 for the weekly limit.

Alternative Approaches Suggested by Comments

Some respondents offered alternatives to the proposals, or suggested changes. For example, an industry respondent suggested that USDA determine the product-based limits using the average added sugars content of currently available products. A professional organization recommended that USDA establish total sugars limits, rather than added sugars limits, for breakfast cereals and yogurt because of the naturally occurring sugar content of those foods.

An individual suggested that USDA reduce sugar content in school breakfast by following Smart Snacks in School requirements for sugar.[38] A few advocacy groups suggested USDA require or recommend product-based limits for condiments and toppings, noting that these products contribute to children's intake of added sugars, especially at breakfast.

Some respondents suggested alternatives to the proposed limit on grain-based desserts in school breakfasts. A professional organization and another respondent suggested that USDA prohibit (rather than limit) grain-based desserts in the school meal programs to promote more nutrient dense foods. A State agency recommended phasing in the grain-based dessert limit by age/grade group, starting with K–5 children. This State agency suggested this could help prevent a drastic drop in participation among older students. A school nutrition professional suggested that grain-based desserts should not be defined by the product name, but by the amount of added sugars in the product. An advocacy group also encouraged USDA to establish a quantitative added sugars limit for grain-based desserts and suggested further reducing the proposed added sugars limit for breakfast cereals.

An industry respondent suggested that if yogurt and flavored milks are subject to product-based limits, they should be excluded from the overall weekly limit. This respondent expressed concern that counting yogurt and flavored milks in the overall weekly limit could create ''perverse and unintended incentives'' to remove these items from meals. Another industry respondent suggested that USDA exempt the added sugars in dried cranberries from the weekly added sugars limit. This respondent argued that not providing an exemption for cranberry products could discourage the consumption of products like cranberries that include added sugar for processing and palatability.

A few respondents offered alternative suggestions for the weekly added sugars limit. For example, a school nutrition director suggested starting with a higher weekly dietary specification, such as 15 percent, and adjusting the percentage down as needed. This respondent stated that a more gradual approach for the weekly limit would mirror the proposed sodium reductions. Similarly, an advocacy group recommended removing the product-based limits and instead, gradually phasing in the weekly limit for lunch and breakfast meals. This respondent recommended starting in SY 2025–2026 with a dietary specification limiting meals to less than 25 percent of calories from added sugars, and then implementing a 10 percent limit in SY 2027–2028. A school district supported finalizing a 25 percent weekly limit in SY 2026–2027 and did not recommend further reductions. Another school district recommended a weekly dietary limit of 35 percent of calories from added sugars, with no product-based limits, beginning SY 2025–2026.

However, an advocacy group stated that USDA ''should reject any calls to set a limit higher than 10 percent'' because most children would benefit from a diet with even fewer added sugars, as low as 4 to 8 percent. Another respondent argued that the proposed 10 percent limit is ''still very high.'' An advocacy group agreed, recommending that USDA take ''swifter and more far-reaching action'' by implementing a 6 percent weekly limit for added sugars. A local government recommended that USDA apply the limit to both meals together (breakfast and lunch) instead of applying the 10 percent weekly limit to each meal separately. This respondent suggested this would increase the feasibility of implementation, since breakfast foods typically contribute larger amounts of added sugars. A school nutrition professional suggested incentivizing—but not requiring—schools to meet the 10 percent weekly limit.

Several respondents, including a national organization representing tens of thousands of school nutritional professionals, recommended that USDA make it easier for schools to offer meats/meat alternates in place of grains at breakfast, which they argued would support reducing added sugars in school breakfasts. This includes options suitable for grab-and-go breakfast, such as protein-rich breakfast sandwiches and wraps. A school district suggested many schools ''would love to be able to offer eggs and sausage, or fruit and yogurt parfaits for breakfast,'' and requested that USDA remove the requirement to offer a minimum amount of grains daily for breakfast. A dietitian recommended that USDA require a meat/meat alternate at breakfast. A few industry respondents maintained that the added sugars limit would ''create a drive in the market to increase the protein content of breakfast items,'' noting that the current grain minimum and cost constraints present a barrier to offering meats/meat alternates at breakfast. Additional comments on this topic, received in response to a prior

[38] Regulations for competitive food service and standards are found at 7 CFR 210.11.

rulemaking, can be found in *Section 6: Meats/Meat Alternates at Breakfast.*

Other Comments About Added Sugars

Respondents also submitted other comments about added sugars, including comments related to sweeteners, which respondents used a variety of terms to describe. A school nutrition professional raised concerns that manufacturers would replace added sugars with ''artificial sweeteners'' when reformulating products to meet the proposed limits. Similarly, a dietitian stated that while they support reducing added sugars, food manufacturers would face challenges to meet this requirement without using ''sugar substitutes.'' A school nutrition professional suggested prohibiting ''non-caloric sweeteners (both natural and artificial)'' in school meals, noting that there is limited research on their long-term effects and expressed concern these additives may cause stomach problems in young children. An individual voiced similar concerns about ''low calorie sweeteners'' and suggested prohibiting or labeling products so that parents or students can avoid those food items, if desired.

A school district requested that the added sugars limits be accompanied by an increase in reimbursement rates. This respondent anticipated an increase in product costs as added sugars are replaced with more expensive and healthier ingredients. One industry respondent also shared financial concerns, suggesting that schools would need to adjust menus by adding food items or increasing portion sizes to meet calorie ranges if added sugars are reduced. This respondent suggested one solution to this challenge would be to increase Federal funding. Another industry respondent described the ''chronic underfunding of school breakfasts'' and encouraged adequate resources to facilitate schools offering nutritious breakfast items, such as fresh fruits and vegetables. Although this respondent acknowledged their comment was outside the scope of this rulemaking, they emphasized that funding plays an important role in the types of foods that schools can offer students.

A few advocacy groups encouraged USDA to provide sufficient time, menu planning resources, and technical assistance to support implementation of the added sugars limits. Specifically, some respondents suggested USDA update its Team Nutrition resources for reducing sugars in CACFP, if this requirement is finalized. A State agency requested that USDA update Administrative Review guidance and assessment tools, along with guidance on how schools can assess compliance with the weekly limit. An advocacy group recommended that, during implementation, schools should not be penalized and suggested that USDA prioritize additional technical assistance and training for schools that are struggling with compliance. A State agency provided similar input, suggesting that USDA provide schools a ''grace period'' for corrective actions during the first Administrative Review cycle, following implementation of the added sugars limits.

Final Rule

This final rule codifies the proposed added sugars limits in the school lunch and breakfast programs, as follows:

• *Product-based limits:* By SY 2025–2026, schools must implement quantitative limits for breakfast cereals, yogurt, and flavored milks. As explained below, this rule does not finalize the proposed product-based limit for grain-based desserts at breakfast. The product-based limits that are finalized in this rule are as follows:

• *Breakfast cereals* are limited to no more than 6 grams of added sugars per dry ounce.

• *Yogurt* is limited to no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce).

• *Flavored milk* is limited to no more than 10 grams of added sugars per 8 fluid ounces. Flavored milk sold as a competitive food for elementary school students will follow the 10 grams of added sugars per 8 fluid ounce limit, while flavored milk sold as a competitive food for middle and high school students will be limited to 15 grams of added sugars per 12 fluid ounces.[39]

• *Weekly dietary limit:* By SY 2027–2028, schools must implement a dietary specification limiting added sugars to less than 10 percent of calories per week in the school lunch and breakfast programs; this weekly limit will be in addition to the product-based limits described above.

As proposed, this final rule also updates CACFP total sugar limits for breakfast cereals and yogurt to align with the product-based added sugars limits established for NSLP and SBP as stated above. Because CACFP operates on a fiscal year calendar, these changes must be implemented by October 1, 2025. For CACFP, the product-based added sugars limits are as follows:

• *Breakfast cereals* are limited to no more than 6 grams of added sugars per dry ounce.

• *Yogurt* is limited to no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce).

The existing total sugars limits for breakfast cereals and yogurt in CACFP will remain in place until October 1, 2025, when the new added sugars limits must be implemented. With State agency approval, CACFP operators may choose to implement the added sugars limits for breakfast cereals and yogurt early.

Two-Step Approach To Reduce Added Sugars in School Meals

USDA is committed to improving the nutritional quality of school meals by establishing requirements that align with the goals of the most recent *Dietary Guidelines.* USDA also acknowledges stakeholders' concerns about added sugars in school meals and the harmful effects on children's health. The two-step approach to reducing added sugars finalized in this rule is expected to set schools up for success by gradually decreasing added sugars over the next several years. USDA acknowledges that, as noted in public comments, program operators need sufficient time to prepare and plan menus to meet the new added sugars limits. By first phasing in the product-specific limits for breakfast cereals, yogurt, and flavored milk, USDA expects that schools will be better positioned to successfully meet the weekly limits for added sugars, which will take effect two school years after the effective date of the product-based limits.

USDA intends for the product-based limits for breakfast cereals, yogurt, and flavored milk to have a meaningful impact on the added sugars offered in school meals. However, USDA recognizes that there are other foods offered in school meals that contribute to children's overall intake of added sugars, which makes the weekly dietary limit an important second step to align school meals more closely with the goals of the *Dietary Guidelines.* For example, USDA expects that added sugars in condiments and toppings will be addressed through the weekly added sugars limit, upon implementation. While USDA appreciates public comments recommending product-based limits for condiments and toppings, such limits were not included in the proposed rule and this final rule does not establish product-based added

[39] For clarification, the added sugars limit for flavored milk sold as a competitive food in middle and high schools due to the larger serving size. The serving size for milk offered as part of a reimbursable meal is 8 fluid ounces. Milks sold to middle and high school students as a competitive food may be up to 12 fluid ounces. Milks sold to elementary school students as a competitive food may be up to 8 fluid ounces, and so will follow the 10 grams of added sugars per 8 fluid ounce limit.

sugars limits for these items. USDA expects that the overall weekly limit will help to reduce the amount of added sugars offered in condiments and toppings. Additionally, although this rule does not finalize the grain-based dessert limit at breakfast, USDA expects that schools will select grains with less added sugars to meet the weekly added sugars limit at breakfast and, as explained below, USDA will provide resources to support more nutrient-dense choices at breakfast. USDA is also interested in additional stakeholder input on how to improve and simplify its grain-based desserts requirements and will solicit stakeholder input on grain-based desserts in the coming months.

USDA also acknowledges respondent concerns regarding the palatability of meals with less added sugars and related concerns about plate waste and student participation. However, USDA expects that gradually phasing in these requirements will give schools time to adjust menus and help children gradually adapt to meals with fewer added sugars over time.

Added Sugars in the Child and Adult Care Food Program

For consistency, this final rule applies the product-based added sugars limits for breakfast cereals and yogurt to the CACFP. Based on public comment, USDA has adjusted the implementation date for CACFP to follow the program calendar, which operates on a fiscal year rather than a school year. Effective October 1, 2025, the *added* sugars limits will replace the current *total* sugar limits for breakfast cereals and yogurt in CACFP. The existing total sugars limits for breakfast cereals and yogurt in CACFP will remain in place until October 1, 2025, when the new added sugars limits take effect. However, with State agency approval, CACFP operators may choose to implement the added sugars limits for breakfast cereals and yogurt early.

As mentioned in public comments, CACFP operators have successfully implemented product-based sugar limits, and this rule updates these limits from total sugars to added sugars based on *Dietary Guidelines* recommendations. Although some public comments recommended continuing with total sugars limits, that approach would not be consistent with the *Dietary Guidelines* recommendations. And, as noted, added sugars information is now available on the Nutrition Facts label.[40] USDA recognizes that many stakeholders would like more consistent requirements across child nutrition programs; this final rule supports USDA's efforts to better align program requirements. Additionally, in response to public comments, USDA clarifies that the per-ounce limit for yogurt will be 2 grams of added sugars. While this clarification applies to NSLP, SBP, and CACFP, it is most relevant to CACFP, where smaller portions may be offered to younger participants and operators will more often need to assess compliance with the added sugars limit in serving sizes that are smaller than 6 ounces.

CACFP operators provide vital nutrition that contributes to the wellness of child and adult participants. USDA recognizes and appreciates the important role CACFP operators play in helping child and adult participants develop and sustain healthy habits in all stages of life. USDA is committed to ensuring that CACFP operators have the technical assistance and resources they need to be successful, including implementing the changes in this rule.

Alignment With WIC Food Package Standards

In April 2024, USDA finalized revisions to the WIC food packages to incorporate recommendations from the National Academies of Science, Engineering, and Medicine (NASEM) in its 2017 scientific report, ''Review of WIC Food Packages: Improving Balance and Choice,'' and to align the food packages with the *Dietary Guidelines for Americans, 2020–2025.* The WIC final rule, *Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Revisions in the WIC Food Packages,*[41] updated limits on total sugars, consistent with recommendations in the NASEM report. This included establishing limits on added sugars in breakfast cereals and yogurt that are consistent with the limits in this final rule. CACFP operators may use any State's WIC list to identify breakfast cereals and yogurt that may be offered in CACFP. Both the WIC final rule and this final rule share the common goal of reducing added sugars intake among child and adult participants and promoting healthy dietary patterns. This cross-program alignment of product-based limits for breakfast cereals and yogurt responds to public comments that highlighted the benefits of allowing use of the WIC list in CACFP by allowing CACFP providers to use the WIC list to identify allowable breakfast cereals and yogurt. It also responds to public feedback requesting that USDA streamline requirements across its nutrition assistance programs.

Additional Feedback Received in Public Comments

USDA appreciates public comments on alternative approaches for reducing added sugars in school meals. A few respondents suggested a stepwise approach for the weekly added sugars limit; for example, by starting with 15 percent and then moving to a 10 percent weekly limit. The intent of the product-based limit is to provide schools with a path toward reaching the 10 percent weekly limit. Other respondents recommended a weekly limit below 10 percent; however, a weekly limit below 10 percent would go beyond recommendations in the current *Dietary Guidelines*. In this final rule, USDA maintains the proposed weekly added sugars limit of 10 percent of calories per week, averaged over the week for lunch and breakfast programs, respectively. In public comments, some respondents recommended combining lunch and breakfast menus under the weekly limit. However, because other school meal pattern requirements (including the other dietary specifications for calories, saturated fat, and sodium) currently apply by program, USDA does not view this as an operationally feasible suggestion. Regarding exemption for certain foods from the weekly limit, USDA has determined that establishing exemptions may impose unintended burden and challenges in calculating and monitoring dietary specifications for the entire menu. This final rule does not exempt any foods from the weekly added sugars limit for school lunch or breakfast. USDA also acknowledges comments that recommended adjusting other meal pattern requirements, such as the calorie limits, as part of this change. However, USDA did not propose changes to the calorie limits in school meals and this final rule does not make changes to the calorie limits for school meals.

Product-Based Limits for Breakfast Cereals, Yogurt, and Flavored Milk

USDA received hundreds of comments regarding the product-based limits for breakfast cereals, yogurt, and flavored milks. For example, some respondents recommended increasing the product-based added sugars limit for breakfast cereals and raised concerns

[40] *Food Labeling: Revision of the Nutrition and Supplement Facts Labels* (81 FR 33741, May 27, 2016). Available at: *https://www.federalregister.gov/documents/2016/05/27/2016-11867/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels*. See also: 21 CFR 101.9(c)(6)(iii).

[41] *Special Supplemental Nutrition Program for Women, Infants, and Children (WIC):* Revisions in the WIC Food Packages (April 2024). Available at: *https://www.fns.usda.gov/wic/fr-041824*.

about the availability of breakfast cereals that meet the proposed limit that children enjoy. Similarly, USDA acknowledges respondent concerns about product availability and the palatability of yogurt and flavored milks that meet the product-based added sugars limits. However, USDA agrees with respondents who stated that the added sugars limits are realistic and that many breakfast cereals, yogurts, and flavored milks that meet the final limits are or will be available to schools. As discussed in the *Regulatory Impact Analysis,* based on data that USDA collected in 2022, 50 percent of breakfast cereals and 57 percent of yogurts already met the added sugars limits finalized in this rule in 2022.[42] Regarding flavored milk, as noted in public comments, the milk industry has committed to reducing added sugars in flavored milk to levels that meet the limits finalized in this rule.[43] USDA appreciates public comments from industry that noted significant progress in product reformulation and a variety of products available in the market that already meet the product-based limits finalized in this rule. Additionally, the gradual, phased-in approach used in this rule will provide schools time to implement the changes.

Product-Based Limit for Grain-Based Desserts at Breakfast [Not Finalized]

As noted above, USDA is not finalizing the proposed limit for grain-based desserts at breakfast. Public comments raised concerns about potential negative impacts of the proposal to the SBP, especially to alternative breakfasts that often contain grab-and-go friendly items, including grain-based desserts such as breakfast bars and toaster pastries. Respondents were concerned about the availability and student acceptance of alternative items that can readily be served in grab-and-go and other alternative breakfast models. In addition, many respondents raised questions about the definition of grain-based desserts as currently used in the NSLP and CACFP[44] or suggested alternative approaches to current requirements for those programs. Under current requirements, which define grain-based desserts by product type, some grain items that are not classified as grain-based desserts are higher in added sugars than items that are classified as grain-based desserts. Some respondents suggested that rather than defining grain-based desserts by product type, USDA should instead define grain-based desserts based on the amount of added sugars in specific products. For these reasons, many respondents recommended that USDA reconsider the proposal. Therefore, in response to stakeholder input, USDA is not finalizing the grain-based dessert limit for school breakfast.

USDA is committed to supporting alternative breakfast models, such as breakfast in the classroom and grab-and-go breakfast, which support student participation[45] by making school breakfast more accessible. USDA also appreciates concerns that the current definition of ''grain-based dessert'' does not target grain products high in added sugar as effectively as possible. Although some respondents raised concerns about product-based limits for breakfast cereals, yogurt, and flavored milk, those comments did not cite operational constraints for alternative breakfast models under the proposed limits. Further, as detailed above, USDA has determined adequate products will be available to meet the product-based limits for breakfast cereals, yogurt, and flavored milk finalized in this rule upon implementation.

USDA recognizes that reducing grain items that are high in added sugars is one important strategy to support the phased-in implementation of the weekly added sugars limit. USDA will continue to support implementation of alternative breakfast models by highlighting popular grain items that are low in added sugars and that are grab-and-go friendly. Schools may also consider offering savory grab-and-go breakfast items, such as breakfast sandwiches and wraps, to reduce the overall added sugars content of school breakfasts. As discussed in *Section 6: Meats/Meat Alternates at Breakfast,* this rule removes the minimum grains requirement at breakfast, making it easier for schools to offer meats/meat alternates at breakfast. In the absence of a grain-based dessert limit at breakfast, schools may need additional support and guidance to reduce added sugars at breakfast and meet the weekly limit upon implementation in SY 2027–2028.

As discussed below, USDA will provide technical assistance to ensure that schools have the resources they need to reduce added sugars at breakfast, including meeting the weekly added sugars limit at breakfast upon implementation. USDA also seeks to support industry in producing breakfast grains which can be part of menus under the weekly added sugars limit. The Department will provide voluntary guideposts for schools and industry to use to assist them in transitioning to the weekly added sugars limits in SY 2027–2028. This will include resources that schools may use to identify grain items that are low in added sugars.

USDA is very interested in and will solicit additional stakeholder input on improving guidance around grain-based breakfast items. As part of this effort, USDA will seek stakeholder input on the current grain-based desserts requirements, alternative approaches to defining and identifying grains that are high in added sugars, and other creative ideas for how to address grain-based desserts in the child nutrition programs. USDA looks forward to receiving stakeholder feedback on this topic in the coming months.

Sweeteners

This final rule is focused on limits for added sugars, not other sweeteners used as sugar substitutes or sugar alternatives. USDA acknowledges respondent concerns regarding sweeteners in child nutrition programs, referred to in public comments in a variety of ways, including ''artificial sweeteners,'' ''non-nutritive sweeteners,'' and ''sugar substitutes.''[46]

[42] USDA Food and Nutrition Service, Office of Policy Support data collection of nutrition label information from major cereal and yogurt manufacturer K–12 and food service catalogs. Data were collected on 191 total cereal products and 110 total yogurt products.

[43] In April 2023, the International Dairy Foods Association announced its ''Healthy School Milk Commitment.'' According to a press release from the International Dairy Foods Association, ''[b]eginning with the 2025–2026 school year, 37 school milk processors representing more than 90% of the school milk volume in the United States commit to provide healthy, nutritious school milk options with no more than 10 grams of added sugar per 8 fluid ounce serving.'' See: International Dairy Foods Association. *IDFA Announces 'Healthy School Milk Commitment' to Provide Nutritious Milk with Less Added Sugar for Students in Public Schools, Surpassing USDA Standards.* April 5, 2023. Available at: *https://www.idfa.org/news/idfa-announces-healthy-school-milk-commitment-to-provide-nutritious-milk-with-less-added-sugar-for-students-in-public-schools-surpassing-usda-standards.*

[44] For NSLP, according to 7 CFR 210.10(c)(2)(iii)(C) (previously 7 CFR 210.10(c)(2)(iv)(C), schools may count up to two ounce equivalents of grain-based desserts per week toward meeting the grains requirement at school lunch. For CACFP, according to 7 CFR 226.20(a)(4)(iii), grain-based desserts do not count toward meeting the grains requirement. The grain-based dessert requirements for NSLP and CACFP remain in effect under this final rule.

[45] Amelie A. Hecht, Deborah A. Olarte, Gabriella M. McLoughlin, Juliana F.W. Cohen, *Strategies to Increase Student Participation in School Meals in the United States: A Systematic Review,* Journal of the Academy of Nutrition and Dietetics, Volume 123, Issue 7, 2023, Pages 1075–1096.e1, ISSN 2212–2672, *https://doi.org/10.1016/j.jand.2023.02.016.* Available at: *https://www.sciencedirect.com/science/article/pii/S221226722300103X.*

[46] Although respondents used a variety of terms in public comments, USDA will refer to ''sweeteners'' in this final rule, consistent with FDA terminology. U.S. Food and Drug Administration, *How Sweet It Is: All About Sweeteners,* June 9, 2023.

Continued

Sweeteners, like all other ingredients added to food in the U.S. food supply, must be safe for consumption under the Federal Food, Drug and Cosmetic Act.[47] FDA determines if food additives, such as sweeteners, are safe for their intended use. FDA has approved six sweeteners as food additives through an extensive evidence-based research process.[48] In addition to the six sweeteners approved as food additives, there are three additional sweeteners that are Generally Recognized as Safe (GRAS). USDA relies on FDA expertise to safeguard the food supply because FDA is the Federal agency responsible for assessing the safety of food additives, food ingredients, and sweeteners, including artificial sweeteners and nonnutritive sweeteners. Therefore, under this final rule, there are no restrictions on sweeteners in school meals, such as the use of sugar substitutes and nonnutritive sweeteners; this approach aligns with current FDA guidance for sweeteners. However, at the local level, schools or districts may opt to limit or remove sweeteners from their school lunch and breakfast menus, which USDA recognizes that some localities have chosen to do. Further, in response to stakeholder concerns about sweeteners, in upcoming studies, USDA will include questions regarding school policies relating to the use of sweeteners in school meals and will continue to monitor FDA research and guidance on this issue.

Ongoing Support

USDA is committed to ensuring that child nutrition program operators have ongoing support and will provide additional technical assistance and resources to assist schools and child care institutions and facilities as they prepare to implement and monitor new or updated requirements. USDA appreciates public comments requesting guidance and support for monitoring these changes and will update the nutrient analysis software approved for use in Administrative Reviews so that it includes a dietary specification for added sugars. As noted above, USDA will provide resources to support schools and industry in transitioning to the weekly added sugars limit in SY 2027–2028 and will make these resources available in time to support procurement for SY 2025–2026. USDA has already highlighted strategies that schools can use to reduce added sugars in *Best Practices for Reducing Added Sugars at School Breakfast.*[49] For example, schools can:

- Reduce how often high-sugar foods and beverages are offered during the week.
- Use fruit to sweeten smoothies and yogurt instead of added sugars.
- Use cinnamon, vanilla, and other spices or extracts to enhance recipes with less added sugars.

In public comments, many respondents suggested that meats/meat alternates be allowed in place of grains to help reduce added sugars in breakfasts. As discussed in *Section 6: Meats/Meat Alternates at Breakfast,* schools may consider this option as a strategy to reduce added sugars at breakfast, since some grain foods commonly offered in school breakfasts tend to be higher in added sugars. Schools now have the option to offer grains, meats/meat alternates, or a combination of both, to meet the combined food component requirement in the SBP. This change gives program operators greater flexibility in menu planning and increases the variety of food items that can be served at school breakfast, helping to address respondent concerns about meeting the added sugars limits at breakfast. Local educational agencies may also consider updating their local school wellness policies with strategies to reduce added sugars in school meals and snacks. USDA also commends industry efforts to reduce added sugars in their products, including in flavored milk. For example, USDA understands that flavored milk processors have already reduced the average amount of added sugars per serving of flavored milk since announcing their ''Healthy School Milk Commitment'' in April 2023.[50] As suggested by comments, support from industry is crucial to schools' efforts to continue to offer foods that are popular with children and also fit within the product-based and weekly limits phased in under this rulemaking.

USDA acknowledges public comments that requested increased funding to support implementation of the added sugars limits. USDA does not have authority to increase the Federal reimbursement rates for school meals.[51] However, USDA launched the HMI Initiative to improve the nutritional quality of school meals through food systems transformation, recognition, and technical assistance; the generation and sharing of innovative ideas and tested practices; and grants. As part of a cooperative agreement to develop and implement USDA's HMI Initiative, AFHK is offering Recognition Awards for school food authorities, including the Breakfast Trailblazer Recognition Award, that will recognize school food authorities who implement specific strategies to reduce added sugars in school breakfast menus, implement an alternative meal service delivery model for breakfast, and use student engagement techniques and/or culinary techniques to prepare breakfasts that students enjoy. Public comments noted the importance of student preferences and participation. Developing healthy dietary patterns and taste preferences begins at a young age, and gradually decreasing added sugars in school meals can contribute to developing student preferences for more nutrient-dense foods, with less added sugars, as recommended by the *Dietary Guidelines.* As part of the HMI Initiative, AFHK will host Healthy Meals Summits, where award recipients and grantees will share best practices and strategies for sustaining their nutritional achievements, including successful strategies to reduce added sugars. The summits will celebrate and showcase creative strategies for serving healthy, appealing meals and the best practices will serve as a blueprint for school food authorities nationwide. USDA will also share strategies and success stories for reducing added sugars in its communications materials and will provide guidance and resources to schools working to reduce

Available at: *https://www.fda.gov/consumers/consumer-updates/how-sweet-it-all-about-sweeteners.*

[47] U.S. Food and Drug Administration, *Aspartame and Other Sweeteners in Food,* July 14, 2023. Available at: *https://www.fda.gov/food/food-additives-petitions/aspartame-and-other-sweeteners-food.*

[48] Amelie A. Hecht, Deborah A. Olarte, Gabriella M. McLoughlin, Juliana F.W. Cohen, *Strategies to Increase Student Participation in School Meals in the United States: A Systematic Review,* Journal of the Academy of Nutrition and Dietetics, Volume 123, Issue 7, 2023, Pages 1075–1096.e1, ISSN 2212–2672, *https://doi.org/10.1016/j.jand.2023.02.016.* Available at: *https://www.sciencedirect.com/science/article/pii/S221226722300103X.*

[49] U.S. Department of Agriculture, *Best Practices for Reducing Added Sugars at School Breakfast,* August 4, 2022. Available at: *https://www.fns.usda.gov/tn/best-practices-reducing-added-sugars-school-breakfast.*

[50] According to the International Dairy Foods Association, ''When the Commitment was announced in April 2023, flavored milk products offered in schools contained an average of 8.2 grams of added sugar per serving. By July 2023, the average had fallen to 7.6 grams of added sugar per serving.'' See: International Dairy Foods Association, *School Milk Is Critical to Child Nutrition—School Year 2023–2024.* Available at: *https://www.idfa.org/wordpress/wp-content/uploads/2023/09/Back-to-School-Milk-Fact-Sheet-2023_2024.pdf.*

[51] The annual payments and rates adjustments for the National School Lunch and School Breakfast Programs reflect changes in the Food Away From Home series of the Consumer Price Index for All Urban Consumers. See: U.S. Department of Agriculture. *Rates of Reimbursement.* Available at: *https://www.fns.usda.gov/cn/rates-reimbursement.*

added sugars in school meals in the months ahead.

Assessing Impact of Added Sugars Limits

USDA recognizes the importance of monitoring progress toward the new added sugars limits and assessing the effectiveness of the two-step approach. USDA has a long history of examining the nutritional quality of school meals through studies such as the *School Nutrition and Meal Cost Study* and the *School Nutrition Dietary Assessment Study* series. The 2024–2025 *National School Foods Study* will incorporate added sugars into this assessment, which is based on an extensive menu survey, designed to determine the food and nutrient content of school meals and afterschool snacks, examine compliance with nutrition requirements, and understand the characteristics of foods and beverages in reimbursable meals.

These studies also assess actual student dietary intake and overall diet quality through 24-hour dietary recall interviews. The 2024–2025 study will establish a ''baseline year'' (SY 2024–2025) for examining the impact of the added sugars and sodium limits included in this rulemaking.

In accordance with its commitment to regularly monitor how consistent school meals are with the goals of the *Dietary Guidelines,* USDA conducts the *School Nutrition and Meal Cost Study* on a five-year cycle, which will provide another comprehensive assessment in SY 2029–2030, after both the updated sodium limits and added sugars limits have been fully implemented.

However, to monitor progress and provide data on the effectiveness of product-based limits as a step toward meeting the overall weekly added sugars limit, USDA will invest in an additional menu assessment in SY 2026–2027, between the two *School Nutrition and Meal Cost Study* cycles. This nationally representative survey will focus on the foods and beverages that make up reimbursable meals and allow USDA to examine the effect of the product-based added sugars limits, which will take effect in SY 2025–2026. Additionally, this survey will allow USDA to estimate both added sugars and sodium content of reimbursable school meals.

Together these studies will provide USDA with critical evidence about rule implementation, effects, and potential barriers and help monitor changes in nutrient content of foods over time. This data will provide invaluable insight into school meal nutrient composition and student dietary outcomes. In addition, USDA will continue current practice of using existing data sources—such as the National Health and Nutrition Examination Survey—to periodically examine other outcomes, including the relationship between estimated school meal program participation, diet quality, indicators of nutrition and health, food consumption patterns, and nutrient intakes. This in turn can inform future policy and rulemaking.

Accordingly, this final rule codifies the product-based added sugars limits for breakfast cereals, yogurt, and flavored milk, and codifies the weekly dietary specification for added sugars in NSLP and SBP regulations found at 7 CFR 210.10(b)(2)(iii), (c), (d)(1)(iii), (f)(3), and (h) and 220.8(b)(2)(iii), (c), (d), and (f)(3). These amendments must be implemented by July 1, 2025, except for the weekly dietary specification, which must be implemented by July 1, 2027. This final rule also replaces total sugar limits for breakfast cereals and yogurt with added sugars limits in CACFP regulations found at 7 CFR 226.20(a)(4)(ii), (a)(5)(iii)(B), (b)(5), and (c). The CACFP amendments must be implemented by October 1, 2025.

Section 3: Milk

This section includes the following sub-sections:

- *Section 3A* discusses requirements for flavored milk in the NSLP, SMP, SBP, and CACFP, and for milk sold à la carte (*i.e.,* as a Smart Snack in School).
- *Section 3B* provides an overview of comments that USDA received in response to the proposed rule's request for input on fluid milk substitutes in the child nutrition programs.
- *Section 3C* discusses the nutrient requirements for fluid milk substitutes.

Section 3A: Flavored Milk

Current Requirement

The National School Lunch Act (42 U.S.C. 1758(a)(2)(i)) requires schools to offer students a variety of fluid milk at lunch; such milk must be consistent with the most recent *Dietary Guidelines.* The Child Nutrition Act (42 U.S.C. 1773(e)(1)(A)) requires school breakfasts to meet the same terms and conditions set forth for school lunches in the National School Lunch Act (42 U.S.C. 1758), including the requirements for fluid milk. Current regulations at 7 CFR 210.10(d)(1)(i), 220.8(d), and 210.11(m) allow schools to offer fat-free and low-fat (1 percent fat) milk, flavored and unflavored, in reimbursable school lunches and breakfasts, and for sale à la carte. The current regulations also require that unflavored milk be offered at each school meal service. Fat-free and low-fat milk, flavored and unflavored, may also be offered to participants ages 6 and older in the SMP and CACFP (7 CFR 215.7a(a) and 226.20(a)(1)(iii)). Lactose-free and reduced-lactose milk meet the meal pattern requirements for fluid milk (7 CFR 210.10(d)(1)(i), 215.7a(a), 220.8(d), and 226.20(a)(1)). The current milk requirements took effect on July 1, 2022.

Proposed Rule

USDA proposed the following two alternatives for milk requirements in the school lunch and breakfast programs and invited public comment on both:

- *Alternative A:* Allow flavored milk (fat-free and low-fat) at school lunch and breakfast for high school children only, effective SY 2025–2026. Under this alternative, USDA proposed that children in grades K–8 would be limited to a variety of unflavored milk. USDA also requested public input on whether to allow flavored milk for children in grades 6–8 as well as high school children (grades 9–12). Children in grades K–5 would again be limited to a variety of unflavored milk. Under both Alternative A scenarios, flavored milk would be subject to the new proposed added sugars limit (10 grams of added sugars per 8 fluid ounces).
- *Alternative B:* Continue to allow all K–12 schools to offer fat-free and low-fat milk, flavored and unflavored, with the new proposed added sugars limit for flavored milk (10 grams of added sugars per 8 fluid ounces).

USDA also proposed a minor technical change to the regulatory text for milk sold à la carte. Instead of repeating the allowable milk types in 7 CFR 210.11(m), which describes the beverages that schools can sell à la carte, USDA proposed to cross-reference 7 CFR 210.10(d). This change was intended to clarify that the NSLP milk requirements apply to milk sold à la carte.

Public Comments

USDA received over 1,600 comments on flavored milk, including almost 600 unique comments. Of these, over 1,500 supported flavored milk, including about 375 unique comments. About 70 opposed flavored milk, including about 50 unique comments. Additionally, specific comment counts regarding Alternative A and Alternative B proposals are described in more detail below. A wide range of stakeholders, including State agencies, school nutrition professionals, advocacy groups, industry respondents, professional associations, dietitians, parents, and students commented on the proposed milk alternatives. At a high

level, respondents provided the following feedback on flavored milk:

- Flavored milk is the leading source of added sugars in school meals.
- Offering flavored milk, which is a more palatable option for some children, improves children's milk consumption and reduces milk waste.
- Milk is an important source of calcium, protein, and other micronutrients.
- USDA should consider operational constraints, such as a lack of storage space for flavored milk, when determining which milk alternative to finalize.

More detailed respondent feedback, including respondent input on the two alternatives, is discussed below.

Alternative A: Allow Flavored Milk for Older Students Only

Fifty-five respondents, including 36 unique comments, representing school nutrition professionals, parents, and advocacy groups, supported Alternative A. A school nutrition professional suggested that Alternative A would help transition students away from flavored milk and reduce their consumption of added sugars. This respondent suggested that after students who are currently in grades K–5 transition to middle and high school, USDA could apply the limit to older children, too. A parent agreed, asserting that water and unflavored milk are the only beverages that young children should consume. A school nutrition professional stated that, although flavored milk is the most popular choice, the amount of added sugars in flavored milk is ''unnecessary for our student's diets.'' This respondent argued that students are already exposed to too much added sugars outside of school meals. Another Alternative A proponent stated that flavored milk should be a treat for younger students, not an everyday choice. An advocacy group noted that flavored milk is a top contributor to added sugars intake and that younger children overconsume added sugars at a higher rate than older children.

Some respondents opposed flavored milk in school meals entirely. Several advocacy groups recommended that USDA limit flavored milk options for all grade levels. Many respondents urged USDA to limit flavored milk to the greatest extent possible, citing that nutrients found in milk are also found in other foods that are lower in added sugars. An individual argued that flavored milk should not be served in school meals because the added sugars ''cancels out any potential benefits of consuming milk.'' A school district opposed flavored milk and mentioned that flavored milk is not offered at any of their schools. An advocacy group urged USDA to prohibit flavored milk in school meals due to the harmful public health impacts of added sugars consumption.

A few respondents addressed concerns about Alternative A's potential impact on children's milk consumption. An advocacy group cited research that found a ''modest decrease'' in student milk consumption when flavored milk was removed from schools but noted that the same study found ''no significant reductions in average per-student intake of calcium, protein, or vitamin D from milk.'' The respondent added that the same study found a decline in added sugars intake from removing flavored milk. However, this advocacy group recommended that USDA periodically monitor milk consumption and intake of milk-related nutrients if Alternative A is implemented.

In addition to general feedback, USDA requested public input on the following questions related to Alternative A:

- Do respondents that support Alternative A have specific input on whether USDA should limit flavored milk to high schools only (grades 9–12) or to middle schools and high schools only (grades 6–12)?
- If Alternative A is finalized with restrictions on flavored milk for grades K–8 or K–5 in NSLP and SBP, should USDA also pursue a similar change in SMP and CACFP?
- Are there any special considerations USDA should keep in mind for SMP and CACFP operators, given the differences in these programs compared to school meal program operators?

In response to the first question, one industry respondent supported limiting grades K–8 to unflavored milks only, if this change is accompanied by a reduction in minimum required calories or an increase in program funding. This respondent explained that when omitting flavored milk, menus are significantly higher in cost due to adding calories from other food groups to meet the required minimum calories. A school district and a dietitian each supported removing flavored milk from the school meal programs entirely but stated that if USDA maintains flavored milk for some students, it should be limited to grades 9–12 only. A few advocacy groups also supported limiting elementary and middle schools to offering unflavored milk only. A few other advocacy groups supported allowing flavored milk for grades 6–12 and limiting grades K–5 to unflavored milk only; one suggested that this approach would give middle schools students, who are old enough to make healthy food choices, the option to choose flavored or unflavored milk.

Regarding the second question, over 100 respondents, including 34 unique comments, addressed whether USDA should pursue a similar change in SMP and CACFP, if Alternative A is finalized for school meals. One CACFP sponsoring organization did not support further restricting flavored milk options in CACFP. A few advocacy groups representing CACFP sponsoring organizations stated they ''categorically oppose'' Alternative A and that ''USDA should not pursue a similar change in CACFP.'' Another advocacy group opposed limiting flavored milk to older children only in the CACFP, asserting that ''acceptance of milk would decrease'' if flavored milk is not permitted. A State agency also opposed limiting flavored milk to older children only in the CACFP, noting that some children participating in the afterschool component of CACFP engage in physical activities, where flavored milk could be a suitable recovery beverage. A CACFP sponsoring organization agreed, suggesting that children who participate in their afterschool care program prefer flavored milk.

However, a State agency supported implementing similar changes in SMP and CACFP to support consistency in program requirements, if Alternative A is finalized for school meals. An individual also supported similar changes in SMP and CACFP, arguing that this would help reduce added sugars intake and help establish healthy eating patterns for young children. This respondent stated that special considerations for these programs are ''unnecessary.'' A school district also supported similar changes in SMP and CACFP ''for consistent messaging and implementation.''

Alternative B: Continue To Allow Flavored Milk for All K–12 Students

About 800 respondents, including 180 unique comments, including State agencies, school nutrition professionals, industry respondents, and individuals, supported Alternative B. Many cited children's preference for flavored milk as a key reason for supporting Alternative B. For example, a school district shared that they serve 90 percent flavored milk and 10 percent unflavored milk, and a dietitian asserted that 95 percent of the children at their school drink flavored milk and the children ''won't drink milk anymore'' if they only offer unflavored milk. A school food service professional supported Alternative B because a

majority of the milk they purchase (97 percent) is flavored milk and they would ''rather students take some form of milk than none at all.'' Numerous other respondents agreed, claiming that flavored milk is associated with higher milk consumption and student participation. One respondent emphasized the importance of allowing choice and teaching students how to consume all foods and beverages in moderation.

A national organization representing tens of thousands of school nutrition professionals supported Alternative B, acknowledging that ''milk processers have significantly reduced added sugar[s]'' in flavored milk served in schools. A school nutrition professional, a parent, and other respondents also recognized the importance of reducing added sugars, but maintained that student participation should be a priority; thus, these respondents supported Alternative B. Respondents also noted that flavored milk is an important source of nutrients such as calcium and protein. A dietitian asserted that a small amount of added sugars in milk helps students receive the nutritional benefits of milk. One respondent claimed that children not drinking milk is more ''detrimental to [student] health than added sugars in flavored milk,'' and therefore supported continuing to allow flavored milk for all K–12 students. Another respondent supported lowering added sugars in flavored milks, but not restricting flavored milks. Respondents also stated that restricting flavored milk may cause students to consume other beverages, including sugary beverages like soda and energy drinks.

Several respondents that supported Alternative B raised operational concerns regarding Alternative A. A State agency suggested that many rural schools have one building and may only have one milk cooler for grades K–12. The State agency also noted that many schools serve meals to students across grades in the same meal service (for example, grades 5–7 or grades 7–9) and it would be difficult for students to understand if one grade can have flavored milk and others cannot. Similarly, another State agency mentioned that some of their schools have grades 6–12 in one building, and ''changing out the milk adds one more task to a busy lunch period.'' This respondent added that some schools do not have extra refrigeration space to remove flavored milk from their milk cooler during the meal service. A third State agency also noted that schools in their State have many unique grade configurations, including grades K–6, K–12, and 7–12. This State agency noted that it would be ''very burdensome'' for schools to move milk in and out of coolers between meal services for different grades, and that the challenges of implementing Alternative A would be even more difficult when different grades are served during the same meal periods.

An individual noted that implementing Alternative A could be difficult for school employees, who would be responsible for explaining the change to families. A dietitian agreed, suggesting that Alternative A would send a ''confusing message.'' A State agency cited concerns about supply chain issues and prices, arguing that schools already have limited choices, and further restrictions would negatively impact price and availability. A school district raised purchasing concerns, noting that purchasing for a large district is ''complicated'' and that Alternative A could create more confusion for vendors. A State agency suggested Alternative A would increase monitoring requirements. A different State agency raised similar concerns, especially when multiple grades share meal services. For example, this State agency noted that differing milk requirements by grade level could create challenges during an Administrative Review, as a reviewer would have to inquire about a student's grade level when they are passing through the lunch line, to ensure the student received a compliant milk.

Other Comments on Flavored Milk

Some respondents offered their own alternatives or suggested changes to the milk requirements. For example, instead of finalizing Alternative A, several respondents suggested limiting flavored milk to lunch only and requiring unflavored milk at breakfast. One respondent supported Alternative A, but for a different approach, suggested allowing flavored milk only once per week for grades 9–12. A few respondents, including an advocacy group and school districts, recommended that USDA allow schools to choose which alternative to implement.

Other respondents encouraged USDA to expand milk options beyond fat-free and low-fat milk. For example, one school district suggested USDA allow reduced-fat (2 percent), unflavored milk, arguing that this option is more palatable for students. One respondent suggested allowing whole milk in school meals, while another agreed and specifically suggested allowing whole, flavored milk. A State elected official encouraged USDA to allow reduced-fat and whole milk options, asserting that this would increase milk consumption and reduce milk waste. An industry respondent agreed, stating that they are confident that the next edition of the *Dietary Guidelines* will ''look more favorably on dairy at all fat levels.'' This respondent urged USDA to allow reduced-fat and whole milk in school meals in anticipation of what the industry respondent expects in the next *Dietary Guidelines.* A dietitian suggested USDA consider ''increasing the allowable fat and calories'' in milk options.

A State agency urged USDA to reconsider the requirement to provide a variety of fluid milks (*i.e.,* at least two options) with each meal service. This respondent argued that the variety requirement leads to a lot of waste. A school food service professional agreed, suggesting that providing variety contributes to waste. This respondent stated that ''skim [milk] is almost never chosen and ends up wasted.'' A professional organization cautioned that limiting flavored milk options could potentially effect meal participation and financial viability for schools. A school district respondent requested that USDA increase funding for Farm to School and equipment grant projects to support more locally produced milk and bulk milk dispensers.

Final Rule

This final rule codifies the proposal to maintain the current milk regulations, with minor technical changes, at 7 CFR 210.10(d), 220.8(d), and 210.11(l).[52] Under this final rule, all schools continue to have the option to offer fat-free and low-fat milk, flavored and unflavored, to K–12 students, and to sell fat-free and low-fat milk, flavored and unflavored, à la carte. Consistent with current requirements, unflavored milk must be offered at each school breakfast and lunch meal service. SMP and CACFP operators may continue to offer fat-free and low-fat milk, flavored and unflavored, to participants ages 6 and older. Additionally, as a reminder, lactose-free and reduced-lactose milk will continue to meet the meal pattern requirements for fluid milk under this final rule (7 CFR 210.10(d)(1)(i), 215.7a(a), 220.8(d), and 226.20(a)(1)).

Under requirements established in this final rule for added sugars, as discussed in *Section 2: Added Sugars,* flavored milk offered to K–12 students

[52] This final rule redesignates the paragraph outlining requirements for competitive beverages, which was previously 7 CFR 210.11(m) to instead be 7 CFR 210.11(l). Under this final rule, the requirements for milk sold as a competitive beverage are outlined at 7 CFR 210.11(l).

in the NSLP and SBP and sold to students à la carte during the school day must comply with the product-based added sugars limit. Under this product-based limit requirement, effective SY 2025–2026, flavored milk must contain no more than 10 grams of added sugars per 8 fluid ounces, or for flavored milk sold à la carte in middle and high schools, 15 grams of added sugars per 12 fluid ounces.

USDA is committed to ensuring that school meals provide children with nutrient-dense foods and beverages that are consistent with the goals of the most recent *Dietary Guidelines.* USDA recognizes that dairy products, including fluid milk, provide a variety of essential nutrients—some of which are underconsumed among school-aged children. The decision to allow flavored, low-fat milk acknowledges concerns expressed in public comments about declining milk consumption among school-aged children. It also acknowledges the nutrients that milk provides (*e.g.,* calcium, vitamin D, and potassium), which remain nutrients of public health concern for the general U.S. population because they are underconsumed.[53] Respondents expressed the importance of considering milk palatability and acceptability when establishing long-term requirements.

Many stakeholders raised concerns about the potential impact on milk consumption if flavored milk options were limited under Alternative A. USDA recognizes that both flavored and unflavored milk provide children with key nutrients. Flavored milk has been shown to encourage milk consumption among school-aged children,[54] and public comments from school nutrition professionals suggest that children may select and consume flavored milk more often than unflavored milk. For example, USDA research from SY 2014–2015 found that about 18 percent of low-fat, flavored milk offered with school lunch was wasted, compared to 35 percent of low-fat, unflavored milk.[55] USDA acknowledges the benefit of allowing flavored milk to be offered as a strategy to promote milk consumption, a beverage that provides several nutrients that are underconsumed during childhood and adolescence. Additionally, many respondents stated that flavored milk is purchased in higher quantities compared to unflavored milk, affirming that flavored milk is a popular choice among students. Offering both flavored and unflavored varieties of milk as part of a nutritious school meal may help to minimize the gap between current and recommended intakes of key nutrients among school-aged children and adolescents. For example, a USDA study found that K–12 students who participated in NSLP were significantly more likely to consume milk compared to students who did not participate.[56] Thus, the school meal programs remain a contributing factor in influencing milk consumption among children. USDA acknowledges the importance of allowing schools the option to offer milk varieties that children will consume and enjoy.

USDA recognizes that some stakeholders supported limiting flavored milk options under Alternative A. USDA appreciates public input on Alternative A, which would have limited flavored milk offerings to older students, in grades 9–12 or grades 6–12. Several respondents acknowledged that Alternative A would help reduce the intake of beverages with added sugars, especially for younger children. Advocacy groups and parents also supported this alternative as a way to transition students from flavored to unflavored milk and reduce their consumption of added sugars. Conversely, other respondents raised important concerns about the operational feasibility if Alternative A were finalized. For example, one school district explained that some schools serve multiple grades in a single meal service, and students from grades K–12 may be in the cafeteria at the same time. These schools may not have the opportunity or capacity to limit milk options as children from different grade levels pass through the serving lines, and would have to monitor student milk selections by grade level to ensure compliance with Alternative A. A few State agencies added that limiting flavored milk options by grade levels could be challenging to monitor during Administrative Reviews. USDA acknowledges respondent concerns that Alternative A could be difficult to implement and monitor, especially for small schools or schools where students from different grade levels share the same meal service. Due to the variability in school size, grade level configurations, storage and cafeteria space, and overall operations, USDA recognizes that Alternative A could cause unintended operational and administrative challenges for both schools and State agencies. USDA appreciates the important concerns raised by stakeholders, particularly on behalf of small schools, and considered this input in the final rule.

USDA recognizes that under this final rule, flavored milk will continue to contribute to added sugars in school meals. However, as noted in *Section 2: Added Sugars,* this rulemaking also finalizes a product-based added sugars limit for flavored milk. By SY 2025–2026, schools must implement a product-based limit for flavored milk of no more than 10 grams of added sugars per 8 fluid ounces or, for flavored milk sold as a competitive food for middle and high schools, 15 grams of added sugars per 12 fluid ounces. In SY 2027–2028, this rule will also implement an overall weekly limit for added sugars of less than 10 percent of calories per week. USDA expects that these actions, as well as the other product-based added sugars limits finalized in this rulemaking, will support an overall decrease in the added sugars content of school meals. Additionally, as noted above, this final rule maintains that NSLP and SBP operators who choose to offer flavored milk must also offer unflavored milk (fat-free or low-fat) to students in the same meal service. This requirement ensures that milk variety in the NSLP and SBP is not limited to flavored milk choices, and that a nutrient-dense form of milk that is lower in added sugars (*i.e.,* unflavored milk) is always available for students to select. USDA is committed to advancing the nutritional quality of school meals and reducing added sugars to safeguard children's health and align with the goals of the most recent *Dietary Guidelines.*

USDA appreciates respondent feedback on additional approaches to

[53] U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines for Americans, 2020–2025. 9th Edition.* December 2020. Page 36. Available at: *DietaryGuidelines.gov.*

[54] See page 58. Institute of Medicine, *Nutrition Standards for Foods in Schools: Leading the Way Toward Healthier Youth* (''IOM Report''). Available at: *https://nap.nationalacademies.org/catalog/11899/nutrition-standards-for-foods-in-schools-leading-the-way-toward.* See also: Mary M. Murphy et al., Drinking Flavored or Plain Milk is Positively Associated with Nutrient Intake and Is Not Associated with Adverse Effects on Weight Status in U.S. Children and Adolescents.

[55] See Table 5.1: *Mean Percentage of Observed Trays including Specific Foods and Mean Percentage of Observed Foods Wasted in NSLP Lunches.* U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, *School Nutrition and Meal Cost Study, Final Report Volume 4: Student Participation, Satisfaction, Plate Waste, and Dietary Intakes,* by Mary Kay Fox, Elizabeth Gearan, Charlotte Cabili, Dallas Dotter, Katherine Niland, Liana Washburn, Nora Paxton, Lauren Olsho, Lindsay LeClair, and Vinh Tran. Project Officer: John Endahl. Alexandria, VA: April 2019. Available at: *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

[56] U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, *School Nutrition and Meal Cost Study Volume 4: Student Participation, Satisfaction, Plate Waste, and Dietary Intakes Appendix I–P.* Available at: *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

reduce added sugars intake from flavored milk. For example, respondents suggested that schools can limit flavored milk options to lunch only, procure flavored milks with the least amount of added sugars, or limit flavored milk to one day per school week. Additionally, there is no requirement that schools offer flavored milk, and schools may choose to remove all flavored milk from school meal menus as long as the school continues to offer a variety of fluid milk. For example, one school district commented that they have removed flavored milk from their menus to support school wellness. USDA encourages schools to consider these strategies to further reduce added sugars in school meals and to choose options that work best for their unique communities.

Respondents also raised other ideas and suggestions related to milk requirements. For example, some respondents encouraged USDA to remove the milk variety requirement. The requirement to offer a variety of milk options is mandated by statute, and USDA does not have the authority to change this statutory requirement (42 U.S.C. 1758(a)(2)(i)). Schools have several options to meet the milk variety requirement, such as offering unflavored fat-free and unflavored low-fat milk. Schools may also offer lactose-free or reduced-lactose milk (fat-free or low-fat) to meet the milk variety requirement. Other respondents recommended USDA allow schools to offer milk with a higher fat content. While USDA appreciates comments suggesting schools be allowed to offer reduced fat and whole milk, allowing these milk options in the school meal programs would not be consistent with the goals of the most recent *Dietary Guidelines* as required by the NSLA and would make it difficult for menu planners to achieve weekly dietary specifications without exceeding calorie and saturated fat limits. Statutory requirements state that milk offered in reimbursable school meals must be consistent with the most recent *Dietary Guidelines,* and the *Dietary Guidelines, 2020–2025* recommends unsweetened, fat-free or low-fat milk for school-aged children. Therefore, USDA does not permit reduced-fat or whole milk in the school meal programs (7 CFR 210.10(d)(1)(i) and 220.8(d)).

As mentioned above, this final rule does not change any milk requirements in CACFP. Many respondents requested that milk standards established in school meal programs be consistent with the CACFP. USDA recognizes that regulatory consistency across programs, a long-time goal at USDA, facilitates program administration and operation at the State and local levels, fosters support, and meets stakeholder expectations.

Accordingly, this final rule makes minor technical changes to the requirements found in 7 CFR 210.10(d)(1), 210.11(l)(1)(ii), (l)(2)(ii), and (l)(3)(ii),[57] and 220.8(d). This final rule continues to allow NSLP and SBP operators to offer unflavored or flavored, fat-free or low-fat milk as part of a reimbursable meal and for sale à la carte, and to allow flavored, low-fat milk in the SMP and in the CACFP for participants ages 6 and older. Because this rule finalizes the current flavored milk requirements, child nutrition program operators will not need to make changes to their menus to comply with this provision, beyond those changes described in *Section 2: Added Sugars*.

Section 3B: Fluid Milk Substitutes: Responses To Request for Input

Current Requirement

As noted in *Section 3A: Flavored Milk,* the National School Lunch Act requires fluid milk (cow's milk) to be offered with every school breakfast and lunch. The statute is also very specific about allowable fluid milk substitutes for non-disability reasons. To provide a substitute for cow's milk in the school meal programs, the statute requires:

- That the fluid milk substitute is nutritionally equivalent to fluid milk and meets nutritional standards established by the Secretary, which must include fortification of calcium, protein, vitamin A, and vitamin D to levels found in cow's milk (42 U.S.C. 1758(a)(2)(B)(i)). This requirement also applies to the CACFP (42 U.S.C. 1766(g)(4)(B)).
- That the substitution is requested in writing by a medical authority or the child's parent or legal guardian (42 U.S.C. 1758(a)(2)(B)(ii)). This requirement also applies to CACFP (42 U.S.C. 1766(g)(4)(C)(i)(II)).
- That the school notify the State agency if it is providing fluid milk substitutes for non-disability reasons (42 U.S.C. 1758(a)(2)(B)(ii)).
- That the school cover any expenses related to providing fluid milk substitutes in excess of program reimbursements (42 U.S.C. 1758(a)(2)(B)(iii)). This requirement also applies to institutions or facilities in the CACFP (42 U.S.C. 1766(g)(4)(D)).

Under current school meal regulations, the statutory requirements for fluid milk substitutes for non-disability reasons are codified in two places:

- Current 7 CFR 210.10(d)(3) details the nutrition requirements for fluid milk substitutes for non-disability reasons.
- Current 7 CFR 210.10(m)(2)(i) through (iii) detail additional requirements for fluid milk substitutes for non-disability reasons, such as the process for requesting a fluid milk substitute on behalf of a student.

Under current CACFP regulations, the statutory requirements for fluid milk substitutes are codified at 7 CFR 226.20(g)(3).

As a point of clarification, the statute and program regulations require schools, institutions, and facilities to provide meal modifications for participants with a disability that restricts their diet. Lactose intolerance may be considered a disability. For example, a child whose digestion is impaired due to lactose intolerance may be considered a person with a disability who requires a substitution for cow's milk. In this example, if a student cannot consume cow's milk due to a disability, and the school food authority obtains a written medical statement as documentation of the student's disability, the school is required to provide a substitution for cow's milk. Further, when providing a meal modification for a participant's disability, the substitution for cow's milk does not need to meet the *non-disability* fluid milk substitute requirements. When providing a meal modification for a participant's disability, the school, institution, or facility would review the participant's medical statement which must include a recommended alternative to accommodate the participant with a disability,[58] and the substitution would not be required to meet the nutrition requirements for *non-disability* fluid milk substitutes. The nutrition requirements for *non-disability* fluid milk substitutes apply only in *non-disability* situations. This section will focus on non-disability fluid milk substitute requirements. Please see *Section 14: Meal Modifications* for a more detailed overview of meal modifications for disability reasons,

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[57] This final rule redesignates the paragraph outlining requirements for competitive beverages, which was previously 7 CFR 210.11(m) to instead be 7 CFR 210.11(l). Under this final rule, the requirements for milk sold as a competitive beverage are outlined at 7 CFR 210.11(l).

[58] However, Program operators should not deny or delay a requested modification because the medical statement does not provide recommended alternatives. When necessary, Program operators should work with the participant's parent or guardian to obtain a supplemental medical statement. See Question 17. U.S. Department of Agriculture, *Accommodating Disabilities in the School Meal Programs: Guidance and Questions and Answers (Q&As)*. April 25, 2017. Available at: *https://www.fns.usda.gov/cn/accommodating-disabilities-school-meal-programs-guidance-qas*.

including updates made by this rulemaking.

Proposed Rule

USDA proposed to reorganize the NSLP regulatory text related to fluid milk substitutes for non-disability reasons to clarify the requirements for requesting and providing non-disability fluid milk substitutes in the school meal programs. The rule proposed to move the NSLP regulatory text explaining the non-disability fluid milk substitute requirements from paragraph (m) of 7 CFR 210.10—which currently discusses exceptions and variations allowed in reimbursable meals—to paragraph (d) of 7 CFR 210.10—which discusses the fluid milk requirements.

USDA did not propose substantive changes to the requirements for non-disability fluid milk substitutes. As noted in the proposed rule, USDA does not have the authority to change the statutory requirements for non-disability fluid milk substitutes. However, USDA requested public input on the current fluid milk substitute process, particularly from parents and guardians with firsthand experience requesting a non-disability fluid milk substitute on behalf of their child, and program operators with firsthand experience processing a request.

Public Comments

USDA received 390 comments with feedback about the current fluid milk substitute process, including 194 unique comments. Several respondents encouraged USDA to make the process of requesting and providing fluid milk substitutes less cumbersome so that participants can more easily access substitutes. These respondents offered a variety of suggestions for USDA, State agencies, schools, institutions, and facilities to consider to improve access to fluid milk substitutes. For example, respondents suggested:

- Pursuing a public education campaign to encourage medical screening of children with possible lactose intolerance and milk allergies.
- Developing informational fliers with basic facts about lactose intolerance and milk allergies to be posted in school cafeterias and community clinics and sent home with children.
- Improving awareness of the process of requesting fluid milk substitutes among school food service professionals, parents, guardians, and students, for example, by:
- Clarifying that schools are authorized and encouraged to provide fluid milk substitutes for non-disability reasons based on a parent or guardian request.
- Issuing guidance with examples of reasons students may request a non-disability fluid milk substitute, such as following a vegan diet.
- Simplifying the process of requesting a fluid milk substitute for a participant, for example, by:
- Including in registration materials a simple way for parents and guardians to request a fluid milk substitute, such as a form with a checkbox.
- Providing a model notice and form parents and guardians may use to request a fluid milk substitute that schools, institutions, or facilities can post on their website and mail to families.
- Providing a list or database of allowable fluid milk substitutes, such as fortified soy beverages or pea protein milk.
- Identifying more shelf-stable fluid milk substitute options, especially for small schools, institutions, and facilities where only a few participants request a fluid milk substitute.
- Clarifying the differences between meal modifications for disability reasons and fluid milk substitutes for non-disability reasons.
- Creating a focus group of students, school nutrition professionals, district officials, and parents and guardians from across the country to further understand the barriers students face in accessing fluid milk substitutes.
- Providing additional reimbursement or funding to schools that offer non-disability fluid milk substitutes.

Several respondents had additional feedback on the process of identifying products that meet the nutrition requirements for fluid milk substitutes. One advocacy group and a few other respondents encouraged USDA to modify the process of identifying acceptable fluid milk substitutes so that program operators can refer to the Nutrition Facts label, noting that currently, some of the required nutrients are not always listed on the label. A State agency observed that when a required nutrient is not included on the Nutrition Facts label, schools need to contact the manufacturer to obtain nutrition information. Another State agency and an advocacy group argued that the current process makes it difficult for program operators to offer fluid milk substitutes. Further, a State agency suggested the requirement for micronutrients in fluid milk substitutes is ''excessive,'' suggesting that requiring substitutes to match the micronutrient profiles of milk discounts the other nutrition benefits of fluid milk substitutes.

A few respondents offered suggestions that would conflict with the statutory requirements for fluid milk substitutes, as detailed in the ''Current Requirements'' section above. For example, respondents suggested that USDA:

- Make non-dairy milk options available to all children and allow more beverages to be offered as fluid milk substitutes.
- Remove the requirement for parents, guardians, or a medical authority to request the fluid milk substitute.
- Remove the requirement that school food authorities notify the State agency if any of its schools choose to offer fluid milk substitutes for non-disability reasons.
- Make broader changes to the meal pattern requirements, such as removing the requirement to offer fluid milk altogether.

A few respondents offered suggestions related to other proposals included in the rule. An industry respondent and an advocacy group suggested that if USDA finalizes added sugars limits for flavored cow's milk, the same limits should apply to fluid milk substitutes. However, another respondent recommended that if USDA applies a sugar limit to fluid milk substitutes, that the limit be for total sugars (rather than added sugars). One State agency requested clarification about whether flavored milk restrictions for K–5 or K–8 students would apply to fluid milk substitutes, if they are finalized for cow's milk. Other respondents supported and recommended maintaining the current non-disability fluid milk substitute process. An industry respondent affirmed that it is important for non-dairy fluid milk substitutes to provide nutrients similar to cow's milk. An advocacy group agreed, noting that except for fortified soy beverages and soy yogurt, the *Dietary Guidelines* do not include plant-based beverages as part of the dairy group. This respondent supported maintaining the statutory requirement that fluid milk substitutes be nutritionally comparable to cow's milk. Another industry respondent affirmed that USDA developed the nutritional requirements for fluid milk substitutes ''on the basis of nutrition science and in accordance with statutory requirements.'' An advocacy group supported the current process for fluid milk substitutes, arguing that it ''works well for school meal program operators'' and provides clear guidelines. A State agency agreed, suggesting that soy milk

and lactose-free milk are ''readily available'' and are nutritious options for children.

One industry respondent appeared to misunderstand the types of fluid milk substitutes that are permitted for non-disability reasons. This respondent argued that certain non-dairy milks are not nutritionally equivalent to cow's milk and that students should either drink cow's milk or water. To clarify, to be allowed as a non-disability fluid milk substitute, a product must meet nutritional requirements outlined in regulation. These statutory requirements ensure that fluid milk substitutes are nutritionally equivalent to fluid milk (42 U.S.C. 1758(a)(2)(B)(i) and 42 U.S.C. 1766(g)(4)(B)). Non-dairy milks that do not meet the nutritional requirements outlined in regulation are not allowable fluid milk substitutes. Another industry respondent confirmed that most plant-based milks, such as almond, coconut, and rice milks, do not currently meet the nutrient standards to qualify as fluid milk substitutes.

Some respondents provided input on lactose-free or reduced-lactose milk. Low-fat or fat-free lactose-free and reduced-lactose milk are milk under the statute and program regulations (42 U.S.C. 1758(a)(2)(A)(ii) and 7 CFR 210.10(d)(1)(i), 220.8(d), and 226.20(a)(1)). This means that schools, institutions, and facilities may offer lactose-free and reduced-lactose milk toward the milk requirements without obtaining a request from a parent or guardian or a medical authority. A few industry respondents encouraged USDA to provide incentives to schools that opt to offer lactose-free milk on a routine basis to all students who want it, and to work with industry to facilitate more extensive offerings of lactose-free milk in schools. For example, these respondents suggested that USDA design a specification for 8-ounce, lactose-free milk and offer it through USDA Foods. Similarly, a State agency noted that it would be helpful if processors packaged 8-ounce, lactose-free or reduced-lactose milks to make these options more accessible to operators.

Several respondents raised concerns on behalf of children who cannot consume, or have difficulty consuming, cow's milk. For example, a group of State Attorneys General mentioned that children of color have markedly higher rates of lactose intolerance, citing a 2013 study [59] that found that Black children were twice as likely as non-Hispanic white children to have allergic sensitization to milk. Similarly, a letter from Members of Congress noted that ''most Black, Indigenous, and other People of Color (BIPOC) are lactose intolerant.'' An advocacy group cited the National Institutes of Health website, which states that about 68 percent of the world's population has lactose malabsorption.[60] A few individuals shared their personal experiences facing digestive issues as a child, which they attributed to drinking cow's milk with their school lunch. These respondents suggested improved access to fluid milk substitutes could help students avoid experiencing the same discomfort today. To help address these issues, a form letter campaign suggested that USDA clarify in the final rule that lactose intolerance may be considered a disability. As noted, a participant whose digestion is impaired due to lactose intolerance may be a person with a disability that requires a menu substitution for fluid milk, and the statute and regulation require schools, institutions, and facilities to provide meal modifications for participants with a disability that restricts their diet. As emphasized by these and numerous other comments, USDA appreciates the importance of clarifying the requirements for meal modifications for disability reasons and fluid milk substitutes for non-disability reasons. USDA is committed to providing guidance to help ensure participants who require a substitution for cow's milk due to a disability receive a meal modification.

Final Rule

This final rule reorganizes the NSLP regulatory text related to fluid milk substitutes for non-disability reasons. This rule moves the regulatory text explaining the non-disability fluid milk substitute requirements from 7 CFR 210.10(m), which discusses exceptions and variations allowed in reimbursable meals, to 7 CFR 210.10(d), which discusses the fluid milk requirements. As noted in the proposed rule, USDA does not have the authority to change the statutory requirements for non-disability fluid milk substitutes,[61] such as the statutory requirement that fluid milk substitutes meet specific nutrition requirements and that fluid milk substitutes must be requested in writing. Therefore, this final rule does not make any substantive changes to the non-disability fluid milk substitute request process outlined in regulation. However, USDA greatly appreciates input that respondents provided on the request process, including their advice on best practices to improve the process for program operators, families, and participants. USDA will consider including this input in future best practice resources.

USDA also encourages State agencies, schools, institutions, facilities, and other stakeholders to consider this input in their State and local processes. For example, community organizations could partner with institutions and facilities to provide families with information about lactose intolerance. USDA reminds schools, institutions, and facilities that lactose-free and reduced-lactose milk meet the meal pattern requirements for fluid milk (7 CFR 210.10(d)(1)(i), 215.7a(a), 220.8(d), and 226.20(a)(1)). Schools, institutions, and facilities may choose to provide lactose-free and reduced-lactose milk to participants without needing to obtain a written request from a parent or guardian.

Regarding fluid milk substitutes that require a written request from a parent or guardian, school food authorities could provide a simple form that parents and guardians could use to request a substitute when sending student registration materials. For its part, USDA remains committed to providing guidance to clarify the differences between meal modifications for disability reasons and fluid milk substitutes for non-disability reasons and will consider ways to improve guidance related to the fluid milk substitutes process. Please see *Section 14: Meal Modifications* for a more detailed overview of meal modifications

[59] The public comment cited the following study: Wegienka et al., *Racial Differences in Allergic Sensitization: Recent Findings and Future Directions,* Current Allergy and Asthma Reports, June 2013, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4888051.*

[60] The public comment cited the following web page: National Institutes of Health. *How common is lactose malabsorption?* Available at: *https://www.niddk.nih.gov/health-information/digestive-diseases/lactose-intolerance/definition-facts#:~:text=While%20most%20infants%20can%20digest,world%27s%20population%20has%20lactose%20malabsorption.*

[61] As detailed in the Current Requirements section, the following requirements related to fluid milk substitutes are statutory, meaning that USDA does not have discretion to change them: that the fluid milk substitute is nutritionally equivalent to fluid milk and meets nutritional standards established by the Secretary, which must include fortification of calcium, protein, vitamin A, and vitamin D to levels found in cow's milk (42 U.S.C. 1758(a)(2)(B)(i)); that the substitution is requested in writing by a medical authority or the child's parent or legal guardian (42 U.S.C. 1758(a)(2)(B)(ii)); that the school notify the State agency if it is providing fluid milk substitutes for non-disability reasons (42 U.S.C. 1758(a)(2)(B)(ii)); and that the school cover any expenses related to providing fluid milk substitutes in excess of program reimbursements (42 U.S.C. 1758(a)(2)(B)(iii)). This requirement also applies to institutions or facilities in the CACFP (42 U.S.C. 1766(g)(4)(D)).

for disability reasons, including updates made by this rulemaking.

USDA appreciates requests for clarification about whether fluid milk substitutes offered in the NSLP and SBP are impacted by the added sugars provision of this rule. USDA did not propose to apply the product-based added sugars limit for flavored milk to fluid milk substitutes; that proposal was specific to cow's milk. Therefore, fluid milk substitutes are not required to meet the product-based added sugars limit for flavored cow's milk. However, effective SY 2027–2028, all meals offered during a school week—including meals containing fluid milk substitutes—will be required to, on average, meet the weekly added sugars limit (*i.e.,* no more than 10 percent of calories from added sugars).

Accordingly, this final rule amends 7 CFR 210.10(d) and (m) to reorganize the regulatory text related to fluid milk substitutes for non-disability reasons in the school meal programs. Schools are not required to change menus or operations as a result of this technical change.

Section 3C: Fluid Milk Substitutes: Nutrient Requirements

Current Requirements and Proposed Rule

As detailed above, the statute and regulations specify nutrition requirements for fluid milk substitutes (42 U.S.C. 1758(a)(2)(B)(i), 42 U.S.C. 1766(g)(4)(B), 7 CFR 210.10(d)(3), and 226.20(g)(4)(B)). Currently, the vitamin A and vitamin D requirements are specified in International Units, or IUs. However, in 2016, the FDA published a final rule that changed the labeling requirements for vitamins A and D to micrograms (mcg) rather than IUs.[62]

To align with the labeling requirements in the FDA's rule, USDA proposed to update the regulatory nutrition requirements for fluid milk substitutes in the 2020 proposed rule. This proposal applied to NSLP, SMP, and CACFP regulations for fluid milk substitutes.

Public Comments

USDA received 46 of the comments on this provision of the 2020 proposed rule, including 22 unique comments; all supported this change. Several proponents suggested that this change could reduce burden and make it easier for child nutrition program operators to identify fluid milk substitutes. A State agency offered support for aligning regulations with current packaging information, agreeing that this could reduce burden. Another State agency noted that the current inconsistency creates additional work and strongly supported the proposed change.

Final Rule

As a conforming amendment, this final rule changes the units for vitamin A and vitamin D requirements for fluid milk substitutes. Instead of 500 IUs, the unit for the vitamin A requirement is now 150 mcg retinol activity equivalents (RAE) per 8 fluid ounces. Instead of 100 IUs, the unit for the vitamin D requirement is now 2.5 mcg per 8 fluid ounces. These requirements, along with the other nutrition requirements for fluid milk substitutes, are shown in the table below.

Nutrition Requirements for Fluid Milk Substitutes

Nutrient	Per Cup (8 fl. oz.)
Calcium	276 mg.
Protein	8g.
Vitamin A	150 mcg. retinol activity equivalents (RAE)
Vitamin D	2.5 mcg.
Magnesium	24 mg.
Phosphorous	222 mg.
Potassium	349 mg.
Riboflavin	0.44 mg.
Vitamin B-12	1.1 mcg.

The amount of vitamin A and vitamin D required in fluid milk substitutes does not change; only the unit of measurement has changed to conform to FDA labeling requirements.

Accordingly, this final rule amends 7 CFR 210.10(d)(2)(ii), 215.7a(b)(2), and 226.20(g)(3)(ii). Child nutrition program operators are not required to change menus or operations as a result of this technical change.

Section 4: Whole Grains

Current Requirement

Current regulations at 7 CFR 210.10(c)(2)(iv) and 220.8(c)(2)(iv) require that at least 80 percent of the weekly grains offered in the school lunch and breakfast programs must be whole grain-rich. The remaining grain items offered must be enriched. To meet USDA's whole grain-rich criteria, a product must contain 50 to 100 percent whole grains; any grain ingredients that are not whole grain must be enriched, bran, or germ. The current whole grain-rich requirement took effect on July 1, 2022.

Proposed Rule

The proposed rule included two options for offering whole grains in the school lunch and breakfast programs and requested public input on both. The rule:

- Proposed to maintain the current whole grains requirement that at least 80 percent of the weekly grains offered are whole grain-rich, based on ounce equivalents.
- Requested public input on an alternative whole grains option, which

[62] Food and Drug Administration. *Food Labeling: Revision of the Nutrition and Supplement Facts Labels* (81 FR 33742, May 27, 2016). Available at: *https://www.federalregister.gov/documents/2016/05/27/2016-11867/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels.*

would require that all grains offered must be whole grain-rich, except that one day each school week, schools may offer enriched grains.

USDA requested public input on both approaches as well as the following questions:

- Which option would be simplest for menu planners to implement, and why?
- Which option would be simplest to monitor, and why?

In addition, USDA proposed to codify the definition of ''whole grain-rich'' for clarity. The proposed regulatory definition reads as follows: *Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched.* This proposed definition would not change the meaning of whole grain-rich, which has previously been communicated in USDA guidance. USDA proposed codifying the definition in NSLP, SBP, and CACFP regulations.

Finally, USDA proposed to update the definition of ''entrée item'' in the competitive food service and standards regulations (7 CFR 210.11(a)(3)).[63] These proposed changes sought to update the whole grain-rich requirements for entrée items sold as Smart Snacks in School for consistency with school meal requirements.

Public Comments

USDA received over 80,000 comments on the whole grains provision of the proposed rule, a majority of which were coded as ''mixed'' or ''other'' comments. Overall, about 3,800 comments supported whole grains, including 47 unique comments, while 49 comments opposed whole grains, including 44 unique comments. State agencies, school nutrition professionals, advocacy groups, professional organizations, industry respondents, dietitians, school nutrition professionals, and individuals provided comments on the proposals. At a high level, respondents provided the following feedback on whole grains:

- Whole grains are an important source of fiber and other nutrients.
- Whole grain-rich varieties of certain foods are less palatable to students, and some whole grain-rich products are less widely available than enriched products.
- USDA should establish a whole grain-rich requirement that allows flexibility for schools to occasionally offer enriched grains.

More detailed respondent feedback, including respondent feedback on the proposal to maintain the current requirement, as well as the alternative days-per-week model, is included below.

Importance of Whole Grains

Many respondents highlighted the importance of whole grains to children's diets. An advocacy group supported whole grain consumption for children's health, reasoning that whole grain foods are wholesome, nutrient-dense, and high quality. An industry respondent mentioned that whole grain-rich requirements in school meals allow students to benefit from whole grain foods, which provide important nutrients. An individual agreed, adding that whole grains are a good source of dietary fiber. Similarly, another respondent asserted that whole grain consumption should be encouraged because of the ''well documented'' positive health effects.

Proposed Approach: Maintain 80 Percent Whole Grain-Rich Requirement, Based on Ounce Equivalents

About 4,800 respondents supported maintaining the current whole grain-rich requirement, including 291 unique comments. Several respondents, including a State agency and a few dietitians, stated that maintaining the current, 80 percent requirement would provide a balanced approach throughout the week and allow menu planners and students continued flexibility. An array of respondents supported maintaining the current requirement because of the nutritional benefits of whole grains and fiber consumption. Many respondents, including school nutrition professionals, agreed that the current requirement helps to increase students' whole grain consumption while allowing flexibility to offer some enriched grains, such as pasta. A State agency, professional organizations, school districts, and form letter campaigns noted that maintaining the current requirement would encourage whole grain consumption while allowing schools the opportunity to serve culturally relevant enriched grain items.

One respondent appreciated the current 80 percent whole grain-rich requirement and mentioned that their school menu usually offers about 90 percent whole grain-rich grains. This respondent stated that the 80 percent requirement provides ''wiggle room'' if a product they normally buy as whole grain-rich is not available and they have to buy the enriched option. A school nutrition professional explained that while it took several years to adjust to whole grain-rich products, students at their school now mostly accept them. Another school district shared that its schools implement a 100 percent whole grain-rich requirement, but still supported the 80 percent requirement because it allows flexibility for schools to occasionally offer enriched grains.

A State agency supported maintaining the current requirement because schools have successfully implemented, and are comfortable with, the requirement. Similarly, another State agency noted that schools can rely on existing menu planning software for implementation and monitoring. A national organization, representing tens of thousands of school nutrition professionals supported the current requirement, emphasizing that this approach would be the ''simplest'' for menu planners to implement and State agencies to monitor. One State agency and two professional organizations suggested that maintaining the current requirement would not require staff retraining or menu changes, and would prevent confusion in menu planning, for example, during shortened school weeks.

Twenty-one respondents, all unique comments, opposed the current whole grain-rich requirement or raised concerns about implementation. For example, a State agency expressed concern that the 80 percent threshold may contribute to administrative burden for both menu planning and Administrative Reviews. This State agency noted that calculating 80 percent whole grain-rich offerings across weekly menus could be complex, time-consuming, and error prone. Another respondent mentioned that the current requirement is easier to monitor with nutrition software but acknowledged that the days-per-week model would be easier for schools that do not have software.

Alternative Approach: Days-Per-Week Model

About 9,100 respondents supported the alternative days-per-week model, including 47 unique comments. A State agency reasoned that the alternative option would simplify menu planning and reduce non-compliance and monitoring burden. Other respondents, including a professional association, a few school nutrition professionals, and a dietitian, agreed, and gave examples of how the alternative approach could be easier to implement. For example, respondents suggested that the days-per-week requirement would be easier to understand, would eliminate the need to calculate percentages, and would

[63] For more information on Smart Snacks in Schools, see: U.S. Department of Agriculture, *Tools for Schools—Focusing on Smart Snacks.* Available at: *https://www.fns.usda.gov/cn/tools-schools-focusing-smart-snacks.*

simplify reviews for State agencies. A school nutrition professional stated that they are implementing the current whole grain-rich requirement using a days-per-week model and asserted that they find this approach simple to plan and monitor.

Other proponents added that the alternative whole grain-rich approach is nutritionally sound. For example, a form letter campaign claimed that the days-per-week model supports a strong whole grain standard. An industry respondent mentioned that allowing enriched grains one day per week would ensure that students are exposed to whole grains in most of their school meals.

Fifty-six respondents, including 37 unique comments, opposed the alternative days-per-week model or raised concerns about implementation. A dietitian expressed concern that the alternative model would limit menu planning flexibility. A State agency shared concerns that schools could potentially offer a larger amount of enriched grains one day each school week, which could reduce the overall percentage of whole grain-rich items offered during the week. A few State agencies requested USDA provide implementation guidance for the days-per-week model, particularly for schools with alternative schedules (such as four- or seven-day school weeks) and for school weeks that are shortened due to holidays, vacations, unexpected closures, and emergencies. Some respondents cautioned that during shortened school weeks, an even larger amount of overall grain offerings could be enriched.

Other Approaches Suggested by Comments

Several respondents provided mixed responses on the two approaches or suggested their own alternatives. Many respondents, including professional organizations, advocacy groups, and a school district encouraged USDA to allow school districts to choose which of the whole grain-rich approaches they would like to implement, reasoning that doing so would provide greater flexibility in program operations. A few professional organizations added that some school districts may find it easier to implement one option over the other, depending on their unique supply chain, staffing, and menu planning considerations. Some highlighted that providing a choice between both options would be considerate of the operational differences between school districts of varying sizes as well as differences between rural and urban school districts.

An advocacy group expressed concern that while both approaches would encourage whole grain consumption, they do not fully align with the *Dietary Guidelines* recommendation that at least half of grains are whole grains.[64] Several advocacy groups urged USDA to require 100 percent of grain products offered in school meals to be whole-grain rich. A State agency emphasized that they have maintained a 100 percent whole grain-rich requirement, suggesting that their schools experience minimal issues complying with their statewide requirement and are successful in procuring products to meet that requirement. Another individual recommended USDA require all grains to be *whole grains* (rather than having a *whole grain-rich* requirement) and expressed concern that whole grain-rich items are only required to contain at least 50 percent whole grains. For clarity, USDA proposed codifying the definition of whole grain-rich to explain that products containing 50 to 100 percent whole grain, such as whole grain oatmeal, are whole grain-rich.

An advocacy group supported strengthening the whole grain-rich requirement reasoning that it could improve schools' environmental sustainability. Instead of permanently maintaining the current requirement, this respondent recommended that USDA transition to requiring all grains offered to be whole grain-rich by SY 2027–2028. Or, if USDA opted to finalize the days-per-week model, this advocacy group recommended that USDA add a requirement that schools ''balance'' the enriched grain day with a 100 percent whole grains day. A form letter suggested that USDA adopt a 100 percent whole grain-rich requirement or increase the whole grain-rich threshold to 90 percent and adopt an additional requirement for fiber. An industry respondent supported the 80 percent threshold for NSLP, but suggested USDA require that 100 percent of grains offered in the SBP be whole grain-rich. Additionally, this respondent suggested that all breakfast cereal offered in child nutrition programs should be whole grain-rich, noting that there are a wide variety of whole grain-rich breakfast cereals available.

Some respondents provided suggestions or questions for USDA to consider. A parent suggested adjusting the proposed whole grain-rich definition by emphasizing more whole (100 percent) grains. One respondent asked if schools can receive ''credit'' if they offer 100 percent whole grains (which exceed the 50 percent threshold to qualify as whole grain-rich) in order to offer more enriched grains. A school district urged USDA to consider an approach that would require schools to offer more whole grains, such as brown rice and bread from whole wheat flour, as opposed to ''processed and manufactured products.'' A form letter suggested USDA consider developing a requirement for fiber, noting that grains are a top source of fiber in school meals. Similarly, one advocacy group suggested a carbohydrate-to-fiber ratio standard to help schools identify more healthful grain products.

Conversely, other respondents suggested that USDA decrease the current 80 percent whole grain-rich threshold. A school nutrition director opposed both whole grain proposals asserting that there is no significant difference between the two options. This respondent suggested USDA instead lower the current whole grain-rich threshold from 80 to 50 percent. A State agency advocated for a 50 to 75 percent whole grain-rich threshold, suggesting that the current 80 percent threshold is challenging to meet for grades K–5 based on the minimum grain amount required for the week. A few other respondents, including a State agency, professional association, school district, and individual, argued that the 80 percent threshold limits menu options and claimed that implementing a 50 percent whole grain-rich requirement would yield higher student participation and more menu planning flexibility. A dietitian agreed, stating that a 50 percent whole grain-rich requirement would provide an ''ideal balance'' between providing whole grains and enriched grains in school meals.

Some respondents who supported a lower whole grain-rich threshold cited specific challenges with offering whole grain-rich foods in school meals, including ongoing supply chain issues and concerns about the taste of certain whole grain-rich products. One respondent mentioned that schools continue to experience supply chain issues and production disruptions on a weekly basis. In recent years, this respondent stated that schools have experienced limited availability of whole grain-rich items and vendors have substituted enriched grain products. When commenting on the whole grains proposal, a food industry respondent explained that product development, reformulation, and recipe adjustments are time-consuming activities. This respondent stated that

[64] See page 18. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

rapid reformulation could increase prices and interfere with consumer testing. Dietitians from a State agency noted that identifying whole grain-rich items is challenging for small school districts that purchase foods from consumer markets and small distributors, which do not have crediting information readily available.

Relatedly, a few respondents shared examples of whole grain-rich products that they asserted are not palatable or do not work well in school cafeteria operations, such as egg noodles, pasta, tortillas, grits, and biscuits. An individual claimed that students do not like certain foods manufactured with whole grain ingredients, and a school nutrition professional asserted that students refuse to consume whole grain-rich biscuits and snack crackers. A school district claimed that offering enriched grains is necessary for student participation in school meals. Another respondent expressed that it is critical for USDA to allow schools to occasionally offer enriched grains, adding that some schools encounter strong regional and cultural preferences for specific items, such as flour tortillas and white rice.

Comments on Other Whole Grain-Rich Proposals

Respondents also provided feedback on the proposal to codify the definition of ''whole grain-rich'' in NSLP, SBP, and CACFP regulations and the proposal to update the definition of ''entrée item'' in the competitive food service and standards regulations. One respondent stated that the proposed regulatory definition for the term ''whole grain-rich'' would allow school nutrition professionals to make more informed decisions when implementing the whole grain-rich requirement. An advocacy group suggested using a minimum of 51 percent in the definition to emphasize that a product should have more whole grains than enriched grains to qualify as whole grain-rich. A professional organization shared concerns that adding the term ''whole grain-rich'' in regulation will require administrative costs for printing materials and training CACFP operators and suggested one year to phase-in implementation. A State agency inquired about what impact, if any, this definition would have on how CACFP program operators identify whole grain-rich items.

Regarding the proposal to update the definition of ''entrée item,'' a few advocacy groups opposed the change and encouraged USDA to maintain the whole grain-rich requirement for Smart Snacks in School entrée items to ensure students purchasing food à la carte receive whole grains. Another advocacy group agreed, stating that while they understood the intent of the change, they were concerned about the impact of schools selling enriched grain entrees à la carte. Other respondents, including a State agency and advocacy groups, supported the proposed change. One advocacy group noted that maintaining the current definition would require entrées sold à la carte to be whole grain-rich, which would prevent schools from selling certain enriched grain NSLP and SBP entrées à la carte. This respondent felt the proposed change would simplify the rules, support consistency within the school meal programs, and improve compliance. Another advocacy group agreed, stating this change would be beneficial to the school meal programs.

Final Rule

Maintain 80 Percent Whole Grain-Rich Requirement, Based on Ounce Equivalents

This final rule maintains the current whole grains requirement that at least 80 percent of the weekly grains offered in the school lunch and breakfast programs are whole grain-rich, based on ounce equivalents. This final rule is based on stakeholder feedback, which emphasized the importance of offering meals that meet local and cultural preferences by ensuring nutrition requirements occasionally allow schools to offer enriched grains. For example, this final rule allows schools the flexibility to occasionally serve white rice or non-whole grain-rich tortillas, while still promoting whole grain-rich foods throughout the school week. The requirement that at least 80 percent of the weekly grains offered in reimbursable school lunch and breakfast programs are whole grain-rich is a minimum standard, not a maximum. Schools may choose to increase whole grain-rich offerings beyond this minimum standard. It reflects a practical and feasible way to work toward the *Dietary Guidelines'* recommendation to increase whole grain consumption. USDA encourages schools to incorporate whole grains in their menus as often as possible to support children's health.

This final rule also supports USDA's commitment to advancing nutrition security by improving the nutritional quality of school meals. Research has demonstrated the importance of school meals in improving children's overall diets, including their whole grain consumption. For example, USDA research published in April 2023 found that after 2013, following implementation of the initial whole grain-rich requirements for school meals, school food became the most whole grain-dense food source in children's diets.[65] USDA expects the Healthy Eating Index (HEI) component score for whole grains will remain high under this final standard. For reference, in SY 2014–2015, USDA found the HEI component score for whole grains was 95 percent of the maximum score at school breakfast and at lunch.[66] In SY 2014–2015, all grains offered in the NSLP and SBP were required to be whole grain-rich; however, school food authorities that demonstrated a hardship in meeting this requirement had the option to request an exemption that allowed them to meet a reduced whole grain-rich requirement: at least 50 percent of all grains offered had to be whole grain-rich.

USDA acknowledges that some respondents asserted that the 80 percent weekly whole grain-rich requirement does not align with the *Dietary Guidelines* recommendations. It is important to acknowledge that schools may offer whole grain-rich foods more often than required throughout the school week and may choose to offer individual items that exceed the minimum threshold to qualify as whole grain-rich. For example, 100 percent whole grain bread and brown rice are examples of foods that exceed the 50 percent minimum criteria to be whole grain-rich. When schools exceed the weekly 80 percent requirement or offer 100 percent whole grain food items, students have greater access to the nutritional benefits of whole grains, further aligning school meals with the goals of the *Dietary Guidelines,* while still maintaining some flexibility for schools to offer enriched grains. USDA appreciates respondent feedback and continues to encourage schools to offer more whole grain-rich foods, including 100 percent whole grain products. Maintaining the option for schools to occasionally offer enriched grains responds to stakeholders who advocated

[65] Lin, Biing-Hwan, Travis A. Smith, and Joanne F. Guthrie. April 2023. *Trends in U.S. WholeGrain Intakes 1994–2018: The Roles of Age, Food Source, and School Food,* ERR–311, U.S. Department of Agriculture, Economic Research Service. Available at: *https://www.ers.usda.gov/publications/pub-details/?pubid=106291.*

[66] See Figure ES.14. And Figure ES.17. *School Nutrition and Meal Cost Study, Final Report Volume 2: Nutritional Characteristics of School Meals* by Elizabeth Gearan, Mary Kay Fox, Katherine Niland, Dallas Dotter, Liana Washburn, Patricia Connor, Lauren Olsho, and Tara Wommak. Project Officer: John Endahl. Alexandria, VA: April 2019. Available at: *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.* (OMB Control Number 0584–0596, expiration date 07/31/2017.)

for USDA to allow some menu planning flexibility to provide a variety of grain offerings, including student, regional, and cultural favorites.

USDA appreciates comments received on the alternative days-per-week model and acknowledges respondents' concerns that this approach could be difficult to implement and monitor, particularly during school weeks that are shortened due to emergency school closures, holidays, or scheduled breaks. USDA also acknowledges that the days-per-week model would require special consideration for schools with four-day schedules, or other alternative schedules. Due to this variability, under a days-per-week model, there is potential that the overall amount of whole grain-rich items offered could decrease, which could reduce children's overall whole grain consumption. Therefore, USDA has determined that maintaining the current 80 percent whole grain-rich requirement is a more practical approach, as it supports children's consumption of whole grains and has already been operationally successful in schools nationwide.

Some respondents mentioned that they implement the current 80 percent whole grain-rich requirement using a days-per-week model. Schools may choose to use this approach under the final rule, provided they continue to offer at least 80 percent of all grains as whole grain-rich, calculated by ounce equivalents. USDA encourages schools to implement a strategy that best meets their operational needs and that meets the required 80 percent whole grain-rich threshold.

USDA recognizes that some schools are concerned about product availability due to supply chain challenges. USDA appreciates the importance of maintaining strong, long-term nutrition standards and incentivizing the food industry to develop products that support schools' efforts to provide children with nutritious school meals. In public comments, industry respondents and schools shared progress made toward expanding whole grain-rich offerings that children enjoy. For example, industry respondents mentioned a wide variety of whole grain-rich products that are currently available in the K–12 market. One industry respondent stated that they offer more than 25 entrée items containing whole grain-rich pasta or breading and suggested that these items are accepted by students. Another industry respondent stated that manufacturers ''have made great strides'' in developing whole grain-rich breakfast options. In addition, USDA Foods in Schools offers whole grain and whole grain-rich products available to schools in the yearly *USDA Foods Available List*.[67] For example, whole grain-rich USDA Foods available to schools for SY 2023–2024 included 100 percent white whole wheat flour, rolled oats, pancakes, brown rice, tortillas, and breaded fish sticks.

USDA technical assistance resources also support efforts to offer whole grain-rich foods in the child nutrition programs. USDA developed the *Whole Grain Resource for the National School Lunch and Breakfast Programs*[68] as well as three separate tip sheets on grains in the *Crediting in the Child Nutrition Programs*[69] series that assist school nutrition professionals with selecting appropriate whole grain-rich products for their programs. For CACFP program operators, USDA developed the *Crediting Handbook for the Child and Adult Care Food Program*[70] that includes technical assistance for identifying and serving whole grain-rich foods served in child and adult care centers. Additionally, USDA develops and shares recipes with whole grain-rich ingredients for child nutrition programs that are published on the *Team Nutrition Recipes*[71] web page.

Definition of Whole Grain-Rich

This final rule codifies the definition of ''whole grain-rich'' in NSLP, SBP, and CACFP regulations. The term ''whole grain-rich'' was originally coined by the National Academy of Medicine (formerly known as the Institute of Medicine) in their 2010 report, *School Meals: Building Blocks for Healthy Children*,[72] and was previously communicated in USDA guidance. This final rule defines the term in regulation for clarity. The intent of this change is to codify the existing definition in NSLP, SBP, and CACFP regulations. The definition in regulation reads as follows: *Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched.* This definition does not change the meaning of whole grain-rich, and program operators can continue to identify whole grain-rich products as described in current guidance. For example, CACFP program operators may continue to use training resources, such as *Identifying Whole Grain-Rich Foods for CACFP*,[73] to credit whole grain-rich foods.

USDA appreciates one respondent's suggestion to adjust the definition to require at least 51 percent of a product to be whole grain in order to qualify as whole grain-rich. However, USDA will finalize the definition as proposed. The definition codified in this final rule was originally used in the National Academy of Medicine's 2010 report and has been in place through policy guidance for more than a decade. Program operators and the food industry have worked diligently to comply with this longstanding definition. For example, the food industry has worked to develop products that comply with the existing definition. While USDA acknowledges that while the respondent's suggested change is minor, finalizing the proposed definition will avoid any unintended consequences that could impact products that comply with the longstanding definition of whole grain-rich. Further, the definition of whole grain-rich finalized in this rulemaking derives from the *Dietary Guidelines*, which recommends at least half, or 50 percent, of total grains be whole grains.

Entrée Items Sold à la Carte

As proposed, this final rule also updates the definition of ''entrée item'' in the competitive food standards regulations at 7 CFR 210.11(a) to clarify that both whole grain-rich and enriched grain entrées offered as part of a reimbursable school meal may qualify as an ''entrée item'' when sold à la carte as a ''Smart Snack.'' USDA acknowledges concerns raised in public comments about how this change could result in schools selling enriched grains to students. However, USDA agrees with public comments that noted that this

[67] U.S. Department of Agriculture, *USDA Foods Available List* January 9, 2023. Available at: *https://www.fns.usda.gov/usda-fis/usda-foods-available.*

[68] U.S. Department of Agriculture, *Whole Grain Resource for the National School Lunch and Breakfast Programs* December 13, 2022. Available at: *https://www.fns.usda.gov/tn/whole-grain-resource-national-school-lunch-and-breakfast-programs.*

[69] U.S. Department of Agriculture, *Crediting in the Child Nutrition Programs* May 23, 2023. Available at: *https://www.fns.usda.gov/tn/crediting-grains.*

[70] U.S. Department of Agriculture, *Crediting Handbook for the Child and Adult Care Food Program* May 8, 2023. Available at *https://www.fns.usda.gov/tn/crediting-handbook-child-and-adult-care-food-program.*

[71] U.S. Department of Agriculture, *Team Nutrition Recipes* March 10, 2023. Available at: *https://www.fns.usda.gov/tn/team-nutrition-recipes.*

[72] See: 7 Recommendations for Nutrient Targets and Meal Requirements for School Meals.'' Institute of Medicine. 2010. *School Meals: Building Blocks for Healthy Children.* Washington, DC: The National Academies Press. *https://doi.org/10.17226/12751.* National Academies of Sciences, Engineering, and Medicine. 2010. School Meals: Building Blocks for Healthy Children. Washington, DC: The National Academies Press. *https://doi.org/10.17226/12751.*

[73] U.S. Department of Agriculture, *Identifying Whole Grain-Rich Foods For CACFP* June 7, 2023. Available at: *https://www.fns.usda.gov/tn/identifying-whole-grain-rich-foods-cacfp.*

change would benefit school programs by simplifying and improving consistency in regulations, acknowledging that both whole grain-rich and enriched grain entrées may be offered at school lunch and breakfast under the current requirements. Additionally, USDA clarifies that as proposed, this change is limited to school lunch and breakfast program entrées sold à la carte; this change does not impact the general standards for competitive foods for all other items sold à la carte. The current whole grain-rich requirements for all other items remain in effect under this final rule; this change is limited to school lunch and breakfast program entrées sold à la carte on the day of, and the school day after, they are included on the school lunch or breakfast menu.

For context, 7 CFR 210.11(c)(3) states that any entrée item offered as part of a reimbursable school meal is exempt from all competitive food standards if it is sold à la carte on the day of, or the school day after, the entrée is offered on a school lunch or breakfast menu. This exemption helps school nutrition professionals prevent food waste and manage their programs. It also helps to reduce potential confusion about whether an entrée served to some students as part of a school meal can be purchased à la carte by other students. The current definition of ''entrée item'' in the competitive food service and standards regulations specifies that grain entrées must be whole grain-rich; however, under the current requirements and this final rule, schools may offer up to 20 percent of their total grains as enriched grains at school lunch and breakfast each week. Therefore, under this final rule, USDA is finalizing the proposed definition of ''entrée item'' so it only references ''grain'' and therefore includes entrées offered with both whole grain-rich and enriched grains. This change updates regulations at 7 CFR 210.11(c)(3) to clarify that whole grain-rich and enriched grain entrées offered in a reimbursable lunch or breakfast may qualify for the competitive foods entrée exemption on the day of, or the school day after, they are offered on the school lunch or breakfast menu. For clarity, this change only applies to grain items sold as entrées in reimbursable school lunches or breakfasts and which qualify for an exemption to the competitive food standards. All other grain items sold à la carte must comply with the general standards for competitive foods at 7 CFR 210.11, which require that grain items sold à la carte must meet USDA's whole grain-rich criteria.

Accordingly, this final rule amends 7 CFR 210.2, 210.10(c)(2)(iii), 210.11(a)(3), 220.2, 220.8(c)(2)(iii), and 226.2 to codify the definition of the term ''whole grain-rich,'' to maintain the current 80 percent whole grain-rich requirement for the school lunch and breakfast programs, and to update the definition of ''entrée item'' to account for the whole grain-rich and enriched grain requirements in school meals. Because this rule finalizes the current whole grain-rich requirements and terminology, as proposed, child nutrition program operators will not need to make changes to comply with this provision of this rule.

Section 5: Sodium

Current Requirement

Current regulations at 7 CFR 210.10(f)(3) and 220.8(f) required schools to meet Sodium Target 1 for school lunch and breakfast in SY 2022–2023. For school lunch only, schools were required to meet Sodium Target 1A in SY 2023–2024. These limits are shown in the tables below:

National School Lunch Program Transitional Sodium Limits:

Age/Grade Group	Sodium Target 1: Effective July 1, 2022	Sodium Target 1A: Effective July 1, 2023
Grades K-5	≤ 1,230 mg	≤ 1,110 mg
Grades 6-8	≤ 1,360 mg	≤ 1,225 mg
Grades 9-12	≤ 1,420 mg	≤ 1,280 mg

School Breakfast Program Transitional Sodium Limits:

Age/Grade Group	Sodium Target 1: Effective July 1, 2022
Grades K-5	≤ 540 mg
Grades 6-8	≤ 600 mg
Grades 9-12	≤ 640 mg

Proposed Rule

USDA proposed to gradually reduce sodium in the school lunch and breakfast programs. For school lunch, USDA proposed three reductions, to be phased in as follows and as shown in the chart below:

- SY 2025–2026: Schools would implement a 10 percent reduction from SY 2024–2025 school lunch sodium limits.
- SY 2027–2028: Schools would implement a 10 percent reduction from SY 2026–2027 school lunch sodium limits.
- SY 2029–2030: Schools would implement a 10 percent reduction from SY 2028–2029 school lunch sodium limits.

Proposed National School Lunch Program Sodium Limits:

Age/Grade Group	Sodium Limit: Effective July 1, 2025	Sodium Limit: Effective July 1, 2027	Sodium Limit: Effective July 1, 2029
Grades K-5	≤ 1,000 mg	≤ 900 mg	≤ 810 mg
Grades 6-8	≤ 1,105 mg	≤ 990 mg	≤ 895 mg
Grades 9-12	≤ 1,150 mg	≤ 1,035 mg	≤ 935 mg

For school breakfast, USDA proposed two reductions, to be phased in as follows and as shown in the chart below:

• SY 2025–2026: Schools would implement a 10 percent reduction from SY 2024–2025 school breakfast sodium limits.

• SY 2027–2028: Schools would implement a 10 percent reduction from SY 2026–2027 school breakfast sodium limits.

Proposed School Breakfast Program Sodium Limits:

Age/Grade Group	Sodium Limit: Effective July 1, 2025	Sodium Limit: Effective July 1, 2027
Grades K-5	≤ 485 mg	≤ 435 mg
Grades 6-8	≤ 540 mg	≤ 485 mg
Grades 9-12	≤ 575 mg	≤ 520 mg

Public Comments

USDA received over 95,000 comments on the proposed sodium limits, a majority of which (about 90,000 comments, including about 400 unique comments) were categorized as ''mixed'' or ''other'' comments. Overall, about 4,900 comments supported sodium reduction as proposed, including about 180 unique comments, 565 comments opposed sodium reductions, including almost 500 unique comments, and over 85,000 comments, nearly all of which were form letters, supported sodium reduction beyond what was proposed. Comments were submitted by State agencies, school nutrition professionals, advocacy groups, industry respondents, professional organizations, school districts, dietitians, and individuals, including parents. At a high level, respondents provided the following feedback on sodium:

• Lower sodium school meals are important to children's health, and some respondents recommended more aggressive reductions, such as 15 percent reductions between sodium limits instead of 10 percent reductions.

• Sodium reduction in school meals is dependent on product availability, and product reformulation takes time and resources.

• Students' consumption of higher sodium foods outside of school impacts their acceptance of lower sodium school meals.

• USDA should research the impact of sodium reduction on school meal menu planning, student participation, and student health prior to finalizing further sodium reductions.

Of the ''mixed'' comments, several form letters with over 85,000 combined submissions supported the sodium proposals but urged USDA to finalize additional reductions, beyond the proposed reductions. Two other ''mixed'' form letters with over 3,600 submissions recommended that USDA retain the current sodium limits instead of moving forward with the proposed limits. Other comments in this category offered suggestions, which are described in more detail below.

Importance of Reducing Sodium

Several respondents discussed the importance of sodium reduction for promoting health across the U.S. population. Advocacy groups mentioned that proposed limits represent progress toward improving children's health and that reducing sodium helps prevent chronic disease. Similarly, a form letter campaign stated that sodium reduction would ''benefit all students and further reduce diet-related diseases.'' A parent agreed, emphasizing the importance of preventative measures to protect children's health. An individual asserted that too much sodium increases children's risk of elevated blood pressure and other chronic health conditions. An advocacy group stated that aligning the proposed rule with the *Dietary Guidelines,* including phasing in sodium reductions, ''sets students up for lifelong success.''

Reducing Sodium in School Meals and Proposed Sodium Limits

As noted, approximately 4,900 respondents supported sodium reduction, including about 180 unique comments. A professional organization and an advocacy group supported the proposed sodium limits because they align with FDA's voluntary reduction goals for the broader food supply. An industry respondent appreciated the sodium proposal because it promotes the use of more herbs and spices in place of sodium, which has the ''potential to shift taste preferences.'' A few school districts supported the proposed limits, with one claiming that manufacturers add an ''unacceptable and unnecessary'' amount of sodium to foods to enhance flavor.

Several respondents provided feedback on the sodium limit proposed for SY 2025–2026, or the other proposed limits. A few school districts and school nutrition professionals supported the initial 10 percent sodium reduction for school lunch and breakfast. A school nutrition director described the initial reduction as ''manageable'' for schools and manufacturers. An industry respondent agreed that USDA should finalize the initial reduction for both programs and expressed their commitment to implement FDA's

voluntary sodium reduction goals to reduce sodium in their K–12 products. Additional respondent feedback on the proposed implementation dates and number of sodium reduction limits is described below.

Over 500 comments opposed sodium reductions, the majority of which were unique comments. Some respondents claimed that, due to student taste preferences, it would be difficult to maintain student acceptance of meals under the proposed sodium reductions. A form letter campaign and other respondents asserted school meals are not to blame for students' excessive sodium intake, pointing instead to meals students consume at home and at other food service establishments. This form letter added that students' taste preferences would not adjust to school meals with less sodium without sodium reductions in the foods that students consume outside of school. Other respondents suggested that school nutrition staffing challenges and reliance on pre-packaged foods make sodium reduction challenging. For example, a dietitian suggested that lower sodium meals may be possible with more scratch cooking, but many districts do not have the time or resources for scratch cooking. Other respondents, including school districts and school nutrition professionals, explained that some schools do not have a full kitchen or adequate staffing to prepare meals with less sodium. A few school districts raised concerns that further sodium reductions would lead manufacturers to replace sodium with chemical preservatives or artificial flavorings.

Approximately 90,000 comments, including about 400 unique comments, provided mixed or other feedback on sodium reduction. A majority of the mixed comments fell into two main categories: those that suggested that USDA maintain the existing sodium limits, or more often, those that suggested that the proposed limits do not go far enough. For example, two ''mixed'' form letters with over 3,600 submissions recommended that USDA retain the existing sodium limits and expressed concern about the proposed reductions. A few school nutrition professionals expressed concerns about the palatability of lower sodium foods and manufacturers' ability to reduce sodium in their products. A professional association encouraged USDA to delay sodium reductions until after conducting listening sessions with school nutrition professionals to determine feasible approaches for lowering sodium.

However, other respondents, including several form letters with over 85,000 combined submissions, suggested that additional sodium reduction is needed, asserting that the proposed limits do not reduce sodium enough. A form letter campaign mentioned that the proposed limits represent progress but stated that the final limits in the proposed rule do not fully align with the *Dietary Guidelines.* A professional organization and a school district recommended providing development opportunities to help school nutrition professionals prepare lower sodium meals, offering financial support for menu changes, and educating students and families on the importance of sodium limits.

Product Availability and Industry Input

Numerous respondents shared input on the availability and development of lower sodium products. An industry respondent asserted that the food industry continues to work to reduce sodium through ''innovation, reformulation, and the use of sodium substitutes'' but that these changes take time. Another industry respondent noted that many manufacturers have already reformulated under the existing sodium limits, asserting that some manufacturers have reduced sodium in their products by up to 80 percent. A third industry respondent asserted that it takes ''on average, three years for manufacturers to innovate and reformulate foods and participate in the school bidding process.'' A State agency suggested that industry ''will not be willing or able'' to reduce sodium in their products.

Other respondents raised concerns about competing priorities within the food industry. For example, one industry respondent explained that resources for reformulation are limited and manufacturers cannot reformulate all of their products at the same time. Another respondent emphasized that manufacturers continue to face supply chain and labor challenges and need time to plan for further sodium reductions. An industry respondent affirmed that product reformulations to reduce sodium can take several months and involve ''trade-offs'' such as reduced shelf-life and increased price. Another industry respondent added that during the reformulation process to reduce sodium content in products, manufacturers may need to use added sugars to maintain palatability, suggesting that a ''careful balance'' is needed when targeting these two ingredients.

Some respondents raised concerns about sodium levels and naturally occurring or ''functional'' sodium in foods commonly offered in school meals. For example, a form letter campaign, as well as other respondents, mentioned that naturally occurring sodium is found in foods such as bread, milk, cheese, and celery. Regarding milk, a school nutrition professional shared that one serving of milk contains 110–125 milligrams of sodium. A few State agencies and school nutrition directors asserted that naturally occurring sodium should be excluded from the weekly sodium limits. An industry respondent mentioned that ''salt and sodium provide significant functionality and [food] safety'' in products like cheese. Another industry respondent expressed that the sodium limits proposed for implementation in SY 2027–2028 and beyond would make it hard for schools to offer plant-based alternatives that are currently available in the school meals market, such as vegetable crumbles and bean patties. This respondent stated that many plant-based products ''require added sodium for food quality, palatability, and shelf-life purposes.'' An individual suggested that condiments be excluded from weekly sodium limits because not all students use them.

Other Alternatives Received From Public Comments

Respondents provided other suggestions or recommendations for USDA to consider. A professional organization suggested allowing sodium limits to be ''optional'' and that USDA encourage schools to meet optional limits by providing a financial incentive. Several other respondents, including school nutrition professionals and industry respondents, encouraged USDA to research the impact of sodium reductions on product availability, menu planning, food waste, student acceptance, student health, and student participation in the school meal programs. An industry respondent added that the study should carefully consider the impacts across all age groups and at schools of varying sizes.

Proposed Implementation Dates and Number of Reductions

USDA requested public input on the following questions about sodium limits and the proposed implementation timeframe:

- Does the proposed implementation timeframe provide appropriate lead time for manufacturers and schools to successfully implement the new sodium limits?
- Do commenters agree with USDA's proposed schedule for incremental sodium reductions, including both the

number and level of sodium reductions and the timeline, or suggest an alternative? Why?

About 300 respondents addressed the proposed implementation timeframe, including 66 unique comments. Some respondents suggested that the proposed implementation timeframe was appropriate. One respondent stated that the gradual approach to sodium reduction would allow time for innovation. An advocacy group agreed, asserting that a gradual approach is ''feasible for schools and the food industry.'' A State agency affirmed that the proposed implementation dates would allow time for student engagement, inventory management, and technical assistance. Another State agency agreed the proposed implementation dates provide adequate lead time for food manufacturers and schools; however, this respondent also emphasized that timely publication of the final rule would be key to successful implementation. An advocacy group asserted that the proposed sodium limits and timeline ''allow schools to plan, source, and test meals that are nutritious, palatable to students and abide by new guidelines.''

Other respondents expressed that the timeframe would not provide schools sufficient time to successfully implement the proposed limits. A State agency suggested USDA reconsider the proposed schedule due to concern about student acceptance. An industry respondent suggested that sodium reduction needs to ''occur more gradually over the next 20 years or more.'' This respondent recommended there be five years between each sodium limit to ''allow technology to catch up to the requirements'' and to allow students to become accustomed to lower sodium meals. A school nutrition professional recommended extending the timeframe for sodium reduction over 10 to 15 years. A school district mentioned that the proposed school breakfast limits are achievable but the proposed school lunch limits are ''too aggressive for manufacturers to implement.'' An individual stated that industry would need at least 3 to 5 years to develop food items to meet the proposed sodium limits. Respondents also provided feedback on the number and levels of sodium limits included in the proposed rule. For example, a few school districts and an advocacy group recommended that USDA maintain the current sodium limits, without any further reductions. A State agency supported only the initial 10 percent reduction, asserting that industry and the U.S. food supply should ''catch up'' before sodium reduction beyond the initial reduction occurs in school meals. A few industry respondents agreed, supporting the initial sodium reduction but recommending that USDA pause on implementation of subsequent limits until research is ''completed and understood.'' Another State agency suggested removing the third proposed sodium limit at lunch and adding more time in between each reduction. Several respondents referenced sodium targets from prior USDA rulemakings, including Sodium Target 2, which falls between the first and second proposed sodium reduction limits.[74] For example, some respondents suggested that Sodium Target 2 levels would be achievable for schools, but that sodium reductions beyond Sodium Target 2 would be too challenging for schools. One advocacy group suggested implementing larger, 15 to 20 percent reductions every two years, instead of 10 percent reductions, or adding a fourth or fifth sodium reduction to align with the recommendations from the *Dietary Guidelines.*

Suggestions for Best Practice Product-Based Sodium Limits

In addition to feedback on the sodium limits and implementation dates, USDA requested public input on the following questions about developing best practices for specific products:

- USDA plans to recommend (but not require) sodium limits for certain products, such as condiments and sandwiches, to further support schools' efforts to procure lower sodium products and meet the weekly limits.
- For which products should USDA develop best practice sodium limits?
- What limits would be achievable for schools and industry, while still supporting lower-sodium meals for children?

State agencies, advocacy groups, and other respondents recommended that USDA develop best practice sodium limits for the following products:

- Broths and soups
- Breaded chicken
- Condiments and sauces
- Canned vegetables and pickles
- Deli meat and sandwiches
- Pizza, pasta dishes, and tacos

A State agency supported USDA's plans to develop best practice product sodium limits for certain foods and encouraged USDA to work with the food industry to develop the voluntary limits. This State agency mentioned that best practice product limits would help State agencies provide technical assistance and support to schools working to reduce sodium. Several respondents, including a form letter campaign, opposed best practice product sodium limits for specific foods; others suggested that developing best practice product limits would not be a good use of time and resources. Some respondents were concerned that best practice product sodium limits would be the ''first stop to product-specific limit requirements'' or appeared to be confused about the intent of the request for input. To clarify, USDA's request for input was intended to inform recommended (not required) best practice product sodium limits for technical assistance purposes. USDA does not intend to require product-based sodium limits.

Final Rule

In response to feedback from stakeholders, this final rule provides schools even more time to gradually reduce sodium in school meals and commits to conducting a study on potential associations between sodium reduction and student participation. As recommended by stakeholders, including a professional organization representing school nutritional professionals in the Nation's largest school districts, this final rule reduces sodium in school lunch and breakfast by approximately 15 percent and 10 percent, respectively. The sodium reduction finalized in this rule falls between the first and second sodium reduction included in the proposed rule and reflect the Sodium Target 2 levels established in the 2012 final rule,[75] a level many stakeholders commented was familiar and achievable. This final rule codifies the following sodium limits in the school lunch and breakfast programs:

- For the next three school years, through SY 2026–2027, schools will maintain current sodium limits (Sodium Target 1A for lunch and Sodium Target 1 for breakfast).
- By SY 2027–2028, schools must implement an approximate 10 percent reduction for breakfast and an approximate 15 percent reduction for

[74] Sodium Target 2 was established by the 2012 rule. Under the 2012 rule, Sodium Target 2 would have been implemented in SY 2017–2018; however, legislative and administrative action prevented implementation of sodium targets beyond Sodium Target 1. To view the Sodium Target 2 limits as established by the 2012 rule, see: U.S. Department of Agriculture. *Nutrition Standards in the National School Lunch and School Breakfast Programs.* (77 FR 4088, January 26, 2012). Available at: *https://www.federalregister.gov/d/2012-1010/p-138.*

[75] U.S. Department of Agriculture. *Nutrition Standards in the National School Lunch and School Breakfast Programs.* (77 FR 4088, January 26, 2012). Available at: *https://www.federalregister.gov/documents/2012/01/26/2012-1010/nutrition-standards-in-the-national-school-lunch-and-school-breakfast-programs.*

lunch from current sodium limits, depending on the age/grade group.

The current sodium limit and the sodium reduction finalized in this rulemaking are shown in the charts below. The current sodium limits for school lunch and breakfast will remain in place through June 30, 2027. Through the end of SY 2026–2027, schools will be able to maintain Sodium Target 1A at lunch and Sodium Target 1 at breakfast. By July 1, 2027, schools must implement the sodium reduction shown in the chart below. The sodium reduction for school lunch, which generally contains higher amounts of sodium than breakfast, will be slightly larger compared to the sodium reduction for school breakfast. This approach allows school nutrition professionals to focus their sodium reduction efforts on lunch.

National School Lunch Program Sodium Limits

Age/Grade Group	Current Sodium Limit: In place through June 30, 2027	Sodium Limit: Must be implemented by July 1, 2027
Grades K-5	≤ 1,110 mg	≤ 935 mg
Grades 6-8	≤ 1,225 mg	≤ 1,035 mg
Grades 9-12	≤ 1,280 mg	≤ 1,080 mg

School Breakfast Program Sodium Limits

Age/Grade Group	Current Sodium Limit: In place through June 30, 2027	Sodium Limit: Must be implemented by July 1, 2027
Grades K-5	≤ 540 mg	≤ 485 mg
Grades 6-8	≤ 600 mg	≤ 535 mg
Grades 9-12	≤ 640 mg	≤ 570 mg

These sodium limits apply, on average, to lunches and breakfasts offered during a school week. Sodium limits do not apply per day, per meal, or per menu item. A weekly average allows flexibility for menu planners to occasionally offer higher sodium meals or menu items, provided they are balanced with lower sodium meals and menu items throughout the week.

While schools are not required to reduce sodium in school meals until SY 2027–2028, USDA encourages schools to gradually reduce sodium at lunch and breakfast prior to the required reduction. USDA encourages school nutrition professionals to adjust food preparation methods, gradually incorporate more lower sodium foods throughout the school week and make menu adjustments to support eventual implementation of the sodium reduction codified by this rulemaking.

As detailed in the *Public Comments* section, many respondents suggested that USDA take a more gradual approach to sodium reduction than proposed. For example, a professional organization representing over 112,000 credentialed nutrition and dietetics practitioners acknowledged the importance of reducing children's sodium intake but recommended a smaller overall reduction at lunch compared to the proposed rule and suggested providing additional time for implementation. USDA agrees with comments that noted the importance of gradually moving toward lower sodium meals in a way that is achievable for schools and the food industry and has incorporated this feedback into the sodium limits established by this final rule. USDA also considered current sodium levels in the U.S. food supply and time needed for product reformulation and for student palates to adjust. The *Dietary Guidelines, 2020–2025* also recognize that ''multiple strategies should be implemented to reduce sodium intake'' across the U.S. population.[76] For example, the *Dietary Guidelines* acknowledge that most sodium comes from salt added during commercial food processing and preparation, and note that ''reducing sodium consumption will require a joint effort by individuals, the food and beverage industry, and food service and retail establishments.'' [77] As a reflection of feedback received from schools and industry partners, the sodium reduction for school lunch and breakfast established by this final rule takes a more gradual approach to lowering sodium compared to the proposed series of limits. By finalizing a single sodium reduction for both school lunch and breakfast, this rule gives schools and industry a clear endpoint to work toward in the near-term.

School nutrition professionals emphasized that sodium reductions need to be gradual for schools to be successful and for students to accept lower sodium meals and numerous respondents suggested that at least three years are needed for product reformulation. USDA incorporated this feedback into the sodium reduction implementation date of July 1, 2027—over three years after the publication of this final rule. Additionally, school

[76] See page 46. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[77] See page 46 and page 102. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

nutrition professionals, advocacy groups, and other respondents encouraged USDA to study the impact of sodium reductions on student participation in the school lunch and breakfast programs. Respondents were concerned, for example, that students would choose to bring meals from home instead of participating in the school lunch and breakfast programs if sodium is further reduced in the programs. Therefore, in response to requests from stakeholders, USDA will examine school meal sodium reduction efforts and monitor student participation data.

As noted above, USDA received numerous comments referencing sodium requirements from prior rulemakings—specifically, the 2012 final rule. USDA considered these comments, as well as implementation of prior rulemakings, to inform the sodium limits in this final rule. A professional organization representing school nutrition professionals in the Nation's largest school districts suggested that Sodium Target 2 from the 2012 rule could be achievable if food manufacturers have an endpoint to work toward. This respondent did not recommend going beyond Sodium Target 2 limits in this rulemaking. Another respondent cited data suggesting that in SY 2014–2015, prior to the pandemic and related supply chain challenges, the average school lunch was ''already well below'' Sodium Target 1 and the average school breakfast was already meeting Sodium Target 2. This is similar to findings discussed in FNS' *Successful Approaches to Reduce Sodium in School Meals* study, conducted prior to the pandemic in 2016 and 2017, which described ''a high rate of success in meeting the Target 1 sodium standards,'' with many school food authorities ''making significant progress toward or reaching [Sodium] Target 2.'' [78] A school district commenting on the proposed rule maintained that they ''would be fine with the [Sodium] Target 2 guidelines,'' adding that Sodium Target 2 was ''achievable and students enjoyed the food we provided prior to COVID.'' Another school district agreed, suggesting that its ''sodium averages are currently at or below [Sodium] Target 2 for both lunch and breakfast.'' However, this school district noted that student feedback and product availability have prevented decreases beyond Sodium Target 2. In response to prior rulemakings stakeholders have also encouraged USDA to allow more time for gradual sodium reduction, including recommending that USDA not go beyond Sodium Target 2. Based on this feedback, USDA expects that gradually phasing in limits that reflect the Sodium Target 2 will be achievable for schools. This rulemaking gives schools and industry a clear endpoint to work toward in the near-term, while providing sufficient time for all stakeholders to prepare for implementation. It also responds to proposed rule comments that suggested that Sodium Target 2 levels are achievable, but that USDA not go beyond the Sodium Target 2 limits in this rulemaking.

USDA also appreciates comments that supported sodium reduction in school meals to benefit children's overall health. While this final rule does not go as far as the proposed rule in reducing sodium, the sodium limits finalized in this rulemaking represent significant progress. The proposed sodium limits, which were informed by FDA's voluntary sodium reduction goals, would have reduced sodium in school lunches by 30 percent and school breakfasts by 20 percent. As detailed in the proposed rule, to develop the proposed limits, USDA used the average short-term FDA targets for foods commonly served in school lunch and breakfast to calculate a baseline menu goal for weekly sodium limits for each meal; this calculation resulted in an initial 10 percent reduction from the transitional sodium limits. The proposed rule built on this initial reduction with two additional reductions at lunch and one additional reduction at breakfast. USDA acknowledges that many respondents supported sodium reduction beyond what was proposed. However, many stakeholders, including school nutrition professionals and industry, expressed concern about meeting sodium levels beyond Sodium Target 2. The sodium limits finalized in this rule respond to stakeholder feedback by considering concerns that respondents raised around student acceptance of meals and the need for product reformulation, which many respondents suggested takes about three years.

This final rule reduces sodium in school lunch and breakfast by approximately 15 percent and 10 percent, respectively, achieving or surpassing the first proposed reduction informed by FDA's voluntary sodium reduction goals while incorporating stakeholder input. The sodium reduction finalized in this rule falls between the first and second sodium reduction included in the proposed rule, and this final rule gives school nutrition professionals additional time to reach the new limits. The sodium limits finalized in this rulemaking also reflect a prior limit that school nutrition professionals and industry are familiar with and have worked toward in the past. As noted above, in SY 2014–2015, many school food authorities were making significant progress toward meeting Sodium Target 2. A single sodium reduction for the school lunch and breakfast programs responds to stakeholders who suggested that one reduction for each program would be more attainable for schools and industry compared to the proposed series of reductions that would have spanned several years. Further, the implementation date for sodium reduction aligns with the weekly dietary limit for added sugars finalized in this rulemaking, allowing school nutrition professionals to implement both changes at the same time, rather than tracking multiple implementation dates.

USDA recognizes that continuing to reduce sodium in school meals is important to improve nutrition security, and USDA will use information from its forthcoming study to inform future sodium reduction efforts. While schools and industry partners have made progress in sodium reduction over the years, USDA acknowledges that there are opportunities for improvement. The *Dietary Guidelines* also acknowledge the importance of reducing sodium intake in achieving a healthy dietary pattern.[79] According to the *Dietary Guidelines,* over 95 percent of children ages 2–18 exceed recommended sodium levels.[80] Consistent with the goals of the *Dietary Guidelines,* this final rule supports efforts to improve children's dietary patterns by gradually reducing sodium limits in school meals. Importantly, this final rule also considers operational feasibility, such as the need for manufacturers to reformulate products to support implementation of reduced sodium limits. As detailed above, the *Dietary Guidelines* acknowledge that most sodium consumed in the United States comes from salt added during

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[78] Gordon, E.L., Morrissey, N., Adams, E., Wieczorek, A. Glenn, M.E., Burke, S & Connor, P. (2019). *Successful Approaches to Reduce Sodium in School Meals Final Report.* Prepared by 2M Research under Contract No. AG–3198–P–15–0040. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service. Available at: *https://fns-prod.azureedge.us/sites/default/files/resource-files/Approaches-ReduceSodium-Volume1.pdf.*

[79] See page 76. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[80] See page 77. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

commercial processing, meaning that ''multiple strategies should be implemented to reduce sodium intake to recommended limits.'' [81] This final rule represents a step toward that gradual, ongoing improvement; USDA agrees with public comments that noted the importance of continual progress toward reducing sodium in American's diets. Additionally, the gradual approach to sodium reduction finalized in this rule aligns with FDA goals and government-wide efforts to reduce sodium intake for the U.S. population. USDA understands that complementary efforts to reduce sodium across the entire U.S. food supply are important to the success of school meal sodium reductions; these efforts are discussed in more detail below, under *Food and Drug Administration Voluntary Sodium Reduction Goals.* USDA is committed to supporting schools' efforts to lower sodium, recognizing that reducing sodium intake is critical for chronic disease prevention and children's health as they grow into adulthood.

Food and Drug Administration Voluntary Sodium Reduction Goals

To develop the proposed rule and this final rule, USDA considered FDA's voluntary sodium reduction goals, which aim to reduce sodium across the U.S. food supply, in the context of school meals. FDA is taking an iterative approach to sodium reduction, which involves establishing sodium targets, monitoring progress, evaluating progress, and engaging stakeholders. FDA recommended voluntary targets, issued in October 2021, be met in 2.5 years and expects to issue revised subsequent targets in the next few years to facilitate a gradual, iterative process to reduce sodium intake. Similar in some respects to FDA's short term sodium reduction targets, this final rule establishes a single limit sodium reduction for both the school lunch and breakfast programs for the near-term. Like FDA's efforts to monitor and evaluate progress, as mentioned above, USDA will examine sodium reduction efforts in school meals assess the potential impacts of these reductions on program operations and participation.

USDA expects that the gradual approach to sodium reduction finalized in this rule will set schools and students up for success, as research [82] indicates gradual sodium reductions are more acceptable to consumers. Aligning school meal sodium limits with FDA's voluntary sodium reduction goals may help support children's acceptance of school lunches and breakfasts with less sodium, as the school meal reductions will occur alongside sodium reductions in the broader U.S. food supply.

Naturally Occurring and ''Functional'' Sodium

In public comments, several respondents raised concerns about naturally occurring sodium in foods such as bread, milk, and celery. As noted above and in the proposed rule, the sodium limits in this rulemaking are informed by FDA's voluntary sodium reduction goals. In developing these goals, FDA ''carefully studied the range of popular foods in today's marketplace to see what reductions are possible'' and considered ''the many functions of sodium in food, including taste, texture, microbial safety and stability.'' [83] This means that FDA's goals are not intended to focus on foods (*e.g.,* milk) that contain only naturally occurring sodium, but rather, to focus on foods where actionable reductions in sodium are feasible. USDA appreciates public comments about naturally occurring sodium in school meals. The sodium limits in this final rule, which are informed by FDA's voluntary sodium reduction goals, account for naturally occurring sodium levels in foods and beverages in the current food supply.

In addition to public comments about naturally occurring sodium, USDA appreciates public comments about ''functional'' sodium. Many respondents requested that USDA account for ''functional'' sodium in this rulemaking. This is similar to feedback included in *Successful Approaches to Reduce Sodium in School Meals,* where manufacturers raised concerns about ''functional'' sodium which plays a role in food shelf life and spoilage.[84] In particular, manufacturers worried that Sodium Target 3 may be so low in sodium that it would affect their ability to produce products such as bakery items, where sodium serves a functional purpose (*e.g.,* salt to strengthen gluten). As noted in the study, while Sodium Target 2 seemed to be ''achievable'' by some manufacturers, Sodium Target 3 was considered ''infeasible'' by nearly all manufacturers, who raised concerns about the impact on food preparation and storage.[85] The *Dietary Reference Intakes for Sodium and Potassium* [86] also acknowledge the functional role sodium plays in the food supply, indicating that ''the major sources of sodium in the diet come from foods in which sodium chloride serves a functional purpose, including baked goods, processed meats, and cheese.'' Similar to examples cited in public comments, the *Dietary Reference Intakes for Sodium and Potassium* point out that sodium plays a role in preserving and fermenting foods, altering the texture of foods, and enhancing flavor. However, based on the evidence available, the Dietary Reference Intakes conclude that continued efforts to reduce sodium intake in the population are warranted.

USDA appreciates the concerns that respondents raised regarding functional sodium. Respondents noted the role sodium plays in food safety, texture, and flavor, and emphasized the importance of considering these factors when determining sodium limits in the school meal programs. USDA considered and accounted for these comments when developing this final rule. Because the sodium limits finalized in this rulemaking are higher than those included in the proposed rule, USDA has concluded that the sodium limits in this final rule adequately account for ''functional'' sodium content in foods offered in school meals while still supporting efforts to reduce sodium intake among children. Further, the sodium limits in this rule do not approach Sodium Target 3, which manufacturers expressed

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[81] See page 46 and page 102. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[82] McGuire S. Institute of Medicine. 2010. Strategies to Reduce Sodium Intake in the United States. Washington, DC: The National Academies Press. Adv Nutr. 2010 Nov;1(1):49–50. *doi.org/10.3945/an.110.1002.* Epub 2010 Nov 16. PMID: 22043452; PMCID: PMC3042781.

[83] U.S. Food and Drug Administration. *Sodium Reduction.* Available at: *https://www.fda.gov/food/food-additives-petitions/sodium-reduction.*

[84] Gordon, E.L., Morrissey, N., Adams, E., Wieczorek, A. Glenn, M.E., Burke, S & Connor, P. (2019). *Successful Approaches to Reduce Sodium in School Meals Final Report.* Prepared by 2M Research under Contract No. AG–3198–P–15–0040. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service. Available at: *https://www.fns.usda.gov/nslp/successful-approaches-reduce-sodium-school-meals-study.*

[85] Gordon, E.L., Morrissey, N., Adams, E., Wieczorek, A. Glenn, M.E., Burke, S & Connor, P. (2019). *Successful Approaches to Reduce Sodium in School Meals, Volume II: Detailed Study Findings.* Prepared by 2M Research under Contract No. AG–3198–P–15–0040. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service. Available at: *https://www.fns.usda.gov/nslp/successful-approaches-reduce-sodium-school-meals-study.*

[86] National Academies of Sciences, Engineering, and Medicine; Health and Medicine Division; Food and Nutrition Board; Committee to Review the Dietary Reference Intakes for Sodium and Potassium; Oria M, Harrison M, Stallings VA, editors. Dietary Reference Intakes for Sodium and Potassium. Washington (DC): National Academies Press (US); 2019 Mar 5. 11, Sodium Dietary Reference Intakes: Risk Characterization and Special Considerations for Public Health. Available at: *https://www.ncbi.nlm.nih.gov/books/NBK545448/#sec_ch11_2.*

particular concern within the study *Successful Approaches to Reduce Sodium in School Meals,* as noted above. Finally, as noted, these sodium limits are informed by FDA's voluntary sodium reduction goals which account for functional sodium levels in foods and beverages in the current food supply. With these higher sodium limits, school nutrition professionals will have room to include foods with naturally occurring or ''functional'' sodium on their menus, including foods that are popular among children.

In summary, the overall weekly sodium limits for school meals finalized in this rule take into account levels of sodium needed to accommodate continued service of healthful foods with naturally occurring and functional sodium. Therefore, foods and beverages containing naturally occurring and functional sodium are not exempt from these sodium limits; rather, the sodium limits in this final rule account for such forms of sodium. USDA estimates that under this rule, schools will continue to be able to serve popular foods and beverages containing naturally occurring and functional sodium with similar frequency as they do currently. While this rulemaking gradually reduces the overall weekly sodium levels in school meals, the limits finalized in this rule allow for foods and beverages with naturally occurring and functional sodium. USDA anticipates that manufacturers will continue to explore all avenues of sodium reduction, including product reformulation and new technologies to reduce sodium, and encourages these efforts. As detailed below, USDA also expects that menu planners will play an important role in gradually reducing sodium levels in school meals over time. USDA anticipates that this gradual reduction in weekly average sodium limits will continue to allow menu planners flexibility to offer meals and menu items that children enjoy.

Ongoing Support for Sodium Reduction Implementation

Successfully reducing sodium in school meals will require the commitment and dedication of all school meals stakeholders. For its part, USDA remains committed to ensuring that menu planners receive the support and technical assistance needed to offer students meals that comply with the sodium limits in this rulemaking. USDA will evaluate progress toward reducing sodium in school meals, as well as in the broader food supply, on an ongoing basis. School nutrition professionals advocated for more gradual sodium reductions to allow menu planners time to modify menus and to give children's palates time to adapt; this rule provides that additional time. Additionally, USDA is committed to providing ongoing support to schools through efforts like the HMI Initiative, Team Nutrition grants, Farm to School grants, and tailored technical assistance. USDA welcomes stakeholder input on successful strategies to reduce sodium in school meals, and the additional assistance and guidance needed from USDA to support these efforts. Further, USDA expects that planned research on sodium reduction in school meals will help to inform future sodium reductions.

Best Practice Product-Based Sodium Limits

USDA appreciates comments that provided suggestions for best practice product-based sodium limits. Consistent with the proposed rule, this final rule does not require product-based sodium limits for specific foods and beverages; however, USDA will issue guidance on best practice product limits for high contributors of sodium in school meals and will incorporate FDA's voluntary sodium reduction goals. This guidance is intended to help schools procure lower sodium products for their weekly lunch and breakfast menus. Best practice limits provided in future guidance will be recommendations, not required limits.

Accordingly, this final rule establishes sodium limits found at 7 CFR 210.10(c) and (f)(4) and 7 CFR 220.8(c) and (f)(4) of the regulations. As noted, schools will maintain existing sodium limits (Sodium Target 1A at lunch and Sodium Target 1 at breakfast) through June 30, 2027. Schools will not need to make any changes to comply with the sodium provision of this final rule until July 1, 2027, when the sodium reduction included in this final rule must be implemented.

Section 6: Meats/Meat Alternates at Breakfast

Current Requirement

Current regulations at 7 CFR 220.8(c)(2) require three food components for a complete school breakfast: fruits, grains, and fluid milk. There is no meats/meat alternates component required at breakfast; therefore, under the current SBP meal pattern, a meat/meat alternate offered at breakfast credits toward the weekly grains requirement. Under current regulations, schools may substitute a 1.0 ounce equivalent of meat/meat alternate for a 1.0 ounce equivalent of grains, after meeting the daily minimum grains requirement.[87] Meats/meat alternates[88] may also be offered as ''extra'' food items at breakfast. ''Extra'' food items are not part of the reimbursable school meal, but do count toward the weekly dietary specifications for calories, saturated fat, sodium, and *trans* fat.

Proposed Rule

In the 2020 proposed rule, USDA set forth a combined meats/meat alternates and grains component. Under the proposal, schools would have the option to serve meats/meat alternates, grains, or a combination of both, depending on school and student preferences. The 2020 proposed rule also proposed to remove the requirement for schools to offer 1.0 ounce equivalent of grains each day at breakfast. Instead, the daily and weekly ounce equivalency requirements for the combined component could be met with meats/meat alternates, grains, or a combination of both.

Public Comments on 2020 Proposed Rule

USDA received 556 comments on the 2020 proposed rule about the combined meats/meat alternates and grains component at breakfast, a majority of which were categorized as ''mixed'' or ''other'' comments. Overall, 95 comments supported the proposal, including 86 unique comments, and 41 comments were opposed, including 38 unique comments.

Proponents, including State agencies, industry respondents, advocacy groups, and school districts, asserted that a combined meats/meat alternates and grains component would increase the variety of appealing breakfast options available to schools. Proponents maintained that this change would deliver protein-rich breakfasts that students enjoy, which they argued could encourage student participation and reduce food waste. One school district noted that parents and guardians often request school breakfasts with more protein and less added sugars. Other respondents agreed, noting that this change could decrease the added sugars in school breakfasts.

Proponents maintained that the proposal would simplify regulations and menu planning. Industry and advocacy groups that supported this change asserted that the current minimum grains requirement is burdensome and prevents some schools from offering meats/meat alternates at

[87] Under current regulations, the minimum daily grains requirement for each age/grade group at breakfast is 1.0 ounce equivalent.

[88] ''Meat alternates'' include cheese, eggs, yogurt, nuts and seeds, tofu and soy products, and beans and peas.

breakfast. One school district suggested this change would allow for more creative menu planning. Others, including State agencies and advocacy groups, provided examples of foods that schools could offer more easily under this change, such as yogurt parfaits, turkey sausage, and vegetable omelets. One respondent mentioned that protein-rich breakfast sandwiches could be offered as grab-and-go items for students. Another respondent noted that protein foods are ''a great way to start the day'' and an option that students enjoy.

Some respondents, including advocacy groups and individuals, were concerned that this change could lead to an increase in schools offering meat products that are high in saturated fat and sodium. Opponents suggested that consuming too much meat has adverse health effects, and some advised USDA that ''processed meats should be very limited or not consumed at all'' in school meals. Other respondents, including industry respondents, cautioned against removing the minimum grains requirement, citing the health benefits of grains and noting that grains are an important source of fiber. However, proponents emphasized that a wide variety of nutritious meats/meat alternates may be offered in school breakfasts. Further, one advocacy group emphasized that the current weekly saturated fat and sodium restrictions would limit the amount of processed meat items. A school district agreed, suggesting that the dietary specifications for calories, sodium, and saturated fat already constrain the amount of animal fats that can be offered each school week.

Some respondents offered modifications to the proposal. For example, an individual argued that each school breakfast should require grains *and* meats/meat alternates, while a State agency suggested USDA allow schools to serve meats/meat alternates without a grain three times per week, so that two times per week, schools must meet a minimum grains requirement. An industry respondent suggested a minimum weekly (rather than daily) grains requirement. Advocacy groups and individuals suggested placing specific calorie and sodium limits on meats served at breakfast; presumably, in addition to the weekly calorie and sodium limits already in place for school breakfasts. While several respondents noted that this proposal would help address concerns about added sugars in school breakfast, some respondents, including a State agency, recommended that USDA also place limits on specific grain items that are high in added sugars.

Final Rule

This final rule codifies the combined grains and meats/meat alternates meal component at breakfast and removes the requirement for schools to offer 1.0 ounce equivalent of grains each day at breakfast. Schools may offer grains, meats/meat alternates, or a combination of both to meet this combined component requirement, based on ounce equivalents. The minimum daily requirement (1.0 ounce equivalent) and minimum weekly requirements (7.0–9.0 ounce equivalents, depending on the age/grade group) for the combined component remains the same; however, this rule allows schools to meet the daily and weekly requirements by offering grains, meats/meat alternates, or a combination of both to meet minimum ounce equivalents.

Schools are not required to make any changes to menus under this provision. However, this change gives menu planners more flexibility and options to plan breakfast menus that meet student preferences and are compatible with meal service models, cost considerations, and other local factors. Schools have discretion to decide what combination of grains and/or meats/meat alternates to offer at breakfast to meet the minimum ounce equivalents. The *Dietary Guidelines* recommend including both grains and protein foods in healthy eating patterns.[89] As such, USDA encourages schools to offer a mix of grains and meats/meat alternates at breakfast throughout the school week.

USDA appreciates comments submitted in response to the 2020 proposed rule that highlighted the importance of reducing added sugars in school meals. This feedback, and later feedback gathered through USDA's stakeholder engagement campaign in summer 2022, informed USDA's proposals to limit added sugars in school meals. USDA agrees with respondents that allowing schools more flexibility to offer meats/meat alternates at breakfast will support implementation of the new added sugars limits outlined in *Section 2: Added Sugars.*

As discussed in *Section 4: Whole Grains,* at least 80 percent of the weekly grains offered at school breakfast must be whole grain-rich, and the remaining grain items offered may be whole grain-rich or enriched. Schools that choose to offer a mix of grains and meats/meat alternates at breakfast will calculate the required whole grain-rich offerings based on the total amount of grains offered at breakfast during the week, by ounce equivalents.

According to USDA's *School Nutrition and Meal Cost Study,*[90] among children who participate in the SBP as opposed to skipping breakfast or eating at home, appealing food was among the top three reasons for student participation. Relative to school lunch, current school breakfast participation is low. As suggested by respondents, providing school nutrition professionals with more flexibility to offer a variety of breakfast foods that students enjoy could encourage student participation. For example, this rule allows schools to offer scrambled eggs, a fruit cup, and low-fat milk as a complete breakfast.

USDA understands concerns raised by some respondents regarding meat products that are high in saturated fat and sodium. The dietary specifications for calories, saturated fat, and sodium remain in place under this rule, and as detailed in *Section 5: Sodium,* this rule implements an additional sodium reduction in school meals. USDA agrees with respondents that suggested that the dietary specifications encourage schools to choose options that are low in saturated fat and sodium. According to USDA's *School Nutrition and Meal Cost Study,* the most common categories of meats/meat alternates offered in school breakfasts in SY 2014–2015 were cheese and yogurt.[91] USDA encourages schools

[89] The *Dietary Guidelines* include recommendations for ''food groups—vegetables, fruits, grains, dairy, and protein foods—eaten at an appropriate calorie level and in forms with limited amounts of added sugars, saturated fat, and sodium''. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines for Americans, 2020–2025.* 9th Edition. December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[90] See Table 5.2. Mean Percentage of Observed Trays including Specific Foods and Mean Percentage of Food Wasted in SBP Breakfasts. U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, *School Nutrition and Meal Cost Study, Final Report Volume 4: Student Participation, Satisfaction, Plate Waste, and Dietary Intakes* by Mary Kay Fox, Elizabeth Gearan, Charlotte Cabili, Dallas Dotter, Katherine Niland, Liana Washburn, Nora Paxton, Lauren Olsho, Lindsay LeClair, and Vinh Tran. Project Officer: John Endahl. Alexandria, VA: April 2019. Available at: *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

[91] The most common categories of meat/meat alternates offered at breakfast in SY 2014–2015 were cheese (offered on 5.4 percent of observed trays) and yogurt (offered on 5.0 percent of observed trays). U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, *School Nutrition and Meal Cost Study, Final Report Volume 2: Nutritional Characteristics of School Meals* by Elizabeth Gearan, Mary Kay Fox, Katherine Niland, Dallas Dotter, Liana Washburn, Patricia Connor, Lauren Olsho, and Tara Wommak. Project Officer: John Endahl. Alexandria, VA: April 2019. Available at: *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

opting to serve meats/meat alternates at breakfast to offer a wide variety of nutrient-dense options, including vegetarian options such as yogurt low in added sugars;[92] breakfast bean burritos; and eggs. USDA acknowledges respondent requests to limit ''processed meats'' in the SBP. However, the dietary specifications for calories, saturated fat, and sodium already limit the amount of meats with added salt that are offered in school breakfasts. Schools must plan all meals to meet the dietary specifications, and these limits provide schools with flexibility to choose foods that meet student preferences while staying within a framework that results in nutritious meals. USDA will not restrict the types of meats permitted at breakfast, beyond existing food crediting guidelines.

This provision does not change the breakfast meal pattern requirements for preschool students. Under 7 CFR 220.8(o), schools serving breakfasts to children ages 1 through 4 may substitute meats/meat alternates for the entire grains component up to three times per week. However, schools are reminded of the existing co-mingling flexibilities, permitted in USDA guidance.[93] Schools that serve meals to preschoolers and K–5 students in the same meal service area at the same time may choose to serve the K–5 breakfast meal pattern under 7 CFR 220.8 to both groups of children.

Accordingly, this final rule amends 7 CFR 220.8(c) introductory text and (c)(2), to codify the combined grains and meats/meat alternates component at breakfast and to remove the requirement for schools to offer 1.0 ounce equivalent of grains each day at breakfast. This change provides schools with more menu planning flexibility at breakfast. Schools are not required to change menus or operations as a result of this provision.

Section 7: Substituting Vegetables for Grains in Tribal Communities

Current Requirement

Current regulations at 7 CFR 210.10(c)(3), 220.8(c)(3), 225.16(f)(3), and 226.20(f) allow program operators in American Samoa, Puerto Rico, and the U.S. Virgin Islands to serve vegetables such as yams, plantains, or sweet potatoes to meet the grains or breads component.[94] Additionally, this option is currently available to SFSP and CACFP sponsors, institutions, and facilities in Guam. The option to substitute vegetables for grains or breads is intended to accommodate cultural food preferences and to address product availability and cost concerns in these outlying areas.

As detailed in *Section 1: Background,* USDA sought stakeholder input when developing the proposed rule. As part of this effort, USDA conducted listening sessions with Tribal leaders, nutritionists, and schools in summer 2022. During these listening sessions, Tribal nutritionists and schools expressed concern that the grains requirements are a poor nutritional match for Indigenous children because grains, such as wheat and flour, were not traditionally a part of their ancestors' diets. Tribal nutritionists and schools requested Indigenous starchy vegetables be allowed as a grain substitute, similar to the current option available for child nutrition program operators in American Samoa, Puerto Rico, and the U.S. Virgin Islands, and for SFSP and CACFP sponsors, institutions, and facilities in Guam.

Proposed Rule

In response to stakeholder input, USDA proposed to add tribally operated schools, schools operated by the Bureau of Indian Education, and schools serving primarily American Indian or Alaska Native children to the list of schools at 7 CFR 210.10(c)(3) and 220.8(c)(3) that may serve vegetables to meet the grains requirements. For SFSP and CACFP, USDA proposed to revise 7 CFR 225.16(f)(3) and 226.20(f) to allow sponsors, institutions, and facilities, as applicable, that serve primarily American Indian or Alaska Native children to substitute vegetables for breads or grains. USDA also proposed to revise the current regulatory text for NSLP, SBP, SFSP, and CACFP to clarify that this provision allows the substitution of traditional Indigenous vegetables, such as prairie turnips. In the proposed SFSP regulatory text, USDA also removed outdated references to the Trust Territory of the Pacific Islands and the Northern Mariana Islands. Finally, USDA proposed to allow all schools, sponsors, institutions, and facilities in Guam and Hawaii to substitute vegetables for grains or breads, to reflect cultural food preferences.

Public Comments

USDA received 264 comments on this proposal, including 143 unique comments. Of these, 104 supported the proposal, including 65 unique comments, none were opposed, and 154 were mixed, including 78 unique comments. School nutrition professionals, advocacy groups, professional organizations, State agencies, and individuals submitted comments on the proposal.

Several respondents, including a national organization representing tens of thousands of school nutrition professionals, an advocacy group, State agencies, individuals, and a form letter campaign, supported the proposal. One individual emphasized the importance of recognizing children's personal, cultural, and traditional dietary preferences. Another individual stated that offering diverse and inclusive meal options promotes belonging and contributes to children's overall wellbeing. This respondent further emphasized the importance of ''taking steps toward embracing our differences, celebrating our diversity, and providing meals that mirror the rich tapestry of cultures represented within our school communities.'' One advocacy group supported the proposal, suggesting that it would ''provide equitable access and outcomes to American Indian and Alaska Native communities and children.'' A State agency described the proposal as a ''nutritional benefit.'' A professional organization affirmed that serving culturally responsive meals and snacks is an equitable practice that may improve meal consumption and strengthen relationships between providers, families, and participants.

Some respondents provided feedback about USDA's proposal to allow program operators in Guam and Hawaii to substitute vegetables for grains or breads. An advocacy group applauded USDA for expanding this option to program operators in Guam and Hawaii. One professional organization encouraged USDA to further accommodate the cultural food preferences of Native Hawaiians. A few other respondents expressed confusion about how the proposal for Guam and Hawaii would interact with the proposal for child nutrition program operators on the mainland that serve primarily American Indian and Alaska Native children. To clarify, USDA proposed to expand this option to all schools, sponsors, institutions, and facilities in Guam and Hawaii. Under the proposed rule, the option to substitute vegetables for grains or breads would be available to any child nutrition program operator

[92] Please see Section 2: Added Sugars, for information on the new added sugars limit for yogurt, which will take effect in SY 2025–2026.

[93] U.S. Department of Agriculture. *Flexibility for Co-Mingled Preschool Meals: Questions and Answers,* June 30, 2017. Available at: *https://www.fns.usda.gov/school-meals/flexibility-co-mingled-preschool-meals-questions-and-answers.*

[94] Current SFSP regulations at 7 CFR 225.15(f)(3) also allow sponsors in Trust Territory of the Pacific Islands, and the Northern Mariana Islands to substitute vegetables for breads. However, these references are outdated.

located in Guam or Hawaii. In addition, under the proposed rule, program operators on the mainland that serve primarily American Indian or Alaska Native children would be eligible to use this option.

Several respondents suggested expanding the proposal, in most cases, advocating for all schools, sponsors, institutions, and facilities to be allowed to substitute vegetables for grains or breads, regardless of their location or participant demographics. One advocacy group suggested expanding the menu planning option to participants from other demographic groups who consume starchy vegetables in place of grains. Going further, a dietitian suggested that expanding the option to all schools, sponsors, institutions, and facilities would eliminate confusion in menu planning. An advocacy group agreed, asserting that vegetable consumption is lacking among all children and that allowing this option for all sites would help reduce sugar, especially at breakfast. A professional organization supported expanding this provision to all schools to avoid excluding any students. An advocacy group agreed, noting that the vast majority of American Indian and Alaska Native children attend public schools that are not tribally operated or majority American Indian or Alaska Native. This respondent concluded that, as proposed, the option may not have its intended impact. A few other respondents raised concerns about the limited focus of the provision, but instead of expanding it, recommended not finalizing it. For example, a State agency acknowledged the importance of offering culturally appropriate foods in the child nutrition programs but raised equity concerns given the narrow focus of the provision; this State agency cautioned against finalizing the proposal. A school nutrition professional claimed that, as proposed, this menu planning option would create division and confusion regarding who can implement the provision. A few respondents offered other suggestions. A form letter suggested that USDA require vegetables offered in place of grains to be prepared in ways that align with traditional preparations, such as baking or boiling. A professional organization suggested that USDA limit substitutions under this provision to starchy vegetables only. This respondent also advocated for more prescriptive language on this provision's eligibility criteria to preserve program integrity and ensure the intended populations are served.

Some respondents requested clarification or additional support. A few respondents, including a State agency and professional organization, requested guidance to support implementation of this provision, including guidance on determining whether a program operator qualifies to use this option. A professional organization expressed concerns about possible administrative burden, specifically for enrolled CACFP sites, further advocating for this provision to be expanded to all program operators. This respondent argued that expanding this option to all operators would prevent administrative burden and promote inclusivity. A form letter campaign did not cite any specific concerns, but asked USDA to ensure that the administrative burden associated with enacting the change will be minimal. A State agency asked for clarification on whether the menu planning option applies to the infant meal pattern. This respondent did not support allowing this option for infants, explaining that allowing vegetables to substitute for other food sources in the infant meal pattern, such as infant cereal, may reduce critical sources of iron in an infant's diet. Another State agency asserted that USDA would need to provide clear guidance about the serving sizes of vegetables that would be required to meet the grains requirements.

In the proposed rule, USDA explained that the list of vegetables included in the proposed regulatory text was not exhaustive. However, USDA encouraged public input on any other vegetables that should be listed as examples in the regulatory text, and some respondents shared feedback. Several advocacy groups suggested that squash, cassava (yuca), and taro would be suitable substitutions for grains and recommended including them as examples. A State agency suggested that Native Hawaiian traditional vegetables such as taro, poi, breadfruit, Okinawan sweet potato, and Molokai sweet potato be included in the regulatory text as examples of vegetables that may be substituted for grains. One professional organization asked USDA to clarify whether all vegetables can be substituted for grains. Another proponent recommended that instead of allowing any vegetable to substitute for grains, as proposed, that USDA set standards about which vegetable subgroups can be substituted for grains to ensure that the vegetables are nutritionally comparable to grains.

In addition to general feedback on the proposal, USDA requested public input on additional menu planning options that would improve the school meal programs for American Indian and Alaska Native children by asking the following question:

- Are there other specific areas of the school meal pattern that present challenges to serving culturally appropriate meals for American Indian and Alaska Native children, specifically regarding any regulatory requirements in 7 CFR 210.10 and 220.8?

A few respondents provided input on specific areas of the school meal patterns that present challenges to serving culturally appropriate meals. One State agency identified that barriers to serving hunted game meats make it challenging to serve culturally appropriate meals to American Indian and Alaska Native children. This respondent also mentioned that milk is not a part of the traditional eating pattern for American Indian and Alaska Native communities. Similarly, an individual stated the milk requirement is challenging to implement due to the high prevalence of lactose intolerance among American Indian and Alaska Native populations. Other respondents mentioned challenges with food crediting. A State agency encouraged USDA to "simplify the crediting process for scratch-cooked meals" to incentivize schools to scratch cook culturally relevant meals. Similarly, an advocacy group suggested USDA consider a "simplified" crediting model that would facilitate scratch cooking and procurement of minimally processed products. Lastly, a form letter campaign voiced concerns about the potential for additional, case-by-case menu planning options due to the administrative burden of such a process. Instead, this form letter recommended that USDA address any barriers to serving culturally appropriate meals through comprehensive changes to the meal patterns.

Final Rule

The final rule amends 7 CFR 210.10(c)(3) and 220.8(c)(3) to allow school food authorities and schools that are tribally operated, operated by the Bureau of Indian Education, and that serve primarily American Indian or Alaska Native children to serve vegetables to meet the grains requirement in NSLP and SBP. For SFSP and CACFP, USDA finalizes the proposal to revise 7 CFR 225.16(f)(3) and 226.20(f) to allow sponsors, institutions, and facilities, as applicable, that serve primarily American Indian or Alaska Native participants to substitute vegetables for grains or breads. Additionally, this final rule allows all schools, sponsors, institutions, and facilities in Guam and Hawaii to serve vegetables to meet the grains or breads

requirement, and in the SFSP regulatory text, removes outdated references to the Trust Territory of the Pacific Islands and the Northern Mariana Islands. Lastly, for all child nutrition programs applicable to this provision, this final rule clarifies that any creditable vegetable can be substituted for grains or breads.

While the proposed rule only listed ''schools'' in the NSLP and SBP regulatory text, this final rule clarifies that this option is available to ''school food authorities and schools'' that qualify. This change responds to comments that encouraged USDA to ensure that the administrative burden associated with enacting the change is minimal. By allowing implementation at the school food authority level, this final rule simplifies use of this option for school food authorities that qualify and reduces the documentation burden. Instead of maintaining documentation for all qualifying schools, school food authorities that qualify would maintain documentation at the school food authority level.

Program operators in Guam and Hawaii are not required to submit a request for approval to use this menu planning option; it is automatically available to any school, sponsor, institution, or facility in Guam or Hawaii that chooses to use it. Therefore, upon implementation of this final rule, all schools, sponsors, institutions, and facilities located in American Samoa, Guam, Hawaii, Puerto Rico, or the U.S. Virgin Islands are eligible for this option; it is not necessary for program operators in these specific areas to maintain documentation to demonstrate eligibility for this option. However, school food authorities or schools that are tribally operated, operated by the Bureau of Indian Education, or program operators that serve primarily American Indian or Alaska Native children must maintain documentation to demonstrate that they qualify if they choose to use this option.

For the NSLP and SBP, the school food authority is responsible for maintaining documentation to demonstrate that the school food authority or its schools qualify to use this option. If the school food authority is tribally operated, is operated by the Bureau of Indian Education, or serves primarily American Indian or Alaska Native students, then the school food authority would maintain school food authority-level documentation of eligibility. If individual schools within the school food authority qualify for this option, then the school food authority would maintain documentation for its qualifying schools, as applicable. As described in the proposed rule, school food authorities or schools ''serving primarily American Indian or Alaska Native children'' include school food authorities or schools where American Indian or Alaska Native children represent the largest demographic group of enrolled children. USDA will issue guidance on acceptable data that can be used to report student demographics, which may include participant self-reporting, school data, or census data. School food authorities must maintain this documentation for program reviews. For example:

- For school food authorities that are tribally operated or operated by the Bureau of Indian Education, an example of documentation is a certifying statement indicating the school food authority is tribally operated or operated by the Bureau of Indian Education.
- For schools serving primarily American Indian or Alaska Native children, an example of documentation may be aggregate data of student demographics, such as participant self-reporting, school data, or census data.

For the SFSP and CACFP, a sponsor, institution, or facility that chooses to use this menu planning option must maintain documentation demonstrating that the site serves primarily American Indian or Alaska Native participants. USDA will issue guidance on acceptable data that can be used to report participant demographics, which may include participant self-reporting, school data, or census data. For example:

- For enrolled sites, the sponsor, institution, or facility determines, based on participant self-reporting, that American Indian or Alaska Native participants represent the largest demographic group of enrolled participants.
- For enrolled sites, the sponsor, institution, or facility provides a certifying statement indicating that the site primarily serves American Indian or Alaska Native participants.
- For non-enrolled sites, the sponsor, institution, or facility determines that American Indian or Alaska Native participants represent the largest demographic group of participants served by the site, based on school or census data.

This final rule allows any vegetable to substitute for the grains or bread component. However, USDA emphasizes the importance of traditional and culturally relevant vegetables, and this final rule provides examples of traditional and cultural vegetables, such as prairie turnips and breadfruit, in the revised regulatory text at 7 CFR 210.10(c)(3), 220.8(c)(3), 225.16(f)(3), and 226.20(f). Respondents provided examples such as squash, cassava (yuca), and taro, all of which would be traditional and culturally relevant vegetables that may substitute for grains or breads under the final rule.

Some respondents asked USDA to establish vegetable subgroup requirements for the provision, or to limit this provision to vegetables prepared in specific ways. USDA is not requiring specific vegetable subgroups or types of preparation in this final rule to minimize burden for program operators that choose to use this flexibility. This approach is imperative for program operators of the SFSP and CACFP because SFSP and CACFP meal patterns do not require vegetable subgroups and a vegetable subgroup requirement for this provision could create barriers to implementation in these programs. Allowing program operators the flexibility to offer vegetables from any subgroup in place of grains or breads allows for a variety of vegetables to be offered, many of which are underconsumed among all populations.[95]

A few respondents requested clarification on specific questions. A State agency requested clarification on whether this option would be applicable to the infant meal pattern. This rule does extend the option to the infant meal pattern. Extending the option to substitute vegetables for grains in the infant meal pattern allows infants to also consume foods, and develop taste preferences, aligned with an Indigenous diet. USDA recognizes the concern that allowing this flexibility for infants could result in a reduced consumption of critical nutrients, such as iron. However, the infant meal pattern allows a variety of foods to meet the required food components for meals and snacks, and only currently requires a grain item at snack when a child is developmentally ready to accept those foods. Allowing sponsors, institutions, and facilities to serve culturally responsive meals and snacks can improve meal consumption and strengthen relationships between providers, families, and participants.

[95] According to the *Dietary Guidelines,* ''Almost 90 percent of the U.S. population does not meet the recommendation for vegetables. In addition, with few exceptions, the U.S. population does not meet intake recommendations for any of the vegetable subgroups.'' Further, according to the *Dietary Guidelines,* ''For most individuals, following a healthy eating pattern will require an increase in total vegetable intake and from all vegetable subgroups, shifting to nutrient-dense forms, and an increase in the variety of different vegetables consumed over time.'' See page 31. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans.* 9th Edition. December 2020. Available at: *https://www.dietaryguidelines.gov/.*

USDA appreciates public feedback on the menu planning options for American Indian and Alaska Native children. Overall, respondents expressed appreciation for USDA's efforts to improve the child nutrition programs for American Indian or Alaska Native children. In addition to these supportive comments, several respondents recommended that USDA expand the proposed menu planning option to more, or even all, child nutrition program operators. USDA acknowledges that additional schools, sponsors, institutions, and facilities may benefit from this provision and appreciates this feedback. However, as proposed, this provision was intended for certain schools, sponsors, institutions, and facilities. Other program operators that were not covered by the proposal, as well as State agencies responsible for program monitoring, did not have the opportunity to provide public comment on a potential broader change. With the exception of clarifying that this option may be applied at the school food authority level, this final rule does not expand this option to additional program operators, beyond those covered by the proposed rule.

This final rule is intended to support American Indian or Alaska Native participants in child nutrition programs and to uphold USDA's commitment to advancing equity, as detailed in the Department's Equity Action Plan.[96] In this plan, USDA outlines its commitment to advancing equity, including a focus on increasing Tribal trust. The Equity Action Plan highlights the importance of considering policy design and implementation to ensure Tribal communities have equitable access to Federal programs and services, including incorporating Indigenous values and perspectives in program design and delivery. While this final rule does not have as broad of a reach as some respondents requested, USDA remains committed to promoting equitable access to the child nutrition programs. USDA will continue to work with its partners to make the child nutrition programs more inclusive for all child and adult participants.

Accordingly, this final rule amends 7 CFR 210.10(c)(3) and 220.8(c)(3), to allow school food authorities and schools that are tribally operated, operated by the Bureau of Indian Education, and that serve primarily American Indian or Alaska Native children to the list of schools[97] that may serve vegetables to meet the grains requirement. For SFSP and CACFP, this final rule amends 7 CFR 225.16(f)(3) and 226.20(f) to allow sponsors, institutions, and facilities, as applicable, that serve primarily American Indian or Alaska Native participants to substitute vegetables for grains or breads. This final rule also amends 7 CFR 210.10(c)(3), 220.8(c)(3), 225.16(f)(3), and 226.20(f) to allow all schools, sponsors, institutions, and facilities in Guam and Hawaii to serve vegetables to meet the grains or breads requirement. These changes provide child nutrition program operators an optional menu planning flexibility. Program operators are not required to change menus or operations as a result of this provision.

Section 8: Traditional Indigenous Foods

Current Requirement

Information about crediting foods in the school meal programs is primarily shared with program operators through USDA guidance, not through regulation. While traditional Indigenous foods are not explicitly mentioned in the school lunch and breakfast program regulations, they may be served in reimbursable school meals in accordance with USDA guidance.

USDA does not define the term ''traditional foods;'' however, the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)) defines traditional food as ''food that has traditionally been prepared and consumed by an [American] Indian tribe'' and includes the following example foods in its definition: wild game meat, fish, seafood, marine mammals, plants, and berries. USDA acknowledges that there are 574 federally recognized Tribes in the U.S. and appreciates the importance of recognizing the diversity of American Indian and Alaska Native cultures and traditions, including food traditions.

In 2015, USDA issued policy guidance[98] about serving traditional Indigenous foods in the child nutrition programs. This guidance explained that if a food is served as part of a reimbursable meal, but not listed in the *Food Buying Guide for Child Nutrition Programs (Food Buying Guide),* the yield information of a similar food or in-house yield[99] may be used to determine a food's contribution toward meal pattern requirements. The 2015 guidance also explained how to credit certain traditional foods, such as wild rice, blue cornmeal, and ground buffalo. In 2023, this guidance, titled *Crediting Traditional Indigenous Foods in Child Nutrition Programs,* was revised to further clarify how to credit traditional Indigenous foods and to expand the list of traditional Indigenous foods that credit similarly to products already listed in the *Food Buying Guide.* Additional resources, such as USDA's fact sheet, *Bringing Tribal Foods and Traditions into Cafeterias, Classrooms, and Gardens*[100] encourage schools to incorporate traditional Indigenous foods in school menus.

Proposed Rule

USDA proposed to explicitly state in regulation that traditional foods may be served in reimbursable school meals. The intent of this proposal was to emphasize USDA's support for integrating traditional Indigenous foods into the school meal programs. While many traditional Indigenous foods may already be served in the programs under existing USDA guidance, USDA expected that this regulatory change would help to address the perception that traditional foods are not creditable, draw attention to the option to serve traditional Indigenous foods, and support local efforts to incorporate traditional Indigenous foods into school meals.

Public Comments

USDA received over 200 comments on the proposal to add ''traditional foods'' to the regulatory text. Of these, 168 supported the proposal, including 68 unique comments. While only one respondent requested no changes, 70 respondents, including 50 unique comments, provided additional feedback on the proposal.

Many respondents, including State agencies, advocacy groups, a national organization representing tens of thousands of school nutrition professionals, school districts, a form letter campaign, and individuals, expressed support for the traditional foods provision and including traditional Indigenous foods in school meals. One proponent explained that including traditional foods in school

[96] U.S. Department of Agriculture, *USDA Equity Action Plan in Support of Executive Order (E.O.) 13985 Advancing Racial Equity and Support for Underserved Communities through the Federal Government,* February 10, 2022. Available at: *https://www.usda.gov/equity/action-plan.*

[97] As noted above, USDA currently allows schools in American Samoa, Puerto Rico, and the U.S. Virgin Islands to serve vegetables such as yams, plantains, or sweet potatoes to meet the grains component. See 7 CFR 210.10(c)(3) and 220.8(c)(3).

[98] U.S. Department of Agriculture, *Child Nutrition Programs and Traditional Foods,* July 15, 2015. Available at: *https://www.fns.usda.gov/cn/child-nutrition-programs-and-traditional-foods.*

[99] Information on calculating in-house yield data may be found on page I–5 of the *Food Buying Guide.*

[100] U.S. Department of Agriculture, *Bringing Tribal Foods and Traditions Into Cafeterias, Classrooms, and Gardens,* August 2017. Available at: *https://www.fns.usda.gov/f2s/tribal-foods.*

meals allows Indigenous children to meet their nutritional needs in a way that connects them with their culture. Another proponent emphasized the importance of connecting children with traditional foods and supported greater inclusion of traditional foods to help address health disparities. An advocacy group suggested the proposal would provide clarity and support to schools that want to incorporate traditional foods into their menus. An individual stated the proposal is important because ''school meals should reflect the cultural heritage and values of the students they serve.'' Similarly, an advocacy group suggested that the proposal would encourage schools to offer more traditional foods, which can increase school meal participation and honor students' cultural traditions. Another advocacy group stated the proposal represents ''progress toward making school meals standards more equitable.''

Several respondents recommended that USDA broaden the scope of this provision. For example, a school district and an advocacy group recommended that USDA encourage all schools to offer foods considered traditional to all cultures, not just American Indian and Alaska Native communities. Similarly, several advocacy groups suggested that USDA consider additional ways meal pattern requirements can be more inclusive of all students' ethnicities and cultural backgrounds. One advocacy group encouraged USDA to provide training and technical assistance, such as guidance, menus, and recipes, to support the inclusion of foods traditional to a variety of cultures. Another advocacy group stated that more culturally relevant menu planning resources would ''support the breadth of diverse traditions and cultures across our nation.''

A few proponents offered suggestions to help schools fully realize the intent of this change. An advocacy group suggested that USDA seek broad input from community members to ensure culturally relevant foods are included in the school meal programs without unnecessary barriers. A form letter campaign encouraged USDA to engage American Indian and Alaska Native communities when implementing this provision and stated that the expansion of traditional and cultural meal options would advance racial equity. An advocacy group suggested USDA ensure that ''traditional foods are readily available in USDA foods, particularly through Tribal producers.''

In addition to requesting general feedback on the proposal, USDA requested public input on the following questions:

- USDA has provided guidance [101] on crediting certain traditional foods. Are there any other traditional foods that schools would like to serve, but are having difficulty serving? If so, what specific challenges are preventing schools from serving these foods?
- Which traditional foods should USDA provide yield information for and incorporate into the *Food Buying Guide?*
- Is ''traditional foods,'' as described in the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)), an appropriate term to use, or do stakeholders recommend a different term?

A few respondents provided input on the first question regarding traditional foods that are challenging to serve. A State agency noted that hunted game, foraged fruits, and freshly caught fish are challenging to serve due to local, State, and Federal food safety requirements. Another State agency provided feedback from a Tribal school in their State; the Tribal school explained that they cannot purchase venison from their local vendor and cited challenges serving maple syrup harvested by community members. One school nutrition professional mentioned that they have no difficulty serving traditional foods in their local area.

Several respondents provided input on the second question, asking which traditional foods USDA should consider adding to the *Food Buying Guide.* A professional organization suggested USDA add wild game including moose, reindeer, and caribou; plants such as kelp and Eskimo potatoes; and fruits such as salmonberries. This respondent described these foods as nutritious and affirmed that these specific foods are important cultural foods for Alaska Native students. A State agency listed whitefish, walleye, and hickory nuts as traditional foods to be added to the *Food Buying Guide.* In a few cases, respondents recommended adding items that are already included in the *Food Buying Guide,* such as cranberries, chestnuts, venison, and bison.

Some respondents suggested adding foods traditional to other cultures to the *Food Buying Guide.* One advocacy group recommended USDA expand the definition of traditional foods to include all cultures and provided several suggestions of foods to add, including bacalao (dried and salted codfish), broccoflower, chorizo, crowder peas, huckleberries, naan, smoked eel, and ulu. A school nutrition professional suggested adding Caribbean, Indian, and Asian foods to the *Food Buying Guide.* A few advocacy groups recommended adding bone broth, nori (dried, edible seaweed), pupusas, arepas, yucca, and curry dishes. Another respondent suggested that USDA credit breadfruit and taro as grains and cited their nutritional benefits. An individual and an advocacy group provided a list of native Hawaiian foods to include, such as purple sweet potato, taro, poi, seaweed, and coconut. For clarification, coconut, seaweed, poi, breadfruit, and taro are already included in the *Food Buying Guide.*

A few respondents provided input on the third question, which asked whether ''traditional foods,'' as defined in the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)), is an appropriate term to use in regulation. An advocacy group and a few State agencies expressed support for the term ''traditional foods'' as defined in the Agricultural Improvement Act of 2014. Another State agency acknowledged the importance of cultural foods in school meals but noted that foods considered to be ''traditional'' may have changed over time and questioned use of this term in the regulation. An individual recommended that foods traditional to Native Hawaiians be considered ''traditional foods'' for the purpose of the regulation. A professional organization encouraged USDA to expand its use of the term ''traditional foods'' to include other cultures, stating that ''traditional foods should not be limited to those consumed by an American Indian Tribe but be inclusive of other diverse cultures.'' A State agency supported inclusion of traditional foods and emphasized the importance of a clear explanation of what qualifies as a traditional food.

Oral comments were submitted during a Tribal Consultation conducted by USDA with Tribal leaders in spring 2023. During this session, many participants expressed support for the term ''traditional foods'' as defined in the Agricultural Improvement Act of 2014 and as used in this provision. One Tribal leader mentioned that this term is recognizable among many Tribes. Consultation participants provided additional input on school meals. One Tribal leader acknowledged the challenge in establishing nutrition requirements that accommodate all communities because all Tribes are different. Another participant expressed concerns about added sugars and risk for diabetes and other chronic diseases among the American Indian and Alaska

[101] U.S. Department of Agriculture, *Child Nutrition Programs and Traditional Foods,* July 15, 2015. Available at: *https://www.fns.usda.gov/cn/child-nutrition-programs-and-traditional-foods.*

Native populations. This participant claimed that in their view, improving the nutritional quality of school meals is a greater concern than serving traditional foods. Additionally, Tribal leaders cited meal costs and reimbursement rates as barriers to including more traditional foods in school menus.

Final Rule

This final rule codifies the proposal to explicitly state in regulation that traditional Indigenous foods may be served in reimbursable school meals. Regulations at 7 CFR 210.10(c)(7) and 220.8(c)(4) will include the definition of traditional foods from the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)), which defines traditional food as ''food that has traditionally been prepared and consumed by an [American] Indian tribe,'' including wild game meat, fish, seafood, marine mammals, plants, and berries. As with all other foods offered in school meals, traditional Indigenous foods will continue to be subject to meal pattern requirements, including the weekly dietary specifications. While the proposed rule used the term ''traditional foods,'' in this final rule, USDA uses the term ''traditional Indigenous foods'' to better communicate the focus of this provision.

USDA appreciates public comments received in response to this provision and feedback that stakeholders provided on serving traditional Indigenous foods in school meals. USDA recognizes that stakeholders support diversity in the child nutrition programs, including offering foods that are significant to students of all cultural backgrounds. As discussed in *Section 14: Meal Modifications,* USDA supports efforts to consider participant preferences when planning and preparing meals, including cultural food preferences. However, for this specific provision, USDA will use the term ''traditional Indigenous foods'' and use the definition of ''traditional foods'' from the Agriculture Improvement Act of 2014 and as referenced in the proposed rule. Food sovereignty and traditional foodways are critical in empowering Tribal communities' self-determination and incorporating American Indian and Alaska Native perspectives into USDA's nutrition assistance programs. USDA will continue to encourage program operators to develop menus that are culturally appropriate for all populations and that meet the needs of their communities. USDA's partnership with the Institute of Child Nutrition offers resources, such as the *Child Nutrition Recipe Box* and additional training materials, to support the integration of cultural foods in child nutrition programs. Additionally, USDA Foods in Schools provides a list of Available Foods each school year for program operators to purchase locally grown and produced foods.[102]

USDA appreciates stakeholder suggestions for traditional Indigenous foods, as well as other cultural foods, that should be added to the *Food Buying Guide.* In 2023, USDA added new yield data for highly requested foods such as chokecherries and taro to the *Food Buying Guide.* Additional traditional Indigenous foods that respondents suggested, such as kelp, are described in the *Food Buying Guide* as similar to other food items with comparable yield information; this information can be used when crediting similar foods for a reimbursable meal. Input provided through public comment will be beneficial as USDA continues its long-term initiative to identify more traditional foods to incorporate into the *Food Buying Guide.* USDA also appreciates the importance of continuing to engage with Tribal leaders and community members to fully realize the intent of this change. Tribal stakeholders and leaders provided USDA with valuable input on this rulemaking through listening sessions and through Tribal Consultation. USDA greatly appreciates this input and recognizes the importance of continuing to work together on other initiatives to improve the child nutrition programs for American Indian and Alaska Native children.

Some respondents suggested that foods from other cultures be added to the *Food Buying Guide.* Many cultural foods, such as arepas and pupusas, are creditable in school meal programs if made with creditable ingredients, such as corn masa, masa harina, nixtamalized corn flour, and nixtamalized cornmeal. Respondents also suggested foods like curry dishes, which are often prepared with vegetables and meats/meat alternates that are already listed in the *Food Buying Guide.* USDA appreciates respondent feedback and continues to encourage program operators to develop diverse menus that meet the needs and preferences of the students they serve.

USDA understands that this change is just one part of a larger effort to support the service of traditional Indigenous foods in school meals and remains committed to promoting traditional foodways through its policies and guidance. USDA's website, *Serving Traditional Indigenous Foods in Child Nutrition Programs,*[103] hosts a collection of resources to support program operators working to incorporate traditional Indigenous foods in reimbursables meals, including fact sheets, recipes, crediting tip sheets, and other resources. This web page provides guidance on sourcing locally grown and raised traditional foods. USDA will continue to update this web page with additional tools and resources as they are developed.

Accordingly, this final rule amends 7 CFR 210.10(c)(7) and 220.8(c)(4) to explicitly state in regulation that traditional Indigenous foods, in accordance with current meal pattern requirements, may be served in reimbursable school meals. Schools are not required to change menus or operations as a result of this technical change.

Section 9: Afterschool Snacks

Current Requirement

Afterschool snacks may be offered to children through the NSLP (''NSLP snacks'') or through the CACFP (''CACFP snacks''). According to the National School Lunch Act (NSLA, 42 U.S.C. 1766a(d)), the nutrition requirements for CACFP snacks[104] also apply to NSLP snacks. However, current regulations at 7 CFR 210.10(o)(2) that outline the nutrition requirements for NSLP snacks served to K–12 children are outdated and do not reflect current statutory requirements. This preamble will refer to afterschool snacks served by schools under 7 CFR part 210 as ''NSLP snacks.''

Proposed Rule

USDA proposed to align the nutrition requirements for NSLP snacks served to K–12 children (ages 6 through 18) at 7 CFR 210.10(o) with the CACFP snack requirements, consistent with statute. Under the proposed rule, the existing nutrition requirements for NSLP snacks served to preschoolers and infants, which already follow CACFP requirements, would remain in effect. The proposed rule also included a terminology change, to remove all references to ''meal supplements'' in 7 CFR part 210 and replace them with the term ''afterschool snacks.''

Additionally, in the 2020 proposed rule, *Simplifying Meal Service and*

[102] U.S. Department of Agriculture. *USDA Foods Available Foods List for SY 2024.* January 9, 2023. Available at: *https://www.fns.usda.gov/usda-fis/usda-foods-available.*

[103] U.S. Department of Agriculture, *Serving Traditional Indigenous Foods in Child Nutrition Programs.* Available at: *https://www.fns.usda.gov/cn/serving-traditional-indigenous-foods.*

[104] The nutrition requirements for snacks served through the CACFP are found at 7 CFR 226.20(c)(3).

Monitoring Requirements in the National School Lunch and School Breakfast Programs,[105] USDA proposed to revise the definition of *Child* in 7 CFR 210.2, to clarify that children through the age of 18 may receive NSLP snacks. The proposal to update the definition of *Child* also sought to align program regulations with statutory requirements (NSLA, 42 U.S.C. 1766a(b)).

Public Comments

USDA received 117 comments on the NSLP snacks proposal in the 2023 rule, including 111 unique comments. Of these, 58 supported the proposal, 3 were opposed, and 56 were mixed. State agencies, advocacy groups, dietitians, and individuals submitted comments in response to this proposal. In addition, USDA received five comments in response to the 2020 proposal to revise the definition of *Child;* all five respondents supported the proposed change.

Regarding the NSLP snacks provision in the 2023 proposed rule, one dietitian suggested the proposal would streamline program requirements, describing it as a positive change. Another proponent agreed, noting the change would align two similar programs without creating administrative burden. A third respondent affirmed the benefits of aligning program requirements, stating that the proposed change would be beneficial for multi-program sponsors, and a school district that currently participates in multiple child nutrition programs agreed. An advocacy group supported the proposal and described the CACFP meal pattern as ''nutritious.'' Another advocacy group supported changing the term ''meal supplements'' to ''afterschool snacks,'' arguing that ''afterschool snacks'' is easier to understand. One proponent supported applying the product-based added sugars limits for yogurt and breakfast cereals to NSLP snacks; these limits are discussed further in *Section 2: Added Sugars.* While not directly related to the proposal, an advocacy group emphasized the importance of afterschool programs in general, noting that children need nutritional support during the hours after school.

One respondent questioned why it is necessary to align the NSLP snacks meal patterns with CACFP. An advocacy group opposed eliminating grain-based desserts from NSLP snacks, which they argued would greatly decrease options for schools. A few respondents raised concerns about specific items that are identified as grain-based desserts and are commonly served as afterschool snacks, such as granola and cereal bars. Several other respondents agreed, noting that schools could experience ''menu fatigue'' due to limited options if grain-based desserts are no longer permitted as NSLP snacks. A State agency cautioned that the proposal to serve at least one whole grain-rich grain each day may be challenging for NSLP snacks operators, given that there is already a whole grain-rich requirement for school meals. Similarly, another State agency questioned how the proposed NSLP snacks whole grain-rich requirement would interact with the existing whole grain-rich requirements for school lunch and breakfast. This State agency maintained that while they usually support efforts to align regulations, some of the differences between the school meal programs and CACFP—such as the whole grain-rich requirements—could lead to confusion. An industry respondent also encouraged USDA to reconsider the proposed NSLP snacks whole grain-rich requirement, citing concerns about requirements that are ''complicated'' and ''hard to follow.''

Other respondents requested clarification or offered suggestions. An advocacy group recommended that USDA reconsider the serving size requirements for fruits and vegetables in afterschool programs, especially for younger children. This respondent suggested that the current serving size for fruits and vegetables (3/4 cup) is too large for elementary schoolchildren. Another advocacy group encouraged USDA to provide ''an adequate timeline'' for implementation, while an industry respondent supported training and technical assistance for schools.

Final Rule

This final rule updates NSLP snacks meal pattern requirements for K–12 children to reflect CACFP snack requirements, consistent with the intent of the National School Lunch Act (NSLA, 42 U.S.C. 1766a(d)). This change must be implemented by July 1, 2025. Program operators have the option, but are not required, to implement this change early. Additionally, this rule finalizes the provision from the 2020 proposed rule to revise the definition of *Child.* This change clarifies that children who are age 18 and under at the start of the school year may receive reimbursable NSLP snacks, consistent with statute (NSLA, 42 U.S.C. 1766a(b)). As with the proposed rule, this final rule changes all regulatory references in 7 CFR part 210 from ''meal supplements'' to ''afterschool snacks.'' This rule does not change requirements for NSLP snacks served to preschoolers and infants; existing requirements for NSLP snacks served to preschoolers and infants remain in effect.

In a public comment, one respondent asked why it is necessary for NSLP snacks meal pattern requirements to follow CACFP requirements. As noted in the proposed rule and above, this change is required by statute. According to the National School Lunch Act (NSLA, 42 U.S.C. 1766a(d)), the nutritional requirements for snacks served through the CACFP also apply to afterschool snacks served by schools. Consistent with statutory requirements, this final rule updates regulations at 7 CFR 210.10(o)(2) outlining the nutrition requirements for afterschool snacks served to K–12 children.

Under the final rule, by July 1, 2025, NSLP snacks served to K–12 children must include two of the following five components:

- Milk
- Meats/meat alternates
- Vegetables
- Fruits
- Grains

The following CACFP snack requirements for children 6 years and older also apply to NSLP snacks served to K–12 children. These requirements for NSLP snacks must be implemented by July 1, 2025:

- Only one of the two components served at snack may be a beverage.
- Milk must be fat-free or low-fat and may be unflavored or flavored.
- Grain-based desserts do not count toward the grains requirement.
- Foods that are deep-fat fried on-site are not reimbursable NSLP snacks.
- As detailed in *Section 2: Added Sugars,* breakfast cereals must contain no more than 6 grams of added sugars per dry ounce.[106]
- As detailed in *Section 2: Added Sugars,* yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce).[107]

[105] *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs* (85 FR 4094, January 23, 2020). Available at: *https://www.federalregister.gov/documents/2020/01/23/2020-00926/simplifying-meal-service-and-monitoring-requirements-in-the-national-school-lunch-and-school.*

[106] While existing CACFP regulations limit breakfast cereals to no more than 6 grams of *total* sugars per dry ounce, in this final rule, USDA has opted to delay implementation of the breakfast cereals limit in NSLP snacks to SY 2025–2026, when USDA will implement the *added* sugars limit for NSLP, SBP, CACFP, and NSLP snacks.

[107] While existing CACFP regulations limit yogurt to no more than 23 grams of *total* sugars per 6 ounces, in this final rule, USDA has opted to delay implementation of the yogurt limit in NSLP snacks to SY 2025–2026, when USDA will implement the *added* sugars limit for NSLP, SBP, CACFP, and NSLP snacks.

In the proposed rule, USDA proposed to apply the per day juice limit and the per day whole grain-rich requirement used in the CACFP to NSLP snacks served to K–12 children. USDA is not finalizing the proposed per day juice limit or the proposed per day whole grain-rich requirement for NSLP snacks served to K–12 children. Instead, this final rule applies the weekly juice limit and the weekly whole grain-rich requirement used in the school meal programs to NSLP snacks. This change, which results in NSLP snacks that are nutritionally similar to snacks offered through the CACFP, is due to operational differences in the requirements for lunches and breakfasts served to K–12 children compared to preschool children. For K–12 children, the NSLP and SBP require that no more than half of the weekly fruit or vegetable offerings may be in the form of juice. As discussed in *Section 4: Whole Grains,* the whole grain-rich requirements for NSLP and SBP meals served to K–12 students also apply on a weekly, rather than daily, basis. As pointed out in public comments, implementing an additional per day requirement, when existing juice limitations and whole grain-rich requirements for NSLP and SBP already apply per week, would be confusing for schools that offer students school meals and NSLP snacks. Therefore, this final rule instead applies the following weekly requirements to NSLP snacks:

- No more than half of the weekly fruit or vegetable offerings at NSLP snacks may be in the form of juice.
- At least 80 percent of the grains offered weekly in NSLP snacks must be whole grain-rich, based on ounce equivalents of grains offered.

USDA has determined that this approach will result in NSLP snacks that are nutritionally comparable to snacks offered through the CACFP, consistent with the intent of the statute, while avoiding operational complexity. For example, under this final rule, NSLP snacks may include juice, but will be required to offer fruits and vegetables in other forms. Regarding fruit juice, the final rule *Child and Adult Care Food Program: Meal Pattern Revisions Related to the Healthy, Hunger-Free Kids Act of 2010* noted that, ''The *Dietary Guidelines* recommends that at least half of fruits should come from whole fruits and found that children age 1 to 3 years consume the highest proportion of juice to whole fruits.'' [108] The NSLP snacks juice limit finalized in this rulemaking incorporates *Dietary Guidelines* [109] recommendations for K–12 students and considers operational factors specific to NSLP snacks, as suggested by public comments. Specifically, this final rule considers that NSLP snacks operates alongside the school lunch and breakfast programs, which have weekly juice limits. Additionally, similar to CACFP requirements, this final rule includes a whole grain-rich requirement for NSLP snacks, while permitting enriched grains, provided that the whole grain-rich threshold is met. The intent of the CACFP whole grain-rich requirement is to ensure that participants receive at least one serving of whole grain-rich grains per day, across all eating occasions. When considering grain offerings at school lunch and breakfast, USDA expects that on most school days, K–12 children receiving school meals and NSLP snacks would meet or exceed one whole grain-rich grain per day. Consistent with statutory intent, the weekly whole grain-rich requirement finalized in this rule improves the nutritional quality of NSLP snacks and will result in snacks that are nutritionally comparable to those offered in the CACFP. It also responds to public comments that raised concerns with the operational feasibility of implementing a per day whole grain-rich requirement in NSLP snacks.

The changes for NSLP snacks served to K–12 children are reflected in the NSLP snacks meal pattern chart for K–12 children (ages 6 through 18) now included at 7 CFR 210.10(o)(2) of this final rule. Unlike the NSLP and SBP, which include three separate age/grade groups (K–5, 6–8, and 9–12), schools offering NSLP snacks to K–12 children will follow a single NSLP snacks meal pattern for all children ages 6 through 18. Schools are encouraged to serve larger portions to older children to meet their increased nutritional needs.

USDA appreciates public input regarding the serving sizes for fruits and vegetables in afterschool snacks. This final rule does not change the serving sizes for fruits and vegetables in the snack meal patterns. In CACFP snacks, for children ages 6 and older, the serving size for fruits and vegetables served as part of a snack will continue to be ¾ cup. In NSLP snacks, for children in grades K–12, the serving size for fruits and vegetables served as part of a snack will also continue to be ¾ cup. Schools are not required to serve fruits or vegetables as part of a reimbursable snack; these components are just two of five options available to schools. Schools offering NSLP snacks may choose to serve any combination of at least two of the five components (milk, meats/meat alternates, vegetables, fruits, and/or grains).

In response to requests for clarification about the changes in this final rule, the following chart summarizes the prior regulatory requirements for NSLP snacks served to K–12 children compared to the requirements implemented by this final rule:

[108] U.S. Department of Agriculture, *Child and Adult Care Food Program: Meal Pattern Revisions Related to the Healthy, Hunger-Free Kids Act of 2010,* April 25, 2016. Available at: *https://www.federalregister.gov/documents/2016/04/25/2016-09412/child-and-adult-care-food-program-meal-pattern-revisions-related-to-the-healthy-hunger-free-kids-act.*

[109] ''Although 100% fruit juice without added sugars can be part of a healthy dietary pattern, it is lower in dietary fiber than whole fruit. Dietary fiber is a dietary component of public health concern. With the recognition that fruit should mostly be consumed in whole forms, the amount of fruit juice in the USDA Food Patterns ranges from 4 fluid ounces at the lower calorie levels and no more than 10 fluid ounces at the highest calorie levels.'' See page 87: U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

Topic	OLD NSLP Snacks Requirements for K-12 Children	NEW NSLP Snacks Requirements for K-12 Children (Must be Implemented July 1, 2025)
Total number of snack components	Snacks must contain two different components out of four total components	Snacks must contain two different components out of five total components
Milk	No regulatory requirements for fat or flavoring in NSLP snacks	Milk must be fat-free or low-fat and may be unflavored or flavored
Fruit and vegetable	Fruits and vegetables are part of a single component	Fruits and vegetables are two separate components
Juice	No regulatory juice limits in NSLP snacks	No more than half (50 percent) of the weekly fruit and vegetable offerings in NSLP snacks are in the form of juice
Whole grain-rich	No regulatory requirements to offer whole grain-rich grains in NSLP snacks	At least 80 percent of the weekly grains offered in NSLP snacks must be whole grain-rich, based on ounce equivalents of grains offered
Grain-based desserts	No regulatory requirements for grain-based desserts in NSLP snacks	Grain-based desserts do not count toward the grains requirement
Deep-fat fried foods	No regulatory requirements for deep-fat fried foods in NSLP snacks	Foods that are deep-fat fried on-site are not reimbursable NSLP snacks
Added sugars	No regulatory added sugars limits in NSLP snacks	Breakfast cereals must contain no more than 6 grams of added sugars per dry ounce and yogurt must contain no more than 12 grams of added sugars per 6 ounces[110]

There are a few differences to point out for NSLP snacks served to *preschoolers:* [111]

• Milk fat requirements and flavoring limitations: milk must be unflavored whole milk for children age one and must be unflavored low-fat or unflavored fat-free milk for children ages two through five.

• Juice limitations: full-strength juice may only be offered to meet the vegetable or fruit requirement at one preschool meal or snack per day. For example, a school serves breakfast, lunch, and NSLP snack to preschoolers using the preschool meal patterns for all meals and snacks. If the school opts to serve juice to preschoolers at breakfast, juice may not be served to the preschoolers during the lunch or NSLP snack service on the same day.

• Whole grain-rich requirement: at least one serving of grains per day must be whole grain-rich. For example, a school serves a whole grain-rich item to preschoolers at lunch and chooses to serve a grain at NSLP snack. In this example, the grain served for NSLP snack would not be required to be whole grain-rich. However, schools that provide NSLP snacks to preschoolers may choose to serve additional whole grain-rich items, beyond the one serving per day requirement.

Accordingly, this final rule amends 7 CFR 210.2 to revise the definition of *Child* for consistency with statute. This final rule also amends 7 CFR 210.10(o) to align NSLP snacks meal pattern requirements for K–12 children with CACFP snack requirements, consistent with the intent of the statute. The updates to NSLP snack meal pattern requirements must be implemented by July 1, 2025.

[110] While existing CACFP regulations include *total* sugars limits for breakfast cereals and yogurt, in this final rule, USDA has opted to delay implementation of these limits for NSLP snacks to SY 2025–2026, when USDA will implement the *added* sugars limit for NSLP, SBP, CACFP, and NSLP snacks.

[111] Consistent with existing policy guidance, schools may choose to follow the K–5 NSLP snack meal pattern when preschoolers and K–5 students are co-mingled at meal service. See *Flexibility for Co-Mingled Preschool Meals: Questions and Answers,* June 30, 2017. Available at: *https://www.fns.usda.gov/cn/flexibility-co-mingled-preschool-meals-questions-and-answers.*

Section 10: Substituting Vegetables for Fruits at Breakfast

Current Requirement

Current regulations at 7 CFR 220.8(c) and (c)(2)(ii) allow schools to substitute vegetables for fruits at breakfast, provided that the first two cups per week are from specific vegetable subgroups: dark green, red/orange, beans and peas (legumes), or ''other'' vegetable subgroups.[112] However, in recent years, through Federal appropriations, Congress has provided schools the option to substitute any vegetable—including starchy vegetables—for fruits at breakfast, with no vegetable subgroup requirements. This Congressional flexibility has been offered on a temporary basis and has left schools without long-term certainty regarding menu planning options. For example, in calendar year 2019, schools were initially granted the flexibility to offer any vegetables in place of fruit at breakfast from February 15 through September 30. This flexibility was extended by Congress through a subsequent appropriations bill but was not granted permanently.[113] Most recently, Congress provided schools the same flexibility in SY 2022–2023 and SY 2023–2024, allowing any vegetable to credit in place of fruits in weekly breakfast menus.[114]

Proposed Rule

In the proposed rule, USDA acknowledged that it is confusing for State agencies and schools to have a requirement in regulation that is changed periodically through Federal appropriations. To permanently address this issue, USDA sought to establish a durable standard that continues to encourage vegetable variety at breakfast. USDA proposed to continue to allow schools to substitute vegetables for fruits at breakfast but to change the vegetable variety requirement. Under the proposal, schools choosing to offer vegetables in place of fruits at breakfast one day per school week would have the option to offer any vegetables, including a starchy vegetable. Schools that choose to substitute vegetables for fruits at breakfast on two or more days per school week would be required to offer at least two different vegetable subgroups during that weekly menu cycle. In other words, the requirement to offer a second, different vegetable subgroup would only apply in cases where schools choose to substitute vegetables for fruits at breakfast more than one day per school week.

In the proposed rule, USDA proposed to change the name of the ''legumes (beans and peas)'' vegetable subgroup to ''beans, peas, and lentils'' for consistency with the *Dietary Guidelines.* As discussed in *Section 20: Miscellaneous Changes* of this final rule, USDA is finalizing this proposed terminology change. Therefore, in the final rule portion of this section, USDA will refer to the ''beans, peas, and lentils'' vegetable subgroup.

Public Comments

USDA received hundreds of comments on the proposal to change the vegetable variety requirement when substituting vegetables for fruits at breakfast. Of these, 722 supported the proposal, including 51 unique comments. Seventeen respondents opposed the proposal, and 89 respondents provided mixed feedback, including 58 unique comments. Comments were submitted by State agencies, advocacy groups, industry respondents, school districts, and dietitians.

Several respondents, including school nutrition professionals and State agencies, supported this change, suggesting that it would allow greater menu flexibility at breakfast compared to the current regulatory requirement. One proponent noted that offering two different vegetable subgroups at breakfast during a weekly menu cycle is achievable and provided examples of how the proposal could be implemented during a school week. A couple of school nutrition professional organizations stated that this change would simplify regulations for menu planners and eliminate confusion. A State agency agreed and mentioned that this change would help school nutrition staff better understand when more than one vegetable subgroup is required at breakfast. An advocacy group supported the proposal and emphasized the importance of maintaining variety in vegetable subgroups offered at breakfast, particularly the inclusion of non-starchy vegetables. A professional organization supported the proposal, arguing that requiring a variety of vegetable subgroups at breakfast will prevent schools from offering the same vegetable every day. An advocacy group supported the proposal, describing it as a ''durable standard that encourages vegetable variety.''

Some respondents opposed the proposal, asserting that it would allow too much flexibility compared to the current regulatory requirement. One advocacy group did not agree with the proposal, suggesting it would allow schools to serve vegetables from a single subgroup up to four days per school week. For example, this respondent shared that if a school chose to substitute vegetables for fruits every day, the ''school could offer an omelet with spinach on Monday, but then serve hash browns, tater tots, or home fries the other four days of the week.'' While it is accurate that under the proposal, a school substituting vegetables for fruits at breakfast more than once per school week would only need to offer two vegetable subgroups, schools would still be required to meet the dietary specifications for calories, saturated fat, and sodium at breakfast.

Conversely, other respondents felt that the proposal was too restrictive and argued that schools should be able to offer any vegetable in place of fruit at breakfast, without any vegetable subgroup requirements. Some respondents suggested that fruits would continue to be a popular offering at breakfast, and when opting to substitute vegetables, schools should have maximum flexibility in planning their menus. One school nutrition professional organization asserted that having to monitor vegetable subgroups adds complexity to the program. This respondent maintained that when offering vegetables, schools should have the option to offer any vegetable without meeting a variety requirement. Other food service directors agreed, suggesting that USDA allow any vegetable to substitute for fruit at breakfast. A dietitian cautioned that requiring schools to offer a variety of vegetable subgroups throughout the week ''may disincentivize schools from the offering of vegetables at breakfast.'' One industry respondent expressed that all vegetables should be permitted to substitute for fruits at breakfast without limitations or restrictions, further stating that this flexibility would ''address the issue long-term, prevent confusion, and increase overall vegetable intake within the program.'' An individual stated that continuing to require vegetable variety would result in schools offering vegetables that children do not like at breakfast, increasing plate waste.

[112] See: ''Vegetables'' page 31. U.S. Department of Agriculture and U.S. Department of Health and Human Services. 2020–2025 Dietary Guidelines for Americans. 9th Edition. December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[113] See: U.S. Department of Agriculture, *School Breakfast Program: Substitution of Vegetables for Fruit,* March 18, 2019. Available at: *https://www.fns.usda.gov/sbp/substitution-vegetables-fruit* See also: U.S. Department of Agriculture, *School Breakfast Program: Continuation of the Substitution of Vegetables for Fruit Flexibility,* January 22, 2020. Available at: *https://www.fns.usda.gov/sbp/school-breakfast-program-continuation-substitution-vegetables-fruit-flexibility.*

[114] See: U.S. Department of Agriculture, *Consolidated Appropriations Act, 2023: Effect on Child Nutrition Programs,* March 3, 2023. Available at: *https://www.fns.usda.gov/cn/consolidated-appropriations-act-2023-effect-programs.*

However, this respondent also maintained that the most popular vegetables at breakfast are potatoes and sweet potatoes, which USDA notes are from two different subgroups: starchy and red/orange. Therefore, a school that chooses to substitute vegetables for fruits could meet the proposed variety requirement for the school week by offering these two popular vegetable options.

Other respondents recommended alternative approaches or requested clarification. For example, a professional organization supported the proposal to require a variety of vegetables at breakfast, when schools choose to substitute vegetables for fruits, but suggested that USDA limit starchy vegetables to avoid increasing sodium. A few advocacy groups recommended that, in addition to the proposed variety requirement, USDA should also require that a single vegetable subgroup cannot make up more than half of the vegetable offerings at breakfast per week. These respondents asserted that this alternative standard would be less restrictive than the current regulatory standard, continue to encourage a variety of vegetable subgroups, and ensure that no single vegetable dominates SBP menus. An industry respondent opposed allowing any vegetables to substitute for fruits at breakfast, arguing that ''fruits contribute different nutrients than vegetables.'' Another respondent requested clarification about the requirements for vegetable offerings after a school meets the variety requirement. This respondent shared that their school usually offers vegetables as an ''extra item'' at breakfast and requested that this continue to be an option.

A few respondents provided other comments on the potential impact of the proposal. For example, an advocacy group suggested that substituting vegetables for fruits could help to reduce the overall sugar content of school breakfasts. A State agency noted that school menu planners and State agency staff would need guidance, training, and monitoring resources if this proposal is finalized. Similarly, an individual suggested that USDA provide sample menus with ideas to incorporate a variety of vegetables into the breakfast program. One respondent raised concerns that the proposed change would add paperwork for school nutrition staff. Conversely, one State agency maintained that they do not expect the change to be administratively burdensome.

Final Rule

This final rule continues to allow schools to substitute vegetables for fruits in the SBP and codifies the proposal to simplify the vegetable variety requirement. Under this final rule, schools choosing to offer vegetables at breakfast one day per school week have the option to offer any vegetable, including a starchy vegetable. Schools that choose to substitute vegetables for fruits at breakfast on two or more days per school week are required to offer vegetables from at least two different subgroups. The vegetable subgroups that schools may choose from include the following, a defined at 7 CFR 210.10(c)(2)(iii):

- Dark green
- Red/orange
- Beans, peas, and lentils
- Starchy
- ''Other'' vegetables

USDA acknowledges that some stakeholders preferred a different approach. A few respondents requested that USDA limit how often any one vegetable subgroup could be offered at breakfast, with some advocating for a specific limit on starchy vegetables. Other respondents encouraged USDA to remove the vegetable variety requirement altogether. However, USDA has determined that it is important to continue to encourage vegetable variety when schools choose to offer vegetables at breakfast. As noted in the proposed rule, while the *Dietary Guidelines* recommend increasing consumption of vegetables in general, they note that starchy vegetables are more frequently consumed by children and adolescents than the red/orange, dark green, or beans, peas, and lentils vegetable subgroups, underscoring the need for variety. The proposed requirement, finalized in this rulemaking, provides a straightforward and durable approach to support children consuming a variety of vegetables.

USDA appreciates respondent requests for clarification about implementation of this provision, such as one respondent who requested that USDA explain what vegetable subgroup requirements would apply after a school offers two different subgroups at breakfast. Under this final rule, after a school offers vegetables from two different subgroups, the school can choose to offer any vegetables at breakfast—including vegetables from a subgroup the school has already offered that school week. For example, a school can substitute a starchy vegetable for fruit at breakfast on Monday, then substitute a dark green vegetable for fruit at breakfast on Tuesday. The rest of the week the school may choose to substitute any vegetables, including a dark green or a starchy vegetable, for fruit at breakfast, since it would have met the variety requirement by Tuesday. As requested by comments, USDA will provide guidance and resources to support successful implementation of this provision and to assist schools in their efforts to offer a variety of vegetables as part of nutritious school breakfasts.

This final rule continues to require schools opting to serve vegetables at breakfast to offer a variety of subgroups, and in a way that is less restrictive compared to the previous regulatory standard. Consistent with current regulations, schools are not required to offer vegetables at breakfast and may choose to offer only fruits at breakfast to meet this component requirement. Schools may also continue to offer vegetables at breakfast as an extra item, subject to the weekly dietary specifications for calories, saturated fat, sodium, and upon implementation, added sugars. As suggested by comments, USDA expects that fruit will continue to be a popular offering in reimbursable school breakfasts. While USDA acknowledges feedback received about potential administrative burden, this final requirement does not add any additional administrative requirements beyond menu documentation and production records required for Administrative Reviews, for schools that choose to substitute vegetables for fruits at breakfast.

Accordingly, this final rule amends 7 CFR 220.8(c)(2)(i) and (ii) to change the vegetable variety requirement for substituting vegetables for fruits at breakfast. This change provides schools with more menu planning flexibility at breakfast when compared to the current regulation. Schools that are following the current regulatory requirement are not required to change menus or operations as a result of this provision. Schools that are using the Congressional flexibility [115] will need to offer at least two vegetable subgroups at breakfast, if offering vegetables in place of fruit at breakfast more than once per week.

Section 11: Nuts and Seeds

Current Requirement

Current regulations allow nuts and seeds, and nut and seed butters, as a meat alternate in the child nutrition programs. In all child nutrition

[115] See: U.S. Department of Agriculture, *Consolidated Appropriations Act, 2023: Effect on Child Nutrition Programs,* March 3, 2023. Available at: *https://www.fns.usda.gov/cn/consolidated-appropriations-act-2023-effect-programs.*

programs, nut and seed butters may credit for the full meats/meat alternates component. However, current regulations limit the crediting of whole nuts and seeds (or nut and seed pieces) in some child nutrition programs. Current lunch and supper regulations limit nut and seed crediting to 50 percent of the meats/meat alternates component (7 CFR 210.10(c)(2)(i)(B), 225.16(d)(2) and (e)(5), 226.20(a)(5)(ii) and (c)(2)). SBP regulations include the same limit (7 CFR 220.8(c)(2)(i)(B)). CACFP regulations for breakfast do not explicitly include the 50 percent limit for nuts and seeds, but refer to USDA guidance, which includes the 50 percent limit (7 CFR 226.20(a)(5)(ii)). Snack regulations and USDA guidance on snacks do not include the 50 percent limit; nuts and seeds may credit for the full meats/meat alternates component when offered as part of a snack (7 CFR 210.10(o)(2)(ii), 225.16(e)(5), and 226.20(c)(3). For programs where nut and seed crediting is limited to 50 percent of the meats/meat alternates component, program operators choosing to serve nuts and seeds must serve them alongside another meat/meat alternate to fully meet the component requirement.

Proposed Rule

USDA proposed to allow nuts and seeds to credit for the full meat/meat alternate component in all child nutrition programs and meals. This proposal would remove the 50 percent crediting limit for nuts and seeds at breakfast, lunch, and supper.

Public Comments

USDA received 389 comments on the proposed change to allow nuts and seeds to credit for the full meats/meat alternates component, including 217 unique comments. Of these, 310 supported the proposal, including 158 unique comments, 10 were opposed, and 69 were mixed, including 49 unique comments. State agencies, advocacy groups, industry respondents, school districts, dietitians, and individuals provided input on this proposal.

Several respondents supported the proposal, including a national organization representing tens of thousands of school nutrition professionals. One proponent applauded the proposal, noting that nuts and seeds are good sources of protein, vitamin E, fiber, and many minerals. A dietitian agreed, maintaining that nuts and seeds are healthy proteins that would provide variety throughout the week. An advocacy group added that nuts and seeds provide healthy fats. Another advocacy group representing the CACFP community indicated that 85 percent of its members supported the proposal. Several respondents, including dietitians, school districts, and a State agency, suggested that this change would allow more vegan and vegetarian options in child nutrition program meals. An advocacy group described plant-based entrées that operators could serve under this change, such as walnut and mushroom-based ''taco meat,'' rice pilaf with pistachios, and salad with sunflower seeds. In addition to plant-based options, an advocacy organization and a State agency noted that this proposal would allow more shelf-stable foods to be served in afterschool and summer meals. Another State agency suggested that this proposed change would allow program operators to offer healthier versions of popular bistro or snack boxes. An individual stated that the proposal would allow operators greater latitude to develop menus that reflect participant preferences; other respondents agreed, citing increased demand for vegetarian meals.

One opponent argued that nuts and seeds are not adequate to meet the full meats/meat alternates component requirement. A few industry respondents also opposed the proposal, arguing that in their view, animal products are more nutritious than vegetarian foods. However, this respondent also supported greater menu planning flexibility and opposed ''mandatory federal limits'' in the meal patterns. Another respondent raised concern about oils in nuts and seeds and the potential for nuts and seeds to cause ''digestive distress'' among some participants. One respondent suggested students at their school would not be interested in meals that include nuts and seeds as the full meats/meat alternates component.

Other respondents requested clarification or offered alternatives to the proposal. One respondent asked if nuts would be mandatory, citing food allergy concerns. Another respondent supported the change, but recommended capping the number of times per week operators could offer nuts and seeds to promote variety. One advocacy group suggested that USDA update its crediting guidance for nuts and seeds and nut and seed butters, asserting that the current requirements are too high. For example, this respondent argued that the current requirements result in sandwiches filled with an inedible amount of nut butter, making them difficult to chew and swallow. A State agency recommended targeting this provision to older children, citing concerns about choking hazards for young children. Similarly, an advocacy group raised concerns about the safety and appropriateness of offering nuts and seeds to very young children. This respondent also noted that nut and seed products may be glazed or sugar coated. An industry respondent noted that offering nuts may create menu planning complications due to the sodium content of some nuts. However, this respondent still supported the proposal. Another respondent requested sample menus and recipe ideas to support implementation of this change.

Final Rule

This final rule codifies the proposal to allow nuts and seeds to credit for the full meats/meat alternates component in all child nutrition programs and meals, removing the 50 percent crediting limit for nuts and seeds at breakfast, lunch, and supper. USDA expects this change to reduce complexity by making the requirements consistent across programs and to provide more menu planning options for program operators.

Child nutrition operators are not required to make any changes to their menus to comply with this standard. Nuts and seeds are not required in child nutrition program meals, but rather, continue to be an option for operators. When offering nuts and seeds, child nutrition operators may offer them to meet the full meats/meat alternates component but are not required to; operators may choose to offer nuts and seeds toward only a portion of the component, alongside another meat/meat alternate. Although USDA recognizes that many child nutrition program operators will continue to offer nuts and seeds in snacks, or in small amounts in meals alongside other meats/meat alternates, this final rule gives operators increased flexibility to offer nuts and seeds for the full meats/meat alternates component in all meals and snacks.

USDA appreciates comments regarding the importance of variety in meals and snacks and expects that operators will continue to offer a variety of foods toward the meats/meat alternates meal component. Additionally, according to the *Dietary Guidelines,* more than half of Americans do not meet the recommendations for the nuts, seeds, and soy products subgroup.[116] Therefore, USDA has

[116] See ''Protein Foods,'' page 34. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at *https://www.dietaryguidelines.gov/.*

determined that it is not necessary to limit the number of times nuts and seeds may be served per week in order to promote variety within the meats/meat alternates meal component. As suggested in public comments, USDA expects that this change will expand options for vegetarian and vegan meals that include nuts, seeds, and nut and seed butters. As noted in the *Dietary Guidelines,* a healthy vegetarian dietary pattern can be achieved by incorporating protein foods from plants, including nuts and seeds; beans, peas, and lentils; tofu and other soy products; and whole grains.[117]

USDA appreciates input regarding the serving sizes for nuts, seeds, and their butters. Many factors are considered when determining crediting amounts for foods in the child nutrition programs, including the FDA *Standards of Identity, Dietary Guidelines,* and the USDA Food Safety and Inspection Service *Food Standards and Labeling Policy.* USDA's *Food Buying Guide for Child Nutrition Programs* also assists in determining the contribution that each food makes toward meal pattern requirements. In this final rule and corresponding guidance, USDA will maintain current crediting amounts for nuts and seeds and their butters. In cases where an operator determines a portion is too large for a child or adult participant, it is recommended that nuts and seeds and their butters be served in combination with another meat/meat alternate to meet the full component requirement.

USDA is mindful of respondent concerns about choking hazards and has provided guidance on reducing the risk of choking in young children.[118] As noted in the proposed rule, nuts and seeds are generally not recommended to be served to children ages 1 to 3 because they present a choking hazard. If served to very young children, nuts and seeds should be finely minced. Program operators should also be aware of food allergies among participants and take the necessary steps to prevent exposure. *Section 14: Meal Modifications* provides more information about requirements to provide meal modifications for participants with disabilities, which may include food allergies. Finally, as noted in the proposed rule, USDA encourages program operators to offer nuts, seeds, and their butters in their most nutrient-dense form, without added sugars and salt, and schools must consider the contribution of these foods to the weekly limits for calories, saturated fat, and sodium.

Accordingly, this final rule amends 7 CFR 210.10(c)(2)(iv)(B), 220.8(c)(2)(iv)(B), 225.16(d)(2) and (e)(5), 226.20(a)(5)(ii) and (c)(2) to allow nuts and seeds to credit for the full meats/meat alternates component in all child nutrition program meals, removing the 50 percent crediting limit for nuts and seeds at breakfast, lunch, and supper. This change provides child nutrition program operators more menu planning flexibility. Program operators are not required to change menus or operations as a result of this provision.

Section 12: Beans, Peas, and Lentils at Lunch

Current Requirement

Consistent with the *Dietary Guidelines,* the school lunch meal pattern includes five vegetable subgroups: dark green, red/orange, beans and peas (legumes), starchy, and "other" vegetables. Current NSLP regulations at 7 CFR 210.10(c)(2)(iii) require school food authorities to offer vegetables from all five subgroups each school week. Specifically for the beans and peas (legumes) vegetable subgroup, schools must offer ½ cup over the course of the week at lunch to meet the vegetable subgroup requirement.

In addition to crediting toward the vegetable meal component, legumes may also credit toward the meats/meat alternates meal component (7 CFR 210.10(c)(2)(i)(E)). Legumes may count toward either the vegetable meal component or meats/meat alternates meal component, but not both components in the same meal (7 CFR 210.10(c)(2)(iii)). This limit applies when legumes are offered in a single dish. When a school offers legumes in two separate dishes as part of the same meal, one serving may count toward the vegetable meal component and one serving may count toward the meats/meat alternates meal component, at menu planners' discretion.[119]

Proposed Rule

In the 2020 proposed rule, USDA proposed to allow legumes offered toward the meats/meat alternates meal component to also count toward the weekly requirement to offer ½ cup of the legumes vegetable subgroup per week at lunch, while maintaining the total vegetables requirement. As with the current requirement, under the proposal, legumes would not count toward two meal components (vegetable component and meats/meat alternates component) at the same time. If a school opts to count legumes toward the meats/meat alternates meal component, the school would need to serve another vegetable to count toward the daily and weekly vegetable meal component requirements. However, under the proposal, legumes could count toward the legumes *vegetable subgroup requirement* when offered toward the meats/meat alternates meal component.

Later, in the 2023 proposed rule, USDA proposed to change the name of the beans and peas (legumes) vegetable subgroup in school meal and CACFP regulations to align with the *Dietary Guidelines, 2020–2025,* which changed the terminology for the vegetable subgroup to "beans, peas, and lentils."[120] As discussed in *Section 20: Miscellaneous Changes,* USDA is finalizing this proposed terminology change. Therefore, when discussing the final standard in this section, USDA will use the term "beans, peas, and lentils" in place of "beans and peas (legumes)."

Public Comments on 2020 Proposed Rule

USDA received 103 comments on the 2020 proposed rule about the proposal to allow beans and peas (legumes) offered toward the meats/meat alternates meal component to count toward the weekly legumes subgroup requirement, all of which were unique comments. Of these, 61 supported the proposal, 28 were opposed, and 14 were mixed.

One proponent emphasized that the proposal would not reduce the total amount of vegetables at lunch, but would instead help schools offer legumes. A school district suggested that this change would allow more

[117] See "Protein Foods," page 33. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

[118] U.S. Department of Agriculture, *Reducing the Risk of Choking in Young Children at Mealtimes.* September 2020. Available at: *https://www.fns.usda.gov/tn/reducing-risk-choking-young-children-mealtimes.*

[119] See Question 35. U.S. Department of Agriculture. *Meal Requirements Under the National School Lunch Program and School Breakfast Program: Questions and Answers for Program Operators Updated to Support the Transitional Standards for Milk, Whole Grains, and Sodium Effective July 1, 2022,* March 2, 2022. Available at: *https://www.fns.usda.gov/cn/sp052022-questions-answers-program-operators.*

[120] The *Dietary Guidelines, 2020–2025,* changed the terminology for the "legumes (beans and peas)" vegetable subgroup to "beans, peas, and lentils." The foods within this vegetable subgroup did not change. See "About Beans, Peas, and Lentils," page 31. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition.* December 2020. Available at: *https://www.dietaryguidelines.gov/.*

menu planning flexibility. Other proponents agreed, saying this proposal would help schools offer legumes as part of an entrée, as opposed to a side dish. Some proponents, including an advocacy group, maintained that legumes offered as entrées are more appealing to children and help reduce food waste. For example, one dietitian advised that children may be more likely to consume a bean and cheese burrito, and less likely to consume a scoop of beans from a salad bar. Similarly, a school district noted that students at their school prefer bean dishes such as pupusas, tacos, and chilis (which they offer as meats/meat alternates) compared to side dishes like baked beans and bean salads.

Some opponents seemed to misunderstand the proposal, assuming that it would lessen the overall amount of vegetables offered in school lunch. To be clear, schools would be required to offer a separate vegetable to count toward the daily and weekly vegetable component requirements when offering legumes as a meat/meat alternate. One State agency opposed the proposal, arguing that it could decrease the total amount of legumes offered in cases where schools are currently offering legumes as a meat/meat alternate in an entrée, along with offering legumes in a side dish as a vegetable. A few State agencies expressed concern that this proposal could lead to confusion among schools, resulting in meal pattern errors. Several respondents, including State agencies and an advocacy group, emphasized that training and technical assistance would be critical to ensure this provision is implemented correctly.

One proponent emphasized the benefits of legumes, which they described as versatile, inexpensive, sustainable, and nutritious. Other respondents, including industry respondents, agreed, suggesting legumes are a good source of several important nutrients, including dietary fiber and potassium. In general, many respondents expressed support for increasing consumption of legumes, which are currently underconsumed by children and adolescents (and all other age groups).[121]

Final Rule

This final rule codifies the option for schools to count beans, peas, and lentils offered as a meat alternate at lunch toward the weekly beans, peas, and lentils vegetable subgroup requirement. Under this option, as with the current requirement, schools would determine which overall meal component the beans, peas, and lentils would count toward: the vegetable meal component, or the meats/meat alternates meal component. This new option will permit beans, peas, and lentils offered as a meat alternate to count toward the weekly beans, peas, and lentils vegetable subgroup requirement. However, beans, peas, and lentils offered as a meat alternate would not also count toward the *daily* or *weekly* overall vegetable meal component requirements; schools using this option would be required to offer additional vegetables to meet the daily and weekly vegetable meal component requirements.

For example, a school offers a wrap with chickpeas, fresh tomatoes, and lettuce. In this example, the menu planner opts to count the chickpeas toward the meats/meat alternates meal component. In addition to counting toward the daily and weekly meats/meat alternates meal component requirements, the menu planner could also count the chickpeas toward meeting the weekly vegetable subgroup requirement to offer at least ½ cup of beans, peas, and lentils; the school would not need to offer another vegetable from this subgroup during that week. However, during this meal, because the chickpeas are already counting toward the meats/meat alternates meal component, they cannot also count toward the vegetable meal component. The menu planner would instead count the other vegetables offered in the wrap (tomatoes and lettuce) toward the daily and weekly total vegetable meal component requirements and their respective vegetable subgroups.

In a different example, a school offers a black bean and cheese quesadilla. In this example, the menu planner opts to count the cheese toward the meats/meat alternates meal component, and to count the black beans toward the vegetable meal component. In this case, the black beans could count toward the weekly requirement to offer ½ cup of beans, peas, and lentils (vegetable subgroup requirement), as well as the daily and weekly total vegetable meal component requirements, since the school is offering the beans as a vegetable and not as a meat alternate.

USDA is mindful of concerns, particularly from State agencies, that this provision could be implemented incorrectly. Public comments from State agencies expressed concern that when implementing this provision, schools may incorrectly double-count beans, peas, and lentils toward both the meats/meat alternates component and vegetable component in the same meal, resulting in a missing meal component at lunch. USDA recognizes the importance of providing thorough training and technical assistance to support implementation of this provision. Additionally, schools are not required to use this option and may instead continue with their current menu planning approach for beans, peas, and lentils. This new option is intended to support schools that wish to offer more plant-based and vegetarian options toward the meats/meat alternates meal component.

Accordingly, this final rule amends 7 CFR 210.10(c)(2)(ii)(C) and (c)(2)(iv)(E) to allow beans, peas, and lentils offered toward the meats/meat alternates meal component to also count toward the requirement to offer ½ cup of the beans, peas, and lentils vegetable subgroup each week. Beans, peas, and lentils offered toward the meats/meat alternates meal component would not count toward the daily or weekly overall vegetable meal component requirements. This change provides schools with more menu planning flexibility at lunch. Schools are not required to change menus or operations as a result of this provision.

Section 13: Competitive Foods: Bean Dip Exemption

Current Requirement

Current regulations at 7 CFR 210.11 establish requirements for all foods sold in schools outside of the school meal programs. These requirements, known as competitive food standards, or ''Smart Snacks in School'' standards, help to promote healthy food choices throughout the school day. To comply with these standards, hereafter referred to as the Smart Snacks standards, foods must meet nutrition standards, including the standards for total fat established at 7 CFR 210.11(f).

Proposed Rule

USDA proposed to add hummus to the list of foods exempt from the total fat standard in the Smart Snacks regulations. Hummus would continue to be subject to all other Smart Snacks standards, including limits for saturated fat, total sugars (by weight of product), calories, and sodium. This change would allow hummus, which is already permitted as a contributing (creditable) part of a reimbursable school meal, to be sold as a Smart Snack to students on campus throughout the school day, provided all other Smart Snacks nutrition standards are met.

[121] U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines for Americans, 2020–2025.* 9th Edition. December 2020. Available at: *https://www.dietaryguidelines.gov/.*

Because there is currently no FDA standard of identity for hummus, USDA proposed to add the following definition of ''hummus'' to the Smart Snacks regulations: *Hummus means, for the purpose of competitive food standards implementation, a spread made from ground pulses (beans, peas, and lentils), and ground nut/seed butter (such as tahini [ground sesame], peanut butter, etc.) mixed with a vegetable oil (such as olive oil, canola oil, soybean oil, etc.), seasoning (such as salt, citric acid, etc.), vegetables and juice for flavor (such as olives, roasted pepper, garlic, lemon juice, etc.). Manufactured hummus may also contain certain ingredients necessary as preservatives and/or to maintain freshness.*

Public Comments

USDA received 200 comments on the proposal to exempt hummus from the Smart Snacks total fat standard, including 174 unique comments. Of these, 145 supported the proposal, including 119 unique comments, 1 was opposed, and 54 were mixed. Comments were submitted by State agencies, advocacy groups, industry respondents, school districts, and individuals.

Respondents, including a national organization representing tens of thousands of school nutrition professionals, overwhelmingly supported the proposal. One proponent noted that hummus provides many nutrients, including fiber, protein, iron, and magnesium. Another proponent described hummus as a nutritious snack option and maintained that hummus is filling and high in protein. An advocacy group noted that hummus provides healthy fats and is often served alongside other nutrient-dense foods, such as vegetables or whole grains, while other respondents, including a State agency, maintained this proposal would help children incorporate more legumes into their diets. Another State agency asserted that this proposal would allow schools to add a healthy à la carte option to their cafeterias. An advocacy group suggested this proposal would expand à la carte options for vegans and vegetarians.

A few proponents sought confirmation that the proposed exemption was limited to the total fat standard and that other Smart Snacks standards would continue to apply to hummus. For example, an advocacy group supported the proposal, provided that hummus would continue to be subject to the saturated fat standard for Smart Snacks. A State agency requested clarification that the Smart Snacks sodium limits would continue to apply to hummus. To clarify, under the proposed rule, hummus would continue to be subject to all other Smart Snacks standards, including limits for saturated fat, total sugars (by weight of product), calories, and sodium.

A few respondents opposed the proposal or provided other comments. One opponent cited concerns about processed foods, especially those containing soybean or canola oil. An advocacy group did not oppose the change, but suggested children would not eat hummus. One respondent wondered if schools could serve carrots with hummus as a Smart Snacks compliant combination food.

Although not directly related to the hummus proposal, other respondents recommended that USDA exempt other foods from the Smart Snacks total fat standard. For example, a few respondents encouraged USDA to provide an exception for avocados or guacamole. Another encouraged an exemption for salads with dressings, arguing that salad dressing has a high percentage of calories from fat, even if the overall calories in the salad are low. An industry respondent recommended that USDA exempt other condiments from Smart Snacks standards, suggesting that condiments promote the consumption of nutrient-dense foods. One school district suggested that USDA exempt nut butters from the total fat standard; to clarify, nuts and seeds and nut/seed butters are already exempt from the total fat and saturated fat Smart Snacks standards (7 CFR 210.11(f)(3)(ii)). This exemption does not apply to combination foods that contain nuts and seeds or nut/seed butters with other ingredients, such as peanut butter and crackers, trail mix, or chocolate covered peanuts.

A few respondents provided feedback on the proposed definition of hummus. A State agency described the proposed definition as ''reasonable.'' Another respondent pointed out that the word ''hummus'' has a culturally significant meaning and suggested USDA use a different term, such as ''ground bean-based dip.'' An advocacy group noted that some types of hummus do not include ground nut or seed butters. This respondent noted schools may prefer to sell hummus without nut or seed butter as an ingredient, given the potential for nut or seed allergies. Because of this, the advocacy group recommended making nut or seed butter an optional ingredient in the definition of hummus. A school district requested that USDA clarify whether the definition applies only to hummus made from chickpeas, or alternatively, if dips that include other types of beans would qualify for the exemption.

Final Rule

In this final rule, USDA is revising the terminology for this provision based on public comment. Instead of referring to ''hummus'' in regulation, this final rule will refer to ''bean dip.'' This change reflects input received through a public comment, which noted that the word ''hummus'' already has a culturally significant meaning and is traditionally made from chickpeas (rather than any variety of beans, peas, or lentils). The change also addresses a school district's question about whether this exemption is limited to hummus made with chickpeas, or if it can include products made from other types of beans. Based on these comments, USDA has determined a more general term is preferred. Therefore, this final rule adds *bean dip* to the list of foods exempt from the total fat standard in the Smart Snacks regulations. This exemption applies to products marketed as hummus, as well as bean dips made from any variety of beans, peas, or lentils. Bean dip would continue to be subject to the saturated fat standard for Smart Snacks, as well as all other Smart Snacks requirements.

This final rule also codifies the following definition of ''bean dip'' in the Smart Snacks regulations. Under this definition, bean dip can be made from chickpeas as well as other varieties of beans, peas, and lentils: *Bean dip means, for the purpose of competitive food standards, a spread made from ground pulses (beans, peas, and/or lentils) along with one or more of the following optional ingredients:*

- *Ground nut/seed butter (such as tahini [ground sesame] or peanut butter;*
- *Vegetable oil (such as olive oil, canola oil, soybean oil);*
- *Seasoning (such as salt, citric acid);*
- *Vegetables and juice for flavor (such as olives, roasted peppers, garlic, lemon juice); and*
- *For manufactured bean dip, ingredients necessary as preservatives and/or to maintain freshness.*

USDA appreciates input that stakeholders provided on the proposed definition. In this final rule, USDA has adjusted the definition to clarify that bean dip does not need to include all of the ingredients listed in the definition to qualify for this exemption. To qualify for the exemption, a bean dip must include ground pulses (beans, peas, and/or lentils), but the remaining ingredients listed in the definition are not required. The final definition clarifies that these remaining ingredients are *optional.* A bean dip may include any combination of one or more of the remaining optional

ingredients listed in the definition. For example, hummus made with chickpeas, water, tahini, sunflower oil, lemon juice, and spices (such as garlic, salt, and crushed red pepper) could be sold a la carte as a bean dip under this final rule provided that the product as packaged meets the Smart Snacks standards for calories, sodium, saturated fat, and total sugars by weight.

This change applies to bean dip as a standalone product; it does not apply to combination foods that include bean dip. For example, the exemption does not apply to hummus packaged with pretzels, pita, or other snack-type foods. Applying this exemption only to bean dip as a standalone product ensures that the other foods that are offered for sale to children at school alongside the bean dip remain subject to the Smart Snacks total fat standard, as well as all other Smart Snacks standards. Under this change, schools have the option to sell bean dip as a standalone product, or along with other standalone products that also meet the Smart Snacks standards, such as carrots or celery. As detailed at 7 CFR 210.11(d)(2), fresh vegetables, such as carrots and celery, with no added ingredients are exempt from Smart Snacks standards. Schools may also sell bean dip along with whole grain-rich pita bread, whole grain-rich crackers, or other products, provided those products meet the Smart Snacks standards.

As a reminder, when a product that is exempt from the Smart Snacks standards is paired with another product that is exempt, both exemptions are maintained when the products are paired and no other ingredients are added. For example, the celery, peanut butter, and raisins included in ''ants on a log'' sold a la carte would maintain their respective exemptions when paired together with no other ingredients. Additionally, combination foods with at least ¼ cup of fruit and/or vegetable (for example, ¼ cup of grapes with enriched pretzels) can be sold to students on campus throughout the day, provided the combination food, as packaged, meets all Smart Snacks standards for calories, sodium, total fat, saturated fat, and total sugars (by weight of product).

USDA appreciates public input on other foods and products that stakeholders would like to exempt from the Smart Snacks total fat standard. However, this new exemption is limited to bean dips, as defined at 7 CFR 210.11(a)(7). As noted, certain other products already have an exemption to the total fat standard, or the total fat and saturated fat standards, for Smart Snacks. These exemptions remain in place under this rule and are listed at 7 CFR 210.11(f).

Accordingly, this final rule amends 7 CFR 210.11(a)(7) to codify the definition of ''bean dip'' and 7 CFR 210.11(f)(2)(ii) to exempt bean dip, including hummus, from the total fat standard in the Smart Snacks regulations. This change provides schools the option to sell bean dip as a Smart Snack. Schools are not required to change operations as result of this provision.

Section 14: Meal Modifications

Current Requirement

Current regulations require schools, institutions, and facilities to make meal modifications to ensure participants with disabilities have an equal opportunity to participate in, and benefit from, the NSLP, SBP, and CACFP (7 CFR 210.10(m)(1), 220.8(m), and 226.20(g)(1)). The regulations allow, but do not require, schools, institutions, and facilities to make substitutions for ''medical or other special dietary needs'' that are not disabilities but that prevent a participant from consuming the regular reimbursable meal or snack. Under current NSLP and SBP regulations, substitutions for disability reasons must be supported by a written statement signed by a licensed physician. Under current CACFP regulations, the written statement must be signed by a licensed physician or licensed healthcare professional who is authorized by State law to write medical prescriptions. Under the current NSLP, SBP, and CACFP regulations, substitutions for ''medical or other special dietary needs'' must be supported by a written statement signed by a recognized medical authority (7 CFR 210.10(m)(2), 220.8(m), and 226.20(g)(2)). An exception is fluid milk substitutes for ''medical or special dietary needs'' that are not disabilities. Fluid milk substitutes for ''medical or special dietary needs'' must be supported by a written request; however, the written request may come from a parent or guardian or from a medical authority (7 CFR 210.10(m)(2)(ii)(B) and 226.20(g)(3)).[122] Fluid milk substitutes are discussed in greater detail in *Section 3B: Fluid Milk Substitutes: Responses to Request for Input* and *Section 3C: Fluid Milk Substitutes: Nutrient Requirements.*

Current NSLP and SBP regulations also encourage schools to consider ''ethnic, religious, or economic'' factors when planning or preparing meals, provided the variations meet the meal pattern requirements (7 CFR 210.10(m)(3) and 220.8(m)). CACFP regulations allow institutions and facilities—with USDA approval—to vary meal components on an experimental or continuing basis, if the variations are nutritionally sound and necessary to meet ''ethnic, religious, economic, or physical'' needs (7 CFR 226.20(h)).

In September 2016, USDA updated its school meal modification policy guidance[123] to reflect passage of The Americans with Disabilities Act (ADA) Amendments Act of 2008. Later, in June 2017, USDA issued updated CACFP and SFSP meal modification policy guidance.[124] The ADA Amendments Act clarified the meaning and interpretation of the ADA definition of ''disability'' to ensure that it would be broadly construed and applied without extensive analysis. Therefore, rather than focusing on if a child or adult participant has a disability, USDA's updated policy guidance stated that program operators should focus on working collaboratively with parents, guardians, participating adults, or a person acting on behalf of an adult participant to ensure equal opportunity to benefit from the programs. Notably, USDA's updated policy guidance[125] allowed a State licensed healthcare professional, such as a nurse practitioner or physician's assistant, to submit a medical statement on behalf of a child or adult participant with a disability. It also clarified that program operators may accommodate requests related to a disability that are not supported by a medical statement if the requested modification can be accomplished within the program meal patterns and encouraged operators to use this option when possible. At the

[122] As noted in the proposed rule, based on statutory requirements, USDA regulations include several other requirements for fluid milk substitutions for non-disability reasons, such as specific nutrition standards. See page 8061: *Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans* (88 FR 8050, February 7, 2023). Available at: *https://www.federalregister.gov/d/2023-02102/p-208.*

[123] U.S. Department of Agriculture, *Modifications to Accommodate Disabilities in the School Meal Programs,* September 27, 2016. Available at: *https://www.fns.usda.gov/cn/modifications-accommodate-disabilities-school-meal-programs.*

[124] U.S. Department of Agriculture, *Policy Memorandum on Modifications to Accommodate Disabilities in the Child and Adult Care Food Program and Summer Food Service Program,* June 22, 2017. Available at: *https://www.fns.usda.gov/cn/modifications-accommodate-disabilities-cacfp-and-sfsp.*

[125] See Question 16. U.S. Department of Agriculture, Accommodating Disabilities in the School Meal Programs: Guidance and Questions and Answers (Q&As). April 25, 2017. Available at: *https://www.fns.usda.gov/cn/accommodating-disabilities-school-meal-programs-guidance-qas.*

same time, the updated policy guidance explained that program operators may choose to obtain a written medical statement for all disability meal modifications, even those that fall within the meal patterns. This updated guidance addressed modifications required to accommodate disabilities that restrict a participant's diet; it did not address dietary preferences or other non-disability requests, which program operators are encouraged—but not required—to meet.

Proposed Rule

In the 2020 rule, USDA proposed a variety of regulatory changes to reflect the updated policy guidance and to improve access to modified meals for participants who need them. The rule proposed to codify in regulation that State licensed healthcare professionals may write medical statements to request modifications on behalf of participants with disabilities in the school meal programs and CACFP. It also proposed to define a State licensed healthcare professional as an individual authorized to write medical prescriptions under State law. Regarding child and adult participant food preferences, the 2020 rule proposed to revise existing regulatory text to encourage schools, institutions, and facilities to meet participants' cultural, ethical, Tribal, or religious preferences when preparing meals in the school meal programs and CACFP.[126] The rule also proposed reorganizing the regulatory text to distinguish between disability and non-disability requests more clearly. The 2020 rule did not propose changes to SFSP regulations.

Public Comments on 2020 Proposed Rule

USDA received 120 comments on the meal modifications provision of the 2020 proposed rule, including 83 unique comments. Of these, 69 supported the proposed changes, including 32 unique comments, 6 were opposed, and 45 were mixed.

Many respondents supported USDA's proposal to codify the existing policy guidance in regulation and appreciated the clarification that a medical statement is only required for modifications that fall outside the meal patterns. Respondents also emphasized the importance of ensuring participants who need meal modifications can easily access them and encouraged USDA to take steps to minimize burden for families in the modification request process.

Respondents provided input on the requirement for program operators to obtain a medical statement when the meal modification does not meet the meal pattern requirements. One State agency maintained that the meal patterns provide enough flexibility to meet a variety of needs and preferences. In cases where a child or adult participant requires a modification outside the scope of the meal patterns, this State agency agreed it should be supported by formal documentation. A few other State agencies asserted that requiring a medical statement protects children's health and is not too burdensome. Another State agency agreed, adding that the medical statement helps program staff ensure that a child or adult participant's health needs are met. Similarly, an advocacy organization noted that child nutrition professionals work diligently to meet non-disability dietary requests and preferences, and when making a disability-related meal modification, they benefit from a complete written medical statement. An individual suggested that program operators obtain a medical statement for all meal modifications, regardless of whether they fall within or outside of the meal patterns.

USDA requested specific input on the proposed definition of State licensed healthcare professional, and whether additional healthcare professionals should be permitted to submit a medical statement on behalf of a child or adult participant with a disability. Most respondents supported USDA's proposal to codify in regulation the authority allowing State licensed healthcare professionals to submit a medical statement on behalf of a participant with a disability. However, respondents shared a variety of perspectives on whether this authority should be expanded further. For example, one State agency did not support expanding the scope of who can submit a medical statement beyond State licensed healthcare professionals, noting that obtaining the medical statement is an important step in ensuring that all participant's needs are met with professionalism and sound medical guidance. An advocacy group agreed, stating that they do not support expanding the definition to include additional professionals; this respondent maintained that ''State licensed healthcare professional'' as defined in the proposed rule is the appropriate level of authority to ensure a child or adult participant's health.

One State agency suggested that allowing registered and licensed dietitians to write medical statements to support meal modifications seems very reasonable given this is their field of expertise. A second State agency agreed, noting that dietitians may be more accessible to families, reducing the burden of obtaining the necessary documentation for a meal modification, while a third State agency argued that dietitians may be better suited than the currently approved professionals to determine whether a child or adult participant has a disability that affects their ability to consume certain foods. Another respondent noted that dietitians tend to be available at the district level working directly with schoolchildren who could benefit from disability-related meal modifications. However, several respondents noted that dietitians are not licensed in all States.

One State agency recommended accepting medical statements from registered dietitians, speech pathologists, licensed clinical social workers, and psychologists. Another State agency agreed, noting that registered dietitians and speech pathologists have extensive training and are often consulted to develop modification requests for children with disabilities. Others, including school districts and individuals who work in schools, agreed, noting expanding the scope of who can submit a medical statement would facilitate access to meal modifications for children who need them. However, a few State agencies expressed concern that adding additional titles would confuse non-disability preferential requests with medically necessary requests. Others agreed, cautioning against expanding this authority to professionals who are not trained in science-based nutrition therapy. One State agency noted that, within their State, at least 10 types of professionals already meet the definition of ''State licensed healthcare professionals.'' This State agency maintained that program operators have not struggled to obtain the required documentation needed to provide meal modifications for disability-related needs.

Final Rule

This final rule codifies in regulation that State licensed healthcare professionals may write medical statements to request modifications on behalf of child or adult participants with disabilities in the school meal programs and CACFP. It also defines a

[126] For comparison, current regulations at 7 CFR 210.10(m)(3) state that, ''Schools should consider ethnic and religious preferences when planning and preparing meals . . . Any variations must be consistent with the food and nutrition requirements specified under this section and needed to meet ethnic, religious, or economic needs.''

State licensed healthcare professional as an individual authorized to write medical prescriptions under State law. Based on public input, this final rule also permits registered dietitians to write medical statements to request modifications on behalf of child and adult participants with disabilities in the school meal programs and in CACFP. The requirement to accept medical statements from registered dietitians must be implemented by July 1, 2025, for NSLP and SBP, and by October 1, 2025, for CACFP. Schools, institutions, and facilities have the option, but are not required, to implement this change prior to the implementation date. This final rule also encourages schools, institutions, and facilities to meet participants' non-disability dietary preferences when planning and preparing school and CACFP meals.

This final rule updates and reorganizes the regulatory text to distinguish between disability and non-disability requests more clearly. Because a dietary need that restricts a participant's diet could be considered a disability, this final rule removes the regulatory language regarding participants ''without disabilities who cannot consume the regular lunch or afterschool snack because of medical or other special dietary needs.'' [127] This change reflects that participant requests for modifications or variations would fall into one of two categories: disability or non-disability requests. Additionally, in NSLP regulations, the final rule moves the regulatory text related to fluid milk substitutes for non-disability reasons to the section of the regulation that discusses fluid milk requirements (7 CFR 210.10(d)). This change is expected to help clarify the requirements for fluid milk substitutions for non-disability reasons. The final rule also adjusts the regulatory language regarding written requests for fluid milk substitutes, replacing ''medical authority'' with ''State licensed healthcare professional or registered dietitian.'' This reflects the approach used for fluid milk substitutes in the proposed rule, which changed ''medical authority'' to ''State licensed healthcare professional,'' except that this final rule also includes registered dietitians. This supports USDA's efforts to use consistent terminology across program regulations. As with prior regulations and the proposed rule, a child or adult participant's parent or guardian may also submit a written request for a non-disability fluid milk substitute in NSLP, SBP, or CACFP. Lastly, this final rule updates the regulatory definitions of *Child* in NSLP and SBP regulations, *Child with a disability* in NSLP regulations, and *Persons with disabilities* in CACFP regulations.

Along with State licensed healthcare professionals, USDA is authorizing registered dietitians to submit medical statements for disability meal modifications in response to public comment, and due to the specific education and training requirements they receive. Registered dietitians are not required to have a State license to submit medical statements for meal modifications under this rule. USDA agrees that registered dietitians are well-positioned to determine specific, nutritionally sound meal modifications to support participants with disabilities. Registered dietitians are credentialed professionals, and according to the Commission on Dietetic Registration, registered dietitians are food and nutrition experts who have met the Commission on Dietetic Registration's (CDR) criteria to earn the registered dietitian credential.[128] USDA acknowledges that other skilled professionals—such as speech therapists, psychologists, and social workers—have extensive knowledge in their fields and serve critical roles in the care of children and adults. While USDA does not authorize acceptance of medical statements for disability meal modifications beyond State licensed healthcare professionals and registered dietitians, USDA expects that State licensed healthcare professionals and registered dietitians will continue to coordinate with other key professionals, depending on the specific needs of participants with disabilities. With this rule, USDA is balancing the importance of improving participant access to meals that meet their individual needs with the importance of ensuring that schools, institutions, and facilities have the information they need to keep participants with disabilities that restrict their diet safe.

USDA recognizes that some respondents are concerned about dietary requests that are not medically necessary. Schools, institutions, and facilities are not obligated to meet requests that are not related to a participant's disability. Additionally, USDA reminds schools, institutions, and facilities that their obligation is to provide a meal modification to accommodate a participant's disability, not to provide an exact product listed on the medical statement. For example, if a medical statement lists an expensive, brand-name product as a substitution for a participant with a disability, the school, institution, or facility should engage in an interactive process with the participant's parent or guardian to see if it would be safe and appropriate to provide a lower-cost, generic brand item. In most instances, a generic brand is sufficient, unless the brand name item is medically necessary. In general, if a school, institution, or facility has concerns about a request, they are responsible for working with the parent or guardian to develop an appropriate modification and, as applicable, suitable alternatives.

This final rule also codifies changes related to non-disability meal variations in the school meal programs and CACFP. The prior NSLP regulations encouraged schools to consider variations for ''ethnic, religious, or economic reasons.'' In CACFP, the prior regulations noted potential variations for ''ethnic, religious, economic, or physical needs'' at the institution or facility level but did not encourage variations to meet participant preferences. This final rule changes the school meal and CACFP regulations to encourage program operators to meet child and adult participant preferences when planning and preparing meals. As noted in the proposed rule, meeting non-disability dietary preferences is encouraged, but not required. Although the proposed rule specifically listed several categories of non-disability dietary preferences, in the final rule, USDA has instead opted to refer to ''preferences'' generally. This is not intended to diminish the importance of the dietary preferences listed in the proposed rule, but rather, to allow the regulation to be applied broadly to the range of child and adult participant dietary preferences. These preferences include, but are not limited to, the non-disability dietary preferences included in the proposed rule: cultural, ethical, Tribal, and religious preferences. The *Dietary Guidelines* emphasize the importance of considering dietary preferences and cultural traditions and provide a framework to be customized to reflect the foodways of the diverse

[127] This language reflects regulatory language formerly included in NSLP regulations at 7 CFR 210.10(m)(2). Similar language was also previously included in CACFP regulations at 7 CFR 226.20(g)(2).

[128] The Commission on Dietetic Registration is the credentialing agency for the Academy of Nutrition and Dietetics. See: Commission on Dietetic Registration. *Registered Dietitian (RD) or Registered Dietitian Nutritionist (RDN) Certification.* Available at: *https://www.cdrnet.org/RDN.*

cultures in the U.S.[129] Similarly, the NSLP, SBP, and CACFP allow schools, institutions, and facilities to choose specific foods to offer at each meal, provided the meal meets the overarching meal pattern requirements. USDA acknowledges that, due to operational and budgetary constraints, program operators may not be able to meet all participant preferences at each meal service; however, USDA encourages program operators to strive for an inclusive meal service.

Consistent with the proposed rule, these changes do not apply to SFSP. USDA acknowledges that many stakeholders would like to see SFSP included with these changes. However, USDA instead intends to address SFSP meal pattern requirements separately and comprehensively in future rulemaking. The existing policy guidance[130] for SFSP meal modifications for disabilities remains in effect.

Accordingly, this final rule amends 7 CFR 210.2, 210.10(d)(2) and (m), 215.7a(b), 220.8(m), 226.2, and 226.20(g) to revise regulatory requirements for meal modifications for disability and non-disability reasons for the school meal programs and CACFP. The change requiring program operators to accept medical statements from registered dietitians must be implemented by July 1, 2025, for NSLP and SBP, and by October 1, 2025, for CACFP.

Section 15: Clarification on Potable Water Requirements

Current Requirement

Current NSLP regulations at 7 CFR 210.10(a)(1)(i) require schools to make potable water available and accessible without restriction to children at no charge in the places where lunches are served during the meal service. When breakfast is served in the cafeteria, current SBP regulations at 7 CFR 220.8(a)(1) require schools to make potable water available and accessible without restriction to children at no charge. USDA issued policy guidance to support implementation of this provision in July 2011. In that policy guidance, USDA specified that schools must serve *plain* water to meet the potable water requirement.[131]

Proposed Rule

In the 2020 proposed rule, USDA proposed to allow schools to offer calorie-free, naturally flavored, noncarbonated water to meet the potable water requirement. Under the proposed rule, schools would have the option to continue to offer plain water to meet the potable water requirement but could also meet the requirement by offering naturally flavored water.

Public Comments on 2020 Proposed Rule

USDA received 85 comments on the potable water provision of the 2020 proposed rule; all were unique comments. Of these, 37 supported the proposal, 29 were opposed, and 19 were mixed.

Proponents, including State agencies, school districts, and industry respondents, argued that offering naturally flavored water would increase water appeal and consumption. For example, one advocacy group suggested that water infused with lemons, berries, cucumbers, or mint would boost student water consumption. A State agency agreed that water with cucumber, lemon, or herbs would be a low-cost way to improve the palatability of water.

A few respondents supported expanding potable water options, but only to water flavored with fresh or frozen fruits or vegetables. Other respondents argued that this provision should not permit water with food additives or sweeteners. Some respondents requested clarification on the type of water schools could offer to meet the potable water requirement under this provision.

One opponent argued children's mealtime beverage options should be limited to plain water, milk, and limited amounts of 100 percent fruit or vegetable juice. Another opponent suggested consuming flavored water would adapt children's palates toward sweeter beverages, moving them away from the natural taste of water. Several respondents were opposed to water flavored with certain ingredients, such as ''artificial sweeteners'' and other additives. One advocacy group argued that the goal of the potable water provision is to ensure clean drinking water for children and maintained there is no reason to revise the current standard.

Some respondents offered alternatives or suggestions for implementation. For example, one State agency did not oppose allowing water flavored with fruits, vegetables, and herbs, but emphasized this option should be in addition to plain potable water. This State agency was concerned about food allergies and indicated that maintaining plain potable water during mealtimes would be important for children who cannot consume water with fruits, vegetables, or herbs. Regarding water with fruits or vegetables added, a few advocacy groups suggested clarifying that fruits or vegetables used to flavor water may not count toward the meal pattern requirements. Several respondents, including proponents and opponents, noted the importance of following food safety guidelines when offering fruit- or vegetable-infused water.

Respondents also highlighted the importance of water consumption and hydration. One advocacy group emphasized the importance of ensuring schools have safe drinking water. Another respondent suggested investing in basic plumbing, as well as installing water bottle filling stations in schools. A few advocacy organizations stated support for policies and efforts that expand safe water options for students.

Final Rule

This final rule will not adopt the 2020 proposal to allow schools to offer calorie-free, naturally flavored, noncarbonated water to meet the potable water requirement. This decision is supported by public comments, which noted that some children may have food allergies that prevent them from consuming water with fruits, vegetables, or herbs. It is also responsive to public comments that raised concerns about other ingredients, such as sweeteners or additives. Under this final rule, schools will continue to be required to make plain potable water available and accessible without restriction to children at no charge during the meal service. To clarify this requirement, this final rule adds the word ''plain'' to the regulations requiring potable water to be offered with school meals at 7 CFR 210.10(a)(1)(i) and 220.8(a)(1). As with current regulations, this requirement applies in places where lunches are served during the meal service, including lunches served outside of the cafeteria. For breakfast, as with current regulations, this requirement applies when breakfast is served in the cafeteria.

[129] According to page ix of the *Dietary Guidelines,* ''A healthy dietary pattern can benefit all individuals regardless of age, race, or ethnicity, or current health status. The *Dietary Guidelines* provides a framework intended to be customized to individual needs and preferences, as well as the foodways of the diverse cultures in the United States.'' U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines for Americans, 2020–2025.* 9th Edition. December 2020. Available at: *DietaryGuidelines.gov.*

[130] U.S. Department of Agriculture, *Policy Memorandum on Modifications to Accommodate Disabilities in the Child and Adult Care Food Program and Summer Food Service Program,* June 22, 2017. Available at:*https://www.fns.usda.gov/cn/modifications-accommodate-disabilities-cacfp-and-sfsp.*

[131] U.S. Department of Agriculture. *Water Availability During NSLP Meal Service.* July 12, 2011. Available at: *https://www.fns.usda.gov/cn/water-availability-during-nslp-meal-service.*

Maintaining the requirement to offer plain potable water responds to public comments that emphasized the importance of prioritizing access to plain water for children who prefer it, or who cannot consume water with fruits, vegetables, or herbs due to food allergies. However, USDA wishes to clarify that the requirement to offer plain potable water does not limit schools' ability to also offer potable water with fruits, vegetables, and herbs added, in addition to the required plain water. For example, a school may offer fruit-infused water at lunch provided children also have access to plain potable water during the meal service. State agencies and schools are reminded that reasonable costs associated with providing potable water are an allowable cost to the nonprofit school food service account. Additionally, based on public comment, USDA clarifies that fruits, vegetables, and herbs added to plain potable water do not count toward the meal pattern requirements for fruits or vegetables. Schools also are not required to count the negligible calorie content of water infused with fruits, vegetables, or herbs toward the weekly calorie limits.

USDA also appreciates public comments regarding the importance of food safety when offering water with fruits, vegetables, or herbs. Regulations at 7 CFR 210.13(a) require school food authorities to ensure that food storage, preparation, and service is in accordance with the sanitation and health standards established under State and local law and regulations. School food authorities must also develop a written food safety program that covers any facility or part of a facility where food is stored, prepared, or served (7 CFR 210.13(c)). Schools opting to offer water with fruits, vegetables, or herbs must continue to follow the food safety requirements as detailed in 7 CFR 210.13(c), as well as applicable State and local requirements.

Accordingly, this final rule amends 7 CFR 210.10(a)(1)(i), 210.18(h)(2)(v), and 220.8(a)(1) to add the word ''plain'' to the potable water requirements. Schools are not required to change menus or operations as a result of this technical change.

Section 16: Synthetic Trans Fats

Current Requirement

Current regulations prohibit synthetic *trans* fat in the school lunch and school breakfast programs, and in foods sold to children on campus during the school day (7 CFR 210.10(f)(4), 220.8(f)(4), and 210.11(g)). This requirement was included in *Nutrition Standards in the National School Lunch and School Breakfast Programs* [132] and in *National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010.*[133] The synthetic *trans* fat prohibition was phased in, beginning with the NSLP, in SY 2012–2013.

In 2015, the FDA determined that partially hydrogenated oils, the major source of artificial (synthetic) *trans* fat in the food supply, were no longer ''Generally Recognized as Safe,'' or GRAS. Based on this determination, the FDA took regulatory action to eliminate partially hydrogenated oils (and, therefore, synthetic *trans* fats) from the United States food supply. While the compliance date for certain uses was extended, the compliance date for most uses of partially hydrogenated oils was June 18, 2018.[134] As of January 2020, food manufacturers were no longer allowed to sell foods containing *trans* fats. This FDA action effectively banned *trans* fats from being added to foods made or sold in the U.S., making additional regulations prohibiting synthetic *trans* fats in school meals unnecessary.

Proposed Rule

In the 2020 proposed rule, USDA proposed to remove the synthetic *trans* fat prohibition for NSLP, SBP, and foods sold to children on campus during the school day. The proposed rule stated that under this change, schools would not have to comply with, and State agencies would not have to monitor, synthetic *trans* fat requirements. As noted in the proposed rule, based on the FDA's action to remove synthetic *trans* fat from the United States food supply, USDA determined that school meal regulations prohibiting synthetic *trans* fat were no longer necessary. Because FDA took action to remove synthetic *trans* fats from the food supply, USDA concluded that maintaining additional regulations to prohibit synthetic *trans* fats in school meals was unnecessary.

Public Comments on 2020 Proposed Rule

USDA received 29 comments on the synthetic *trans* fat provision of the 2020 proposed rule; all were unique comments. Of these, 14 supported the proposal, 14 were opposed, and 1 was mixed.

Proponents, including industry respondents and advocacy groups, supported removing the synthetic *trans* fat prohibition due to the FDA's actions to remove synthetic *trans* fat from the food supply. One industry respondent supported the change but questioned how *trans* fat that occurs naturally in foods would be monitored. However, another industry respondent noted that naturally occurring *trans* fat, which is present in some meat and dairy products, occurs at very low levels. A few State agencies supported the proposal. One State agency noted that synthetic *trans* fat would not be a concern in school meals after its elimination from the U.S. food supply. Another State agency agreed but noted that the FDA's compliance date could be extended; this State agency recommended that USDA delay implementation of its regulation until synthetic *trans* fat is fully eliminated from the food supply.

A few opponents cited general health concerns related to synthetic *trans* fat consumption, without acknowledging the elimination of synthetic *trans* fat from the food supply. Several other opponents, including State agencies and Attorneys General from several States, cited concerns about the FDA's compliance date for the elimination of synthetic *trans* fat. One State agency provided mixed feedback, recommending that USDA align its final standard with the FDA's compliance date. Another State agency opponent cited concerns about synthetic *trans* fat in non-domestic foods.

Final Rule

This final rule removes the dietary specification prohibiting synthetic *trans* fat in the school lunch and breakfast programs and in foods sold to children on campus during the school day. Under this change, schools will no longer need to include the synthetic *trans* fat prohibition in their procurement documentation, and State agencies will no longer need to review product labels or manufacturer specifications for compliance with the synthetic *trans* fat dietary specification. This change reduces burden by

[132] U.S. Department of Agriculture. *Nutrition Standards in the National School Lunch and School Breakfast Programs.* (77 FR 4088, January 26, 2012). Available at: *https://www.federalregister.gov/documents/2012/01/26/2012-1010/nutrition-standards-in-the-national-school-lunch-and-school-breakfast-programs.*

[133] U.S. Department of Agriculture. *National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010.* (81 FR 50132, July 29, 2016). Available at: *https://www.federalregister.gov/documents/2016/07/29/2016-17227/national-school-lunch-program-and-school-breakfast-program-nutrition-standards-for-all-foods-sold-in.*

[134] U.S. Food and Drug Administration. *Final Determination Regarding Partially Hydrogenated Oils (Removing Trans Fat).* Available at: *https://www.fda.gov/food/food-additives-petitions/final-determination-regarding-partially-hydrogenated-oils-removing-trans-fat.*

eliminating a requirement that USDA determined is no longer necessary due to the FDA's actions to eliminate synthetic *trans* fat from the U.S. food supply.

USDA acknowledges respondent concerns about the compliance date for the FDA's order eliminating synthetic *trans* fat from the U.S. food supply. While implementation of the FDA's order began in June 2018, at the time the 2020 proposed rule published, the compliance date for certain uses of partially hydrogenated oils had been extended. The final compliance date of January 2021, which extended the compliance date for specific, limited petitioned uses of partially hydrogenated oils, has now been in effect for several years.[135]

USDA appreciates concerns one respondent raised regarding synthetic *trans* fat in non-domestic foods. The elimination of synthetic *trans* fat applies to all foods sold in the U.S food supply, including non-domestic foods. Additionally, school food authorities are required by law to purchase domestic commodities or products to the maximum extent practicable. This rulemaking strengthens the existing Buy American requirements and establishes a new threshold limit for non-domestic food purchases (see *Section 18: Buy American*). Further, USDA data from SY 2017–2018 found that fruits and vegetables are by far the most common non-domestic food purchases for school food authorities.[136] Therefore, USDA does not expect the limited use of non-domestic foods in the NSLP and SBP to result in an increase in synthetic *trans* fats in school meals.

Finally, USDA acknowledges public comments about naturally occurring *trans* fat. The FDA notes that *trans* fat occurs naturally in small amounts in some meat and dairy products and is present at very low levels in other edible oils.[137] In the 2012 rule, USDA clarified that the *trans* fat prohibition for school meals would not apply to naturally occurring *trans* fat present in some meat and dairy products. Rather, it would apply to synthetic *trans* fat, which the 2012 rule preamble noted "are found in partially hydrogenated oils used in some margarines, snack foods, and prepared desserts." [138] This final rule does not impact naturally occurring *trans* fat, which continue to be permitted in school meals.

Accordingly, this final rule amends 7 CFR 210.10(a)(3), (b)(1), (c), (f), (g), (h), and (j), 210.11(f) and (g)(2), 210.18(l)(2)(iii), and 220.8(a)(3), (b)(1), (c), (f) through (h), and (j). This change reduces burden on State agencies and schools. Schools are not required to change menus or operations as a result of this change.

Section 17: Professional Standards: Hiring Exception for Medium and Large Local Educational Agencies

Current Requirement

Current regulations at 7 CFR 210.30(b)(1) describe the hiring standards for school nutrition program directors; the standards vary for directors operating in small, medium, and large local educational agencies. Specifically, the hiring requirements for school nutrition program directors in medium (2,500 to 9,999 students) and large (10,000 or more students) local educational agencies are as follows:

- According to 7 CFR 210.30(b)(1)(ii), school nutrition program directors with local educational agency enrollment of 2,500 to 9,999 students (*i.e.,* a medium local educational agency) must have:
- A bachelor's degree, or equivalent educational experience, with an academic major or concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field;
- A bachelor's degree, or equivalent educational experience, with any academic major or area of concentration, and a State-recognized certificate for school nutrition directors;
- A bachelor's degree in any academic major and at least two years of relevant experience in school nutrition programs; or
- An associate's degree, or equivalent educational experience, with an academic major or area of concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field and at least two years of relevant school nutrition program experience.
- According to 7 CFR 210.30(b)(1)(iii), school nutrition program directors with local educational agency enrollment of 10,000 or more students (*i.e.,* a large local educational agency) must have:
- A bachelor's degree, or equivalent educational experience, with an academic major or area of concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field;
- A bachelor's degree, or equivalent educational experience, with any academic major or area of concentration, and a State-recognized certificate for school nutrition directors; or
- A bachelor's degree in any major and at least five years of experience in management of school nutrition programs.

Proposed Rule

USDA proposed to allow State agency discretion to approve the hiring of an individual to serve as a school nutrition program director in a medium or large local educational agency, for individuals who have 10 or more years of school nutrition program experience but who do not hold a bachelor's or an associate's degree. Additionally, USDA proposed to clarify in regulation that State agencies may determine what counts as "equivalent educational experience" for the hiring standards. The proposed rule suggested that this change would allow highly experienced individuals to advance their careers in school food service. Additionally, the proposal could help to ease hiring challenges that USDA understands some medium and large local educational agencies experience.

Public Comments

USDA received 297 comments on the proposed changes for professional standards including 169 unique comments. Of these, 173 supported the proposal, including 106 unique comments, 23 were opposed, all of which were unique comments, and 101 were mixed, including 40 unique comments. State agencies, school nutrition professionals, advocacy groups, industry respondents, school

[135] See: "Implementation." U.S. Food and Drug Administration. *Final Determination Regarding Partially Hydrogenated Oils (Removing Trans Fat).* Available at: *https://www.fda.gov/food/food-additives-petitions/final-determination-regarding-partially-hydrogenated-oils-removing-trans-fat.*

[136] Of the 26 percent of school food authorities that reported using exceptions to the Buy American provision in SY 2017–2018, 93 percent reported using them to purchase fruit, while 53 percent reported using them to purchase vegetables. By comparison, 18 percent reported using them to purchase "other" foods, such as yeast, oils, and spices, and less than 10 percent each reported using them to purchase grains or meat/meat alternates. See *Exhibit 4: Among SFAs that Reported Using an Exception to the Buy American Provision, Reasons for Using an Exception and Products Purchased.* U.S Department of Agriculture, Food and Nutrition Service, Office of Policy Support, *Child Nutrition Program Operations Study (CN–OPS–II): SY 2017–18.* Beyler, Nick, Jim Murdoch, and Charlotte Cabili. Project Officer: Holly Figueroa. Alexandria, VA: November 2022.

[137] U.S. Food and Drug Administration. *Final Determination Regarding Partially Hydrogenated Oils (Removing Trans Fat).* Available at: *https://www.fda.gov/food/food-additives-petitions/final-determination-regarding-partially-hydrogenated-oils-removing-trans-fat.*

[138] U.S. Department of Agriculture. *Nutrition Standards in the National School Lunch and School Breakfast Programs.* (77 FR 4088, January 26, 2012). Available at: *https://www.federalregister.gov/d/2012-1010/p-161.*

districts, dietitians, and individuals submitted comments.

One school district proponent described the proposal as a ''solid move'' that would benefit capable professionals with relevant work experience; this proponent affirmed such individuals are an asset to school nutrition programs. Another school district agreed, stating that the leadership and achievements of experienced candidates should be valued. Several respondents suggested that this proposal would allow knowledgeable professionals to use their skills to benefit schools and students, with some citing their personal experiences in the field of school nutrition. An individual maintained this change would be especially useful in rural communities with small applicant pools and limited ability to hire directors that meet the current education requirements. A school district agreed, stating that any change to expand the pool of candidates would be welcome.

An individual proponent affirmed that the proposal would expand opportunity for school districts to hire qualified candidates from within their district. Similarly, an industry respondent suggested the proposal would allow candidates in assistant director positions to advance in their careers. A State agency agreed, asserting that this change would allow school districts to promote experienced employees who may be the best candidate for the job. A school district suggested the proposal would allow a path for growth in the field of child nutrition while still requiring the experience needed to do the job.

An advocacy group cited a Congressional Research Service report which indicated that 94 percent of foodservice employees in U.S. elementary and secondary schools are women. This respondent suggested that the degree requirement creates an inequity to advancement in school nutrition, citing the cost of obtaining a degree as an example of a barrier. While this respondent supported the proposal, they also urged USDA to promote greater economic opportunity for the school nutrition workforce, including support for professional development. Similarly, a State agency acknowledged that the ability to obtain a degree is ''often a benefit of class and economic privilege'' and supported valuing experience equally. One respondent, citing their personal experience, described working toward an advanced degree as ''time consuming and extremely expensive.'' This respondent also raised concerns about student loan debt, particularly for individuals who have already been working in child nutrition for decades. A school district agreed, stating that experience should matter just as much as a degree, particularly given barriers many people face in obtaining a degree.

A national organization representing tens of thousands of school nutrition professionals noted that the professional standards requirements ensure that school nutrition directors have the education and skills necessary to excel in their roles and to work alongside principals, superintendents, and other highly credentialed individuals. At the same time, this organization supported allowing a minimum of 10 years of school nutrition program experience to substitute for a degree due to hiring and recruitment issues that some schools are experiencing. Similarly, another respondent cited concerns about staffing and workload challenges, and suggested the proposal would benefit schools. An advocacy group emphasized that this proposal could help to address hiring issues by expanding access to promotion opportunities within school nutrition. A State agency agreed, suggesting this proposal would reward dedicated school nutrition staff and encourage career growth.

Other respondents opposed the proposal. One school district argued that a college degree is necessary for the director position in medium and large districts. This respondent noted that this position requires knowledge of food safety, personnel management, and how to ''run a business.'' A few other school districts agreed, arguing higher education is necessary to succeed as a director in medium and large districts. A dietitian maintained that years of experience should not substitute for a degree; along with formal education, this respondent emphasized the importance of ongoing learning. Another opponent argued that the requirements placed on school nutrition professionals have not lessened; therefore, USDA should not provide flexibility to the hiring standards. A school district opponent described their education credentials, maintaining that their advanced degree provided them with skills to balance budgets and develop menus for students with special diets. This respondent urged USDA to uphold the current standards. Another school district argued that the current degree requirement gives school nutrition directors credibility when interacting with school administrators, staff, and families.

In addition to general feedback on the proposed changes, USDA requested public input on the following questions:

- Is it reasonable to allow medium and large local educational agencies to substitute 10 years of school nutrition program experience for a bachelor's or an associate's degree when hiring a school nutrition program director?
- Should USDA also consider allowing medium and large local educational agencies to substitute other types of experience, such as experience in other food service sectors?
- How often do State agencies and school districts anticipate using the hiring exception?
- What strategies do local educational agencies currently use to recruit qualified school nutrition program directors?

A handful of respondents provided feedback in response to the first question, which was about the number of years of experience that USDA should allow to substitute for a degree when hiring a director in a medium or large local educational agency. A dietitian argued that 10 years of real-world experience would provide an individual the knowledge needed to succeed as a director. An advocacy group asserted that a school nutrition professional with 10 years of experience would have participated in many hours of training, in addition to their regular job duties, making them ''very capable of doing an excellent job as a director.'' An industry respondent agreed that 10 or more years of child nutrition program experience ''is a suitable alternative to traditional education.'' One respondent suggested 10 years of experience is appropriate for large school districts and suggested 5 to 7 years could be appropriate for medium school districts, provided the candidate had experience with procurement, menu planning, and personnel management. A few school districts suggested that USDA consider lowering the number of years from 10 to 5 years for medium and large school districts. A State agency agreed, maintaining that allowing 5 years of school nutrition program experience to substitute for a degree would further ease hiring challenges faced by some school districts. Another State agency suggested that it would be reasonable to require 4 years of child nutrition program experience, rather than 10 years, given it typically takes about 4 years to complete a bachelor's degree. A school district respondent did not provide a specific number of years of experience needed, but emphasized the value of institutional knowledge, which they conveyed is the result of ''many years spent doing the work.''

Respondents also addressed whether USDA should allow other types of experience, such as experience in other

food service sectors, to substitute for a degree. One school district encouraged USDA to allow other food service experience, including military food service, to count when assessing a candidate's potential. A State agency agreed, provided the work experience includes duties similar in size and scope to the role of a school nutrition program director. This State agency noted that other food service sectors may provide similar experience in procurement, menu planning, ordering, receiving, invoicing, and inventory control. Conversely, given the specific requirements of school meal programs, a national organization representing tens of thousands of school nutrition professionals maintained that only school nutrition program experience should be allowed to substitute for a degree. This organization further suggested that this experience should include managing or supervising personnel and overseeing school meal programs at the district level for multiple sites. A school district proponent also emphasized the importance of child nutrition program experience, as opposed to commercial food service experience. A State agency agreed, noting that other sectors are not as regulated as USDA food service programs, which may make the transition from another area of food service to school nutrition difficult for a new director.

A few respondents provided input on the third question regarding how often the proposed hiring exception would be used. One State agency noted that they receive at least two requests for hiring exceptions for medium and large school districts per year; this respondent supported the proposal. A second State agency proponent expected to receive about four requests for an exception per year, with the potential for more, should the proposal be finalized. A third State agency did not directly address the question, but shared one real-world example where this exception could have been used to hire a highly qualified candidate with 20 years of experience in their State. This State agency supported the proposal, describing it as ''reasonable.'' On the other hand, one State agency did not anticipate the flexibility would be used often, suggesting that medium and large school districts would opt to require a bachelor's or an associate's degree for director positions.

A few respondents shared strategies that school districts use to recruit qualified school nutrition program directors. One State agency noted that school districts recruit qualified candidates through advertisements on websites, search engines, and social media, and by holding job fairs. Another State agency suggested that partnerships with career tech centers and college programs have helped some school districts, while acknowledging that recruiting directors can be a challenge. One respondent stated that school districts post position openings through ''normal recruitment channels.''

Some respondents offered alternatives to the proposal, or suggested changes. For example, a few respondents recommended that USDA outline specific types of experience candidates must have to qualify for the hiring exception, in addition to their years of experience. A school district emphasized the importance of understanding finances, which they argued is crucial for making strategic decisions. An advocacy group suggested that USDA require experience in a supervisory role and in counting, claiming, menu development, and other areas of program administration. This respondent also suggested requiring a certain number of technical school or college credits to qualify for this exception. A dietitian recommended requiring management skills and emphasized the importance of ensuring directors can interpret regulations, plan menus, oversee a budget, and coach staff. Another respondent suggested that USDA specify whether the years of experience would need to be consecutive for a candidate to qualify for the exception.

Other respondents suggested that USDA narrow the scope of the proposed change or add other requirements to the process. One respondent recommended that medium and large school districts should only be allowed to use this exception if they implement a plan for the candidate to earn a degree. A State agency recommended limiting this exception to instances when there is documentation that no candidates who applied for the position met the education criteria. An advocacy group recommended the exception only be allowed in rural areas, arguing that urban school districts can find candidates that meet the existing standards. However, another advocacy group acknowledged differences in local needs based on school district size and urbanicity, and suggested State agencies should have discretion to approve the hiring of a director based on specific local context. Going further, an individual recommended that it should be the school district's decision whether to use the hiring exception, presumably as opposed to requiring State agency approval. Another respondent suggested eliminating the education requirements entirely, arguing if someone can do the job based on their skills, they should be eligible. A form letter campaign supported the proposal but suggested that USDA seek guidance from school nutrition professionals to make sure the change is implemented in a way that is ''as helpful as possible.''

A few respondents provided feedback on school nutrition hiring and training requirements in general. One advocacy group acknowledged the importance of the professional standards requirements, noting that they ensure school nutrition program personnel have the knowledge and skills they need to operate the programs successfully. This respondent suggested that the professional standards have supported improvements in meal quality in their State and nationwide. A few respondents noted the value of mentoring for a successful career in school nutrition. Another emphasized the important role of their State agency, adding that they feel well supported by their State agency in their continued learning.

Final Rule

This final rule codifies the proposal to allow State agency discretion to approve the hiring of an individual to serve as a school nutrition program director in a medium or large local educational agency, for individuals who have 10 or more years of school nutrition program experience but who do not hold a bachelor's or an associate's degree. Directors hired under this exception must have a high school diploma or GED. USDA expects that this change will allow highly experienced and qualified individuals to advance their careers in school nutrition. This change is also expected to ease hiring challenges which USDA understands are experienced by some medium and large local educational agencies.

USDA appreciates public input on the number of years of experience, and the type of experience, that should qualify a candidate for this exception. Several respondents acknowledged the importance of experience in school nutrition, including experience developing menus that meet the regulatory meal pattern requirements, counting and claiming meals, and maintaining compliance with other program rules. USDA agrees with public comments that suggested a candidate should have school nutrition experience to qualify for this exception. Further, USDA agrees with public comments stating that 10 years is an appropriate amount of time to substitute for a degree. The candidate's experience does not need to be in consecutive years; a

candidate only needs to accrue a total of 10 years of experience in school nutrition to qualify for this exception.

This final rule also codifies in regulation that State agencies may determine what counts as ''equivalent educational experience'' for the hiring standards. USDA provided the following examples in the proposed rule, which were supported by a national organization representing tens of thousands of school nutrition professionals:

- If a candidate for a director position in a medium local educational agency does not have an associate's degree, but has more than 60 college credits in a relevant field, the State agency would have the discretion to approve the hiring of that candidate.
- If a candidate for a director position in a large local educational agency does not have a bachelor's degree, but has an associate's degree, is a School Nutrition Specialist certified by the School Nutrition Association, and is a Nutrition and Dietetics Technician, Registered (NDTR)[139] certified by the Academy of Nutrition and Dietetics, then the State agency has the discretion to approve the hiring of that candidate.

These are just two possible scenarios where a State agency may choose to count a candidate's experience toward the hiring requirements as ''equivalent educational experience.'' State agencies have discretion to determine that other types of experience should count toward ''equivalent educational experience'' on case-by-case basis.

As described in 7 CFR 210.15(b)(7), school food authorities must maintain records to demonstrate compliance with the professional standards for school nutrition program directors, managers, and personnel, including the hiring requirements. This final rule does not change the overall recordkeeping requirements for professional standards. However, to demonstrate compliance when using this exception, the school food authority and State agency would need to maintain documentation of the exception. For example, the school food authority and State agency could maintain documentation of the school food authority's request for the exception, and documentation of the State agency's approval. Similarly, this final rule does not change the Administrative Review requirements for professional standards. Professional standards will continue to be evaluated as part of the General Areas of Review, as described at 7 CFR 210.18(h)(2)(ix).

USDA appreciates respondent feedback about the importance of ensuring school nutrition program directors in medium and large districts have the skills needed to succeed in their jobs. Respondents emphasized that obtaining a bachelor's or an associate's degree is an effective way for candidates to demonstrate they have the knowledge and skills needed to succeed as a director, which respondents stressed can be a challenging position. Directors hired under this provision are encouraged, but not required, to work toward a degree in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field. While USDA acknowledges the value in obtaining a degree, USDA has determined that hands-on experience in the school nutrition programs is also an effective way for candidates to demonstrate they have the knowledge and skills needed to succeed as a director in a medium or large school district. USDA also recognizes the importance of providing an alternative option for school nutrition professionals to advance in their careers, even if they are unable to obtain a degree due to financial or other barriers. This exception is available at the discretion of the State agency. School districts and State agencies are encouraged to work together to apply this exception on case-by-case basis as needed and as deemed appropriate.

In public comments, respondents recommended that USDA require candidates to meet specific criteria, in addition to the candidate's years of experience, to qualify for this exception. In this final rule, USDA will not require candidates to meet specific criteria, beyond the required years of experience. However, school districts and State agencies may choose to require candidates to have specific types of experience in order to qualify under this exception. For example, a school district could require candidates to have experience managing a budget or supervising staff to qualify for the director position. As this exception is available at the State agency's discretion, State agencies may also apply additional criteria when using the exception.

As proposed, this final rule removes the existing table at 7 CFR 210.30(b)(2), which provided a summary of the school nutrition program director hiring standards. USDA determined the amount of information within the table was excessive, and instead of maintaining the table in regulations, will develop a more user-friendly table summarizing the hiring standards to be posted on the USDA Food and Nutrition Service public website. The hiring standards remain in regulation at 7 CFR 210.30(b)(1); therefore, this change—which only removes the summary table—is not substantive. In this final rule, USDA also made corrections to current paragraph leveling in 7 CFR 210.30 and reprinted the table summarizing required annual training with non-substantive changes to improve usability.

USDA acknowledges and appreciates public comments from school nutrition directors and staff regarding the importance of their job duties. School nutrition professionals are incredibly hardworking individuals who care deeply about the children they serve. Many school nutrition professionals, some of whom have worked in school nutrition for decades, submitted public comments describing the great pride they take in their work. USDA also recognizes that school nutrition professionals have faced many challenges in their work over the past several years, including serving as essential, front-line workers during the COVID–19 pandemic and more recently, responding to supply chain disruptions and high food costs. USDA remains committed to supporting school nutrition professionals throughout implementation of this final rule and beyond. Additionally, Team Nutrition's Professional Standards Resources website[140] provides a variety of resources which support school nutrition professionals with implementing and meeting the professional standards requirements. These include the Guide to Professional Standards, the Professional Standards Training Database, and the Professional Standards Training Tracker Tool, among others. More information regarding USDA's efforts to support schools and school nutrition professionals may be found in *Section 1: Background* of this preamble.

Accordingly, this final rule amends 7 CFR 210.30(b)(1) to allow State agency discretion to approve the hiring of an individual to serve as a school nutrition program director in a medium or large local educational agency, for individuals who have 10 years or more of school nutrition program experience but who do not hold a bachelor's or an

[139] Nutrition and dietetics technicians, registered (NDTRs) are educated and trained at the technical level of nutrition and dietetics practice for the delivery of safe, culturally competent, quality food and nutrition services. See: Academy of Nutrition and Dietetics, *What is a Nutrition and Dietetics Technician Registered?* Available at: *https://www.eatrightpro.org/about-us/what-is-an-rdn-and-dtr/what-is-a-nutrition-and-dietetics-technician-registered.*

[140] U.S. Department of Agriculture. *Professional Standards.* Available at: *https://www.fns.usda.gov/cn/professional-standards.*

associate's degree. At the discretion of the State agency, this change provides local educational agencies an optional hiring flexibility. Schools are not required to change menus or operations as a result of this provision.

Section 18: Buy American

This section includes the following sub-sections:

- Section 18A describes limited exceptions to the Buy American requirement.
- Section 18B details Buy American exception documentation and reporting requirements.
- Section 18C explains procurement procedures.
- Section 18D defines the term ''substantially'' as it relates to the Buy American requirements.
- Section 18E clarifies requirements for harvested farmed and wild caught fish.

Section 18A: Limited Exceptions to the Buy American Requirement

Current Requirement

The Buy American provision established under the National School Lunch Act (NSLA, 42 U.S.C. 1760(n)) and program regulations at 7 CFR 210.21(d)(2) and 220.16(d)(2) requires school food authorities to purchase domestic commodities or products ''to the maximum extent practicable.'' This provision supports the mission of the child nutrition programs, which is to serve children nutritious meals and support American agriculture. Through policy guidance, USDA has detailed limited exceptions to the Buy American requirements.[141] These limited exceptions apply when the purchase of domestic foods is not practicable and include the following:

- The product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or
- Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

Currently, no regulations establish a definition of ''significantly higher'' when using an exception to the Buy American provision. The school food authority is responsible for determining the dollar amount or percentage which constitutes a significantly higher cost for a domestic product, thus permitting the use of an exception.

The Buy American provision is applicable to school food authorities located in the 48 contiguous United States. Although Alaska, Hawaii, and the U.S. territories are exempt from the Buy American provision, school food authorities in Hawaii and Puerto Rico are required to purchase food products produced in their respective State or territory in sufficient quantities, as determined by the school food authority, to meet school meal program needs, per 7 CFR 210.21(d)(3) and 42 U.S.C. 1760(n)(4)).

Proposed Rule

USDA proposed to strengthen the Buy American requirement by maintaining the current limited exceptions and establishing a new threshold limit for school food authorities that use these exceptions. USDA proposed to codify the following exceptions, previously issued through guidance, for when non-domestic foods may be purchased by school food authorities:

- The product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or
- Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

Additionally, USDA proposed to institute a 5 percent ceiling on the non-domestic commercial foods a school food authority may purchase per school year, based on total commercial food costs. Section 12 of the NSLA (42 U.S.C. 1760) mandates that the Secretary require school food authorities to ''purchase, to the maximum extent practicable, domestic commodities or products.'' Under the statute, this requirement applies to school food authorities located in the contiguous United States and a purchase of a domestic commodity or product for the school lunch or school breakfast program. By proposing a cap on when school food authorities may procure non-domestic commercial foods, USDA is balancing the statutory mandate to Buy American and the intent of the Buy American provision at Section 2 of the NSLA (42 U.S.C. 1751) to ''. . . encourage the domestic consumption of nutritious agricultural commodities and other foods . . .'' while also recognizing that there are times when purchasing domestic foods is not practicable for schools. Finally, consistent with current guidance, USDA proposed to clarify in regulation that school food authorities have discretion to determine whether an exception applies.

Public Comments

USDA received 138 comments on the proposed limited exceptions to the Buy American requirement. Of these, 20 supported the proposed standard, 72 were opposed, and 46 were mixed. Most respondents supported codifying the current exceptions for products not available domestically, but some requested that the significant cost differential be defined or eliminated. Most expressed concern that the 5 percent cap on non-domestic commercial foods is too restrictive.

Importance of Supporting American Agriculture

Several respondents, including, State agencies, Federal elected officials, advocacy groups, and individuals, supported strengthening the Buy American provision. One respondent stated that the proposal supports local farmers and the economy while also protecting the environment by reducing emissions from transporting food long distances. Another respondent affirmed that strengthening the Buy American provision would increase sourcing from local and regional producers. Other respondents supported the proposal for economic reasons. For example, a trade association stated that the 5 percent cap would disincentivize the use of U.S. taxpayer dollars to purchase non-domestic food products. An advocacy group stated that strengthening the provision would maximize public dollars spent on our nation's food and farm economy.

Implementation Challenges: Loss of Variety for Students

Some respondents opposed the proposal, including professional organizations, school districts, dietitians, and individuals. One professional organization asserted that the proposed 5 percent of total costs per school year ceiling on non-domestic commercial foods is too restrictive and could limit students' access to a wide variety of fresh and appealing produce throughout the school year. This respondent mentioned that the proposed changes may place a significant administrative burden on school meal programs and complicate an already complex, challenging procurement process. A State agency agreed, adding that the proposed changes may cause unnecessary stress for menu planners. This State agency expressed that the proposal would affect States located in the north that have shorter growing seasons.

Implementation Challenges: Supply Chain Issues

Some respondents discussed the current supply chain issues, stating that the proposal would make the procurement process more difficult and

[141] U.S. Department of Agriculture. SP 38–2017 *Compliance with and Enforcement of the Buy American Provision in the NSLP.* June 2017. Available at: *https://www.fns.usda.gov/nslp/compliance-enforcement-buy-american.*

burdensome while decreasing variety for students. One respondent asserted that the droughts in California, damaged grain crops in the Midwest, and unseasonably cold weather in the south have impacted the availability of domestic food. A respondent mentioned that the Buy American provision states that schools should purchase domestic products to the maximum extent ''practicable,'' but with the current supply chain challenges, purchasing 95 percent of food domestically is not ''practicable.'' One respondent stated that the 5 percent ceiling is not reasonable while another questioned if the 5 percent ceiling is possible to maintain.

Implementation Challenges: Administrative Burden

Some respondents raised concerns about tracking non-domestic costs. A State agency asserted that maintaining documentation would be burdensome for schools and State agencies, especially for small school food authorities with limited staff. Another State agency agreed with the intent of the proposal but argued that the proposed limitation of 5 percent on non-domestic food purchases, is too restrictive. This State agency said as proposed, this provision will place significant administrative burden on school meal operators and State agencies, adding to an already complex, challenging Federal procurement process.

Alternative Approaches Suggested by Comments

A few trade associations appreciated USDA's efforts to strengthen the Buy American provision for school nutrition programs and supported the proposed 5 percent of total costs cap for non-domestic food. However, these respondents suggested that USDA apply the 5 percent cap to categories and/or product type,[142] established by the USDA's Agricultural Marketing Service, instead of total commercial food purchases. Some of these trade associations suggested that USDA eliminate or define the ''significant cost differential'' exception, stating that it is a vague standard with inconsistent application and that it creates a loophole for distributors.

[142] AMS used the following list as product types: Beef, Cotton, Dairy Products, Eggs, Fish & Seafood, Flowers & Plants, Fruits, Goat, Grain, Lamb, Nuts, Pork, Organic, Poultry, Rabbits, Rice & Pulses, Vegetables, Specialty Products, Tobacco, Wool & Mohair. Also available at: *https://www.ams.usda.gov/grades-standards.*

In addition to general feedback on the proposal, USDA requested input on the following questions:

- Is the proposed 5 percent of total costs per school year ceiling on the non-domestic commercial foods a school food authority may purchase a reasonable ceiling, or should a different percentage be used? Would the 5 percent cap encourage those school food authorities using exceptions to reduce the amount of non-domestic products they purchase? USDA requests that respondents include justification and reasons behind their response.
- How feasible would tracking and documenting the total amount of non-domestic food purchases be? Would purchasing and record keeping processes need to be altered? Does the documentation of total non-domestic purchases alleviate burden associated with documenting each limited exception that is used? And any additional information about how school food authorities would document the total amount of non-domestic food purchases versus total annual food purchases.

About 34 respondents provided input on the first question, regarding the 5 percent of total costs per school year ceiling on non-domestic purchasing. Many respondents stated the proposed 5 percent cap is too restrictive and that the data used to determine the proposed cap is outdated. One respondent stated that there have been supply chain disruptions, inflation, increased procurement challenges due to natural disasters that impact school meal programs, and a pandemic. Due to these factors, this respondent did not feel the proposed 5 percent cap accurately represents the current procurement landscape and does not apply lessons learned from the pandemic. This respondent also stated that the 5 percent cap is significantly lower than current procurement trends. In developing this new requirement, FNS used the most recent data available which was collected in SY 2017–2018 and showed school food authorities spent, on average, 8.5 percent of food costs on non-domestic products.

An individual asserted that the proposed 5 percent cap would increase burden for school nutrition professionals. State agencies suggested that the 5 percent cap would make procurement more cumbersome and add complexity to the oversight process. State agency respondents also argued that mandating a 5 percent cap on non-domestic food products would create additional burden on schools.

Some respondents provided alternatives to the 5 percent cap for non-domestic food purchases. For example, one individual suggested a 10 percent cap. A State agency recommended an exemption list for items like bananas, in addition to the 5 percent cap. Another State agency urged USDA to require school food authorities to develop a system to track non-domestic food products but noted that this would take time. This State agency suggested that USDA create an exception list of food products that have been determined as not produced in the U.S. in sufficient and reasonable available commercial quantities of satisfactory quality, such as canned oranges, canned pineapple, and fresh bananas.

Regarding the second question, 27 respondents provided input on the feasibility of the proposed recordkeeping process. Some respondents affirmed that tracking non-domestic food purchases would be an administrative burden. One individual argued that the recordkeeping process would contribute to administrative burden because items would need separate invoices for a successful audit and tracking purposes. Another respondent asserted maintaining documentation would require vendors and distributors to provide information about non-domestic food products.

A State agency agreed, asserting that school food authorities do not have adequate time and resources for additional paperwork.

Final Rule

This final rule changes the current limited exceptions for the Buy American provision and codifies the two limited circumstances when school food authorities may purchase non-domestic foods:

1. The product is listed on the Federal Acquisitions Regulations (FAR) 25.104 Nonavailable articles list and/or is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or

2. Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

USDA notes that when a school food authority purchases a food item found on the FAR 25.104 Nonavailable articles list, no further documentation is required. The Nonavailable articles list is a list of items that have been deemed not available in the U.S. and excepted from the Buy American statute.[143] The

[143] 41 U.S.C chapter 83 is the Buy American statute that requires public agencies to procure articles, materials, and supplies that were mined, produced, or manufactured in the United States, substantially all from domestic components. Available at: *https://www.acquisition.gov/far/part-25.*

list of items on the FAR 25.104 is non exhaustive. Food products from the FAR Nonavailable articles list must be included in the calculation of the non-domestic cap.

This rulemaking does not define ''significantly higher'' for the definition exception and instead USDA maintains that the definition of ''significantly higher'' is at the discretion of school food authorities. Allowing school food authority discretion acknowledges that school food authorities of various sizes have different resources, and reflects the appropriate flexibility needed for purchases given the diverse needs of school food authorities.

USDA acknowledges that some respondents requested such an exemption list of non-domestic foods to help reduce administrative burden associated with documenting the two exceptions to the Buy American requirements. USDA expects that the inclusion of the FAR 25.104 Nonavailable articles will reduce administrative burden. This list is readily available, reliable, and widely used by the other Federal agencies. Additionally, the inclusion of this list will improve procurement practices, support American agriculture, and contribute toward increased Program integrity.

In response to public comments that suggested a 5 percent cap is too restrictive under current procurement conditions and that FNS data is not representative of current procurement practices, USDA will use a phased approach to gradually reach the proposed 5 percent of total costs per school year cap on non-domestic food purchases. USDA agrees with other respondents who were in support of the 5 percent cap, because it will help support American agriculture and industry, and will use 5 percent as the final cap on non-domestic food costs. The cap on non-domestic food costs is for total commercial food costs purchased. Through a phased-in implementation, USDA intends to help schools, State agencies, and other stakeholders adjust to the new requirement and achieve compliance with the Buy American provision. This phased-in approach will allow schools to gradually adjust to the new requirement and will allow USDA to continue to collect data on use of the Buy American exceptions.

In the proposed rule, USDA asked respondents if the proposed 5 percent cap was too restrictive or if a different cap should be used. Through public comment a 10 percent cap was suggested as an alternative to the 5 percent cap. Using this suggestion, the phased approach will be as follows:

- Beginning in SY 2025–2026, the non-domestic food cost cap will be 10 percent.
- Beginning in SY 2028–2029, the non-domestic food cost cap will be 8 percent.
- Beginning in SY 2031–2032, the non-domestic food cost cap will be 5 percent.

School food authorities will be required to maintain documentation supporting the use of an exception, except when the item is found on the FAR 25.104 Nonavailable articles list. USDA recognizes that the addition of the cap may pose issues for some school food authorities as it requires additional burden to assess the amount of non-domestic purchases. However, USDA notes that the Buy American requirement is mandated by the statute as discussed above. It is also an important aspect of the school meal programs to ''. . . encourage the domestic consumption of nutritious agricultural commodities and other foods . . .'' (42 U.S.C. 1751). In response to comments, USDA has carefully considered how that requirement can be appropriately balanced with when the purchase of domestic foods is not practicable for schools as well as the associated administrative burden. There still may be individual school food authorities that cannot meet the threshold. USDA will work in concert with State agencies during implementation to provide needed technical assistance and guidance, and if appropriate, an accommodation for temporary relief from the requirement as the State agency works with the school food authority on increasing their domestic purchases.

Compliance with the non-domestic cap will be reviewed by State agencies in line with 7 CFR 210.18 during the school meal programs Administrative Review process. Regulations were recently updated through the *Child Nutrition Program Integrity* final rule [144] to specifically add the Buy American requirements in 7 CFR 210.21(d) and 220.16(d) to the General Areas of Review requirements. The process for the General Areas during the review is first technical assistance, followed by corrective action if there are instances of non-compliance. The review of the Buy American requirement will follow this process that is already familiar to State agencies and schools and is meant to simplify administrative burden in response to comments. This process will allow school food authorities and States to work together to achieve compliance. As indicated in the proposed rule, the primary mechanism for collecting information on the Buy American provision is via the Child Nutrition Operations (CN–OPS) study. USDA notes that the CN–OPS study showed that the vast majority of exceptions were used for fruit and technical assistance may center around helping school food authorities to better monitor their contracts and/or track their non-domestic expenses; an example of corrective action is to modify future menus to replace non-domestic items with domestic items. There may be circumstances outside of the school food authority's control that make compliance with the Buy American requirements challenging. These could include nationwide supply chain issues or another pandemic, and USDA will provide guidance and direction with respect to the Buy American requirements.

In addition, in response to respondent concerns about burden, USDA notes that in accordance with a recent Government Accountability Office audit,[145] USDA is committed to creating a template for documenting Buy American exceptions. USDA plans to provide guidance and technical assistance to support school food authority implementation of the cap and tracking of expenses.

Lastly in response to comments suggesting that the non-domestic expenditure cap be based on food categories (*e.g.,* fruit, etc.) already established by the USDA's Agriculture Marketing Service instead of total commercial food purchases, USDA has concluded that this would only add administrative burden for school food authorities. Given the feedback received in public comments, in this final rule USDA is clarifying that the cap will apply to total commercial food costs.

Accordingly, this final rule amends 7 CFR 210.21(d)(5) and 220.16(d)(5) to codify the two limited circumstances when school food authorities may purchase non-domestic foods and to gradually phase in a cap on when school food authorities may procure non-domestic food. Additionally, this final rule amends 7 CFR 210.21(d)(8) and 220.16(d)(8) to codify an

[144] *Child Nutrition Program Integrity* (88 FR 162, August 23, 2023). Available at *https://www.govinfo.gov/content/pkg/FR-2023-02-07/pdf/2023-02102.pdf.*

[145] U.S Government Accountability Office. *USDA Could Enhance Implementation of the Buy American Provision.* April 2023. Available at: *https://www.gao.gov/assets/gao-23-105884.pdf.*

accommodation for schools unable to meet the phased-in cap.

Section 18B: Exception Documentation and Reporting Requirements

Current Requirement

Currently, the primary mechanism for collecting information on the Buy American provision is via the CN–OPS study. The CN–OPS study is a multi-year study that provides USDA with current information on various aspects of school meals programs operations. USDA uses results from this study to help inform program management practices and policy development.

School food authorities document each use of an exception to the Buy American requirements.[146] However, there is no requirement for school food authorities to request a waiver from the State agency or USDA in order to purchase a non-domestic food product.

Proposed Rule

USDA proposed to require school food authorities to maintain documentation supporting use of one of the two limited exceptions and documentation to demonstrate that no more than 5 percent of total annual commercial food costs per school year are for non-domestic foods.

Public Comments

USDA received 24 comments on the proposed Buy American exception documentation and reporting requirements. Of these, one supported the proposal, 21 were opposed, and two were mixed. State agencies, trade agencies, vendors, school food authorities, and individuals submitted comments on the proposal.

The supportive comment came from a trade agency. This respondent stated that they agreed with the proposal and that the proposal would make food distributors more aware of the Buy American requirements.

Many respondents stated that requiring school food authorities to maintain documentation showing no more than 5 percent of their total annual commercial food costs were spent on non-domestic foods will add to administrative burden and stated that school food authorities are already overwhelmed with documentation requirements. Another respondent asserted that the documentation requirement would require time-consuming activities such as reviewing all invoices to determine the total costs and non-domestic costs and calculating the percentage on a regular basis, on top of all the other program requirements that must be monitored.

Respondents stated that they did not see any issues with the current Buy American requirements and suggested USDA leave the provision as is. One State agency claimed that the Buy American provision has not been excessively abused and that adding an additional layer of recordkeeping to an already overwhelmed staff would create unnecessary burden. One respondent mentioned that their vendor is already documenting their use of the Buy American exception, and it only would add another layer of tracking for them. Another respondent recommended that USDA leave the provision as is, asserting that schools understand the importance of limiting non-domestic purchases to special circumstances.

Some respondents provided alternatives or asked for clarification about the proposed documentation and tracking requirements. A State agency noted that while the provision is not difficult to comprehend, if USDA has specific expectations for how tracking and maintenance of documentation should occur, those expectations should be established in the rulemaking. This respondent also suggested that USDA should include what fiscal action, if any, would result if those expectations are not met. Another respondent suggested that schools could meet the documentation and tracking requirements, but it would be difficult.

USDA requested public input on the following questions related to the proposals for exception documentation and reporting requirements of the Buy American requirements:

- Is the proposal to require school food authorities to maintain documentation showing that no more than 5 percent of their total commercial food costs per school year were for non-domestic foods feasible and is the regulatory language clear enough for school food authorities and State agencies to implement and follow?
- For oversight purposes, USDA is considering requiring school food authorities to maintain an attestation statement to attest that any non-domestic foods purchased under the 5 percent cap met one of the two limited exceptions. Would this approach assist school food authorities with the burden associated with documentation requirements? Does it help ensure that any non-domestic food purchase under the 5 percent cap was only a result of utilizing one of the current limited exceptions that USDA proposes to codify through this rulemaking?

About five respondents provided input on the first question about the feasibility of the proposal for documentation showing 5 percent cap for non-domestic food purchases. One respondent stated that the proposed rule would increase administrative burden by imposing additional tracking requirements for school food authorities. This respondent suggested that the documentation requirements would especially impact large school districts.

Regarding the second question, nine respondents, including State agencies, trade associations, and individuals provided input on the possible approach of maintaining an attestation statement that non-domestic food purchases were less than the 5 percent cap. Respondents provided mixed feedback on this question. A State agency and a few individuals expressed that the attestation would help with the documentation burden. However, some respondents were confused on who the attestation statement is intended for, and whether school food authorities or distributors would attest that any non-domestic foods purchased under the 5 percent cap met one of the two limited exceptions.

A State agency suggested that the use of an attestation statement, without backup documentation, is not an effective method of ensuring compliance. This State agency argued that the attestation statement would create additional paperwork that would not actually impact school food authorities' purchasing practices. Lastly, one respondent stated the attestation seems unnecessary.

Final Rule

This final rule requires school food authorities to maintain documentation to demonstrate use of one of the two limited exceptions and institutes a phased-in cap on non-domestic food purchases. In response to public comments, USDA is exempting products found on the FAR 25.104 Nonavailable articles list from the documentation requirement. School food authorities may use this list to deem a product as not domestically available without further documentation. Food products that are found on the FAR Nonavailable articles list will be included in the non-domestic expenditure ceiling calculation. While this was not included in the proposed rule, USDA requested public comment on the feasibility of a non-domestic cap, tracking of purchases, and documentation requirements, and gave notice to the

[146] U.S. Department of Agriculture, *Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program*, June 30, 2017. Available at: *https://www.fns.usda.gov/nslp/compliance-enforcement-buy-american.*

public that changes may be incorporated into a final rule based on public input. Public comments requested that USDA develop a non-domestic product exception list. Allowing the exception of products on the FAR 25.104 Nonavailable articles list from the Buy American documentation requirement addresses these public comments and reduces administrative burden for schools.

In addition, as stated above, in response to respondent concerns about burden, USDA notes that in accordance with a recent Government Accountability Office audit, *USDA Could Enhance Implementation of the Buy American Provision (April 2023),*[147] USDA has committed to creating a template for documenting Buy American exceptions. USDA will also explore any technical assistance resources that will better help school food authorities document non-domestic food purchases.

Accordingly, this final rule amends 7 CFR 210.21(d)(5)(iii) and 220.16(d)(5)(iii) to require school food authorities to maintain documentation to demonstrate use of one of the two limited exceptions to the Buy American provision.

Section 18C: Procurement Procedures

Current Requirement

School lunch and breakfast program regulations do not currently require school food authorities to include any Buy American provisions in required documented procurement procedures,[148] solicitations, or contracts. However, USDA guidance has strongly advised school food authorities to include safeguards in solicitation and contract language to ensure Buy American requirements are followed.[149] Additionally, school food authorities are required to monitor solicitation and contract language to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders (2 CFR 200.318(b)).[150]

Proposed Rule

USDA proposed to require school food authorities to include the Buy American provision in documented procurement procedures, solicitations, and contracts for foods and food products procured using informal and formal procurement methods, and in awarded contracts.

Public Comments

USDA received 30 comments on the proposals to include Buy American requirements in procurement procedures. Of these, 14 supported the proposal and 16 were mixed. State agencies, school districts, advocacy groups, trade associations, dietitians, and individuals submitted comments on the proposal.

Many respondents supported the proposal requiring school food authorities to include the Buy American provision in documented procurement procedures, solicitations, and contracts. Some respondents affirmed that they have these proposed requirements in their procurement procedures.

Other respondents provided mixed feedback. While these respondents agreed with the proposed provision, some suggested expanding it. For example, one respondent suggested that solicitations and contracts require distributors to attest to the domestic or non-domestic origin of delivered products. A professional organization stated that all Federal nutrition assistance programs should adopt the Buy American provision. Another respondent suggested that USDA bar distributors who substitute non-domestic products for domestic products without justification.

Final Rule

USDA agrees with respondents that Buy American provisions should be included in all procurement procedures. This final rule requires school food authorities to include the Buy American requirements in documented procurement procedures, solicitations, and contracts for foods and food products procured for school breakfast and school lunch programs using informal and formal procurement methods, and in awarded contracts.

State agencies are required to verify the inclusion of this language when conducting Procurement oversight and Administrative Reviews. USDA expects that this requirement will ensure vendors are aware of expectations at all stages of the procurement process, in addition to providing contractual protection for school food authorities if vendors fail to meet Buy American obligations.

Accordingly, this final rule amends 7 CFR 210.21(d)(3) and 220.16(d)(3) to require that Buy American provisions be included in all procurement procedures.

Section 18D: Definition of ''Substantially''

Current Requirement

The National School Lunch Act (NSLA, 42 U.S.C. 1760(n)(1)(B)) defines a domestic product as ''[a] food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.'' The current regulatory language at 7 CFR 210.21(d)(1) and 220.16(d)(1) is identical to the statutory language. To satisfy the statutory and regulatory requirements, food products purchased for child nutrition programs must be processed in the United States.[151] However, USDA understands that the meaning of the term ''substantially'' is not clearly defined.

Congressional report language accompanying the original legislation noted that ''substantially means over 51 percent from American products.''[152] Therefore, USDA has stated in guidance that ''substantially'' means over 51 percent of the final processed product (by weight or volume) consists of agriculture commodities that were grown domestically, as determined by the school food authority.[153] The guidance also states that products ''from Guam, American Samoa, Virgin Islands, Puerto Rico, and the Northern Mariana Islands are considered domestic products under this provision as these products are from the territories of the U.S.''

Proposed Rule

USDA proposed to codify a definition of the statutory phrase ''substantially using agriculture commodities.'' The

[147] U.S Government Accountability Office. *USDA Could Enhance Implementation of the Buy American Provision*. April 2023. Available at: *https://www.gao.gov/assets/gao-23-105884.pdf*.

[148] School food authorities are required to have documented procurement procedures, as per 2 CFR 200.318(a).

[149] U.S. Department of Agriculture, *Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program,* June 30, 2017. Available at: *https://www.fns.usda.gov/nslp/compliance-enforcement-buy-american*.

[150] ''Monitoring is also accomplished by reviewing products and delivery invoices or receipts to ensure the domestic food that was solicited and awarded is the food that is received. SFAs also need to conduct a periodic review of storage facilities, freezers, refrigerators, dry storage, and warehouses to ensure the products received are the ones solicited, and awarded, and comply with the Buy American provision.'' U.S. Department of Agriculture, *Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program,* June 30, 2017. Available at: *https://www.fns.usda.gov/nslp/compliance-enforcement-buy-american*.

[151] See also section 4207(b) of the Agriculture Improvement Act of 2018, Public Law 115–334 (42 U.S.C. 1760).

[152] U.S. House of Representatives. *Child Nutrition and WIC Reauthorization Amendments of 1998—House Report 105–633*. July 20, 1998. Available at: *https://www.govinfo.gov/content/pkg/CRPT-105hrpt633/html/CRPT-105hrpt633.htm*.

[153] U.S. Department of Agriculture, *Compliance with and Enforcement of the Buy American Provision in the National School Lunch Program,* June 30, 2017. Available at: *https://www.fns.usda.gov/nslp/compliance-enforcement-buy-american*.

definition, which USDA would codify at 7 CFR 210.21(d)(1)(ii)(A) and 220.16(d)(1)(ii)(A), was proposed as follows: ''*Substantially using agriculture commodities that are produced in the United States*'' *means over 51 percent of a food product must consist of agricultural commodities that were grown domestically*.

Public Comments

USDA received 11 comments on the proposal to codify the definition of ''substantially using agriculture commodities.'' Of these, six supported the proposal, one was opposed, and four were mixed. State agencies, advocacy groups, professional organizations, dietitians, and individuals submitted comments on the proposal.

Most respondents supported the clarification. Some respondents stated that the proposed clarification made sense to them, and that the language provided was welcome. One State agency already requires school food authorities to use this definition based on its use in USDA guidance.

One State agency opposed the proposal and stated that the proposed definition does not meet the intent of other Federal agencies' Buy American requirements as it allows for up to 49 percent of a food product to be non-domestic.

Mixed comments were generally supportive but wanted USDA to go further than the proposed 51 percent threshold. A few respondents wanted the threshold to be raised higher, potentially up to 80 or 90 percent instead of 51 percent. One respondent wanted USDA to clarify that domestic water does not count toward the 51 percent. Another respondent requested that USDA consider that the term ''substantial'' is relative, open to interpretation, and should be further clarified in order to achieve desired results.

USDA requested public input on the following question related to codifying the definition of substantially:

• Does the proposed definition of ''substantially using agriculture commodities that are produced in the United States'' meet the intent of the Buy American requirements? If not, what other suggestions do stakeholders have for the definition?

Approximately three respondents provided input on this question regarding the intent of the Buy American requirements. Respondents generally agreed that the proposed definition is consistent with the intent of Buy American requirements.

Final Rule

This final rule codifies the proposed definition of ''substantially'' in the Buy American provision at 7 CFR 210.21(d)(1)(ii)(A) and 220.16(d)(1)(ii)(A). Consistent with the proposed rule, this definition reads as follows: ''*Substantially using agriculture commodities that are produced in the United States*'' *means over 51 percent of a food product must consist of agricultural commodities that were grown domestically*.

Although USDA acknowledges that some respondents recommended a threshold higher than 51 percent, this definition reflects the Congressional report language and USDA guidance as mentioned above. USDA agrees with supportive respondents and codifies the proposed definition for ''substantially'' in this final rule.

Accordingly, this final rule amends 7 CFR 210.21(d)(1)(ii) and 220.16(d)(1)(ii) to codify the definition of ''substantially'' in the Buy American regulations.

Section 18E: Clarification of Requirements for Harvested Farmed and Wild Caught Fish

Current Requirement

Current regulations do not include language specific to the applicability of the Buy American requirements to fish or fish products. However, in 2019, section 4207 of the Agriculture Improvement Act of 2018 (Pub. L. 115–334) clarified the Buy American provision applies to fish harvested ''within the Exclusive Economic Zone of the United States, as described in Presidential Proclamation 5030 (48 FR 10605; March 10, 1983), or . . . by a United States flagged vessel.'' USDA published *Buy American and the Agricultural Improvement Act of 2018* [154] and explained how to treat harvested fish under the Buy American requirement. The guidance stated that, ''[i]n order to be compliant:

• Farmed fish must be harvested within the United States or any territory or possession of the United States.

• Wild caught fish must be harvested within the Exclusive Economic Zone of the United States or by a United States flagged vessel.''

Prior to the publication of the 2019 guidance, the Buy American provision applied to fish as it would to any other food.

[154] U.S. Department of Agriculture. *Buy American and the Agriculture Improvement Act of 2018*. August 15, 2019. Available at: *https://www.fns.usda.gov/cn/buy-american-and-agriculture-improvement-act*.

Proposed Rule

USDA proposed to add language to the regulations to codify how Buy American applies to fish and fish products in the school lunch and breakfast programs. The proposed change would be consistent with current statutory requirements and existing USDA policy guidance. USDA expects that codifying these existing requirements in regulation will improve awareness of, and compliance with, program requirements.

Public Comments

USDA received 11 comments on the proposal to codify how Buy American applies to fish and fish products in the school lunch and breakfast programs. Of these, four supported the proposed standards and seven were mixed. State agencies, professional associations, industry respondents, and dietitians submitted comments on the proposal.

Proponents generally stated the clarification is acceptable to add to the regulations. Other respondents appreciated the clarification on what criteria must be met for fish and fish products to meet the Buy American requirements but were concerned with the challenges of identifying whether fish were harvested within the Exclusive Economic Zone and/or whether the vessel used to catch the fish was a ''United States flagged vessel.''

Final Rule

USDA agrees with respondents that making the proposed change will improve the understanding of program requirements. This final rule codifies language in regulations regarding how the Buy American requirements apply to fish and fish products offered in the school lunch and breakfast programs. In order to be compliant with Buy American requirements, under this final rule:

• Farmed fish must be harvested within the United States or any territory or possession of the United States.

• Wild caught fish must be harvested within the Exclusive Economic Zone of the United States or by a United States flagged vessel.

This change is consistent with current statutory requirements and existing USDA policy guidance.

Accordingly, this final rule amends 7 CFR 210.21(d)(6) and 220.16(d)(6) to codify language regarding how the Buy American requirements apply to fish and fish products offered in the school lunch and breakfast programs.

Section 19: Geographic Preference

Current Requirement

Section 4302 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) [155] amended the National School Lunch Act to direct the Secretary of Agriculture to encourage institutions operating child nutrition programs to purchase unprocessed locally grown and locally raised agricultural products. Effective October 1, 2008, institutions receiving funds through the child nutrition programs could apply an optional geographic preference for the procurement of unprocessed locally grown or locally raised agricultural products. This provision applies to institutions operating any of the child nutrition programs, including the NSLP, SMP, SBP, Fresh Fruit and Vegetable Program, SFSP, and CACFP, as well as to purchases made for these programs by the USDA Department of Defense Fresh Fruit and Vegetable Program. The provision also applies to State agencies making purchases on behalf of any of the aforementioned child nutrition program operators.

The *Geographic Preference Option for the Procurement of Unprocessed Agricultural Products in Child Nutrition Programs* final rule (75 FR 20316, April 4, 2011) [156] went into effect on May 23, 2011. This final rule incorporated the geographic preference option in program regulations and defined the term ''unprocessed locally grown or locally raised agricultural products,'' which does allow for some minimal processing, food handling, and preservation techniques as defined, to facilitate implementation by institutions operating the child nutrition programs. Language included in that final rule indicates that ''local'' cannot be used as a procurement specification (a written description of the product or service that the vendor must meet to be considered responsive and responsible).

Currently, Federal regulations do not prescribe the way that geographic preference should be applied, or how much preference can be given to local products. Federal regulations also do not define ''local'' for the purpose of procuring local foods for use in child nutrition programs. However, producers located in a specified geographic area can be provided additional points or credit calculated during a program operator's evaluation of proposals or bids received in response to a solicitation.[157]

Proposed Rule

USDA proposed to expand the geographic preference option by allowing locally grown, raised, or caught as procurement specifications for unprocessed or minimally processed food items in the child nutrition programs. This proposal intended to increase the procurement of local foods by child nutrition program operators and ease procurement challenges for operators interested in sourcing food from local producers.

Public Comments

USDA received 389 comments referencing the geographic preference proposal, including 176 unique comments. Of the total comments, 351 supported the proposal, including 138 unique comments, one was opposed, and 37 were mixed. State agencies, school nutrition professionals, advocacy groups, industry respondents, dietitians, elected officials, and individuals submitted comments. Many respondents mentioned that the geographic preference proposal would support local producers. Comments from advocacy groups, State agencies, and an academic institution indicated that the proposal would allow local producers to be more competitive and encourage local and smaller-scale producers to submit bids to sell local foods to child nutrition program operators. A State agency noted that the proposal would help larger school districts and cooperatives of smaller school districts coordinate with small-scale producers to procure locally without relying on the micro-purchase procurement method. A couple of advocacy groups and an individual mentioned that the proposal would be economically beneficial for local producers and communities. Similarly, a professional association suggested the proposal would stimulate local economies and keep money in school communities. Advocacy groups, State agencies, a professional organization, and a dietitian expressed that the proposal would make it easier for child nutrition program operators to procure local products for their meal programs and reduce administrative barriers.

Some respondents shared other potential benefits of the proposal, such as mitigating supply chain disruptions and fostering healthier communities. A food manufacturer and an advocacy group stated that they received positive feedback from child nutrition operators about the proposal. A few advocacy groups also noted that schools that had pre-existing relationships with local suppliers reported fewer supply chain disruptions and more reliable product availability during the COVID–19 pandemic. One advocacy group and one individual suggested that the proposal would support more nutritious school meals and foster connections between students, local producers, and communities. An individual stated that local food procurement can also support schools offering foods that better reflect students' food cultures and heritage. A group of Federal elected officials stated that the proposal would improve domestic sourcing, relieve procurement challenges, and allow more local foods to be incorporated into school meals.

Some respondents provided mixed feedback on the proposal or provided suggestions. One State agency noted that the proposal would make it easier for program operators to procure local foods but recommended that USDA provide guidance on using a definition of ''local'' that does not reduce the number of potential vendors that can respond to a solicitation to a non-competitive level. This respondent also recommended guidance to support program operators in conducting market research and requests for information prior to issuing solicitations. A State agency affirmed this guidance would help program operators avoid delays in awarding contracts to qualified local vendors and prevent program operators from having to reissue solicitations. Another State agency requested that USDA define the term ''local'' in a way that clarifies ''local'' should be based on the source of the agricultural product being procured rather than the bidder's location. Multiple advocacy groups and an individual recommended that the proposed geographic preference language be updated to allow for, or encourage, other procurement specifications to support varied procurement values such as organic certification, independent animal welfare certifications, products produced by historically underserved producers, and more.

Several respondents supported the proposal but raised concerns about the potential increased costs of local foods. An individual noted that the cost of procuring local foods could be a barrier for smaller schools and school districts. Another respondent warned that a lack of locally produced food in their area,

[155] *The Food, Conservation, and Energy Act of 2008* (Pub. L. 110–246). June 18, 2008. Available at: *https://www.congress.gov/110/plaws/publ246/PLAW-110publ246.pdf*.

[156] *Geographic Preference Option for the Procurement of Unprocessed Agricultural Products in Child Nutrition Programs* (75 FR 20316, April 4, 2011). Available at: *https://www.federalregister.gov/documents/2011/04/22/2011-9843/geographic-preference-option-for-the-procurement-of-unprocessed-agricultural-products-in-child*.

[157] U.S. Department of Agriculture. *Procurement Geographic Preference Q&As*. February 1, 2011. Available at: *https://www.fns.usda.gov/cn/procurement-geographic-preference-qas*.

and food safety concerns, would hinder local purchasing. An advocacy group stated that vendors should be required to substantiate that local production requirements are met and recommended that cost incentives be provided to support procurement of local food products. A union, school food service staff member, and an advocacy group agreed that additional funding is needed to make local procurement viable for many program operators, especially in certain States and territories. A State agency and an advocacy group expressed concerns about cost as a barrier to local procurement among CACFP operators.

USDA requested public input on the following questions related to the geographic preference expansion proposal:

- Do respondents agree that this approach would ease procurement challenges for child nutrition program operators interested in sourcing food from local producers?
- Do respondents agree that this approach would encourage smaller-scale producers to submit bids to sell local foods to child nutrition programs?

Several respondents provided input on the first question, regarding whether the proposed approach would ease procurement challenges. Many respondents indicated that expanding school food authorities' options for geographic preference in procurement would streamline local purchasing for child nutrition program operators. Advocacy groups, a trade association, and a State agency noted that the proposal would remove uncertainties and facilitate clear, predictable procurement processes. An academic institution stated that not all program operators are willing and able to apply geographic preference in its current form due to its complexity. This respondent noted that the proposal would ease procurement challenges and enable program operators to spend less time on the administrative aspects of the procurement process and more time incorporating local foods into program menus. A professional organization and dietitian expressed that the proposal would help program operators that operate smaller-scale programs more easily purchase local products.

In response to the second question, many respondents agreed that the proposed approach would encourage smaller-scale producers to submit bids to sell foods to child nutrition programs. Respondents emphasized that expanding geographic preference options would make local and small-scale producers more competitive in the bidding process. A couple of advocacy groups and a State agency asserted that the proposal would simplify bid writing. One advocacy group suggested that local and smaller food producers have a hard time competing against larger producers and distributors, and multiple individuals and advocacy groups emphasized that the proposal could provide smaller local producers a ''competitive edge''. An academic institution stated that the proposal would encourage local producers to submit bids and provide a steady market for smaller-scale producers.

Final Rule

This final rule codifies, without changes, USDA's proposal to expand the geographic preference option by allowing child nutrition program operators to use ''locally grown'', ''locally raised'', or ''locally caught'' as procurement specifications (a written description of the product or service that the vendor must meet to be considered responsive and responsible) for unprocessed or minimally processed food items in the child nutrition programs. The definition of unprocessed, and the minimal food handling and processing techniques allowed within that definition, remains unchanged in this final rule (7 CFR 210.21(g)(2), 220.16(f)(2), 225.17(e)(2), and 226.22(c)(1). USDA agrees with comments that suggested this provision will support increased procurement of local foods by child nutrition program operators. This change may encourage smaller-scale producers to submit bids to sell local foods to child nutrition programs and may ease procurement challenges for program operators interested in sourcing food locally.

USDA will provide guidance and resources on implementing this final standard, including but not limited to: updating the geographic preference section of the *Procuring Local Foods for the Child Nutrition Programs* guide,[158] *the Geographic Preference Fact Sheet,*[159] and *Geographic Preference Q&As Part I*[160] and *Part II.*[161] These resources and guidance respond to comments citing the need for program operators to adopt a definition of ''local'' that will support fair and open competition in the procurement and bidding process. Updates to these resources will also help program operators choose appropriate procurement methods; conduct market research, requests for information, and producer outreach as needed; and retain appropriate documentation while implementing this final standard. USDA will continue to allow State agencies and program operators to adopt their own definition of ''local'' and will not prescribe a Federal definition for the purpose of procuring local foods for child nutrition programs. Program operators are encouraged to adopt definitions of ''local'' that best suit their distinct needs and goals, for example based on their community's unique geography and climate, the availability of local producers and manufacturers, and program participants' interest in local products.

In response to comments requesting that USDA allow procurement values beyond local, such as certified organic or certified by an independent animal welfare program as procurement specifications, USDA will clarify in updated guidance and resources that these and other similar production standards are already allowable as specifications in program operators' procurement solicitations as long as they do not overly restrict competition. USDA will also continue to provide training, technical assistance, and, under certain circumstances as available, financial support, to program operators to help them mitigate costs and other barriers to local food procurement. Since January 2021, USDA has provided:

- $200 million for States to purchase local foods for schools through the Local Food for Schools Cooperative Agreement Program;
- Nearly $3.8 billion in Supply Chain Assistance funds for schools to purchase domestic foods, including $1.3 billion for SY 2023–2024;
- $140 million for Equipment Assistance Grants to help schools buy kitchen equipment, which can help them process local foods; and
- $94 million to provide children with nutritious, local foods and agricultural education through expanded Farm to School engagement.[162]

Accordingly, this final rule amends 7 CFR 210.21(g)(1), 215.14a(e),

[158] U.S. Department of Agriculture. *Procuring Local Foods for the Child Nutrition Programs.* Available at: *https://fns-prod.azureedge.us/sites/default/files/resource-files/June22F2SProcurementGuide508.pdf.*

[159] U.S. Department of Agriculture. *Geographic Preference Fact Sheet.* Available at: *https://www.fns.usda.gov/f2s/geographic-preference.*

[160] U.S. Department of Agriculture. *Procurement Geographic Preference Q&As.* February 1, 2011. Available at: *https://www.fns.usda.gov/cn/procurement-geographic-preference-qas.*

[161] U.S. Department of Agriculture. *Procurement Geographic Preference Q&As: Part II.* October 9, 2012. Available at: *https://www.fns.usda.gov/cn/procurement-geographic-preference-qas-%E2%80%93-part-ii.*

[162] U.S. Department of Agriculture. *USDA Support for School Meals.* Available at: *https://www.fns.usda.gov/cn/support-schools.*

220.16(f)(1), 225.17(e)(1), and 226.22(c)(1), to codify the expansion of the geographic preference option to allow ''locally grown'', ''locally raised'', or ''locally caught'' as procurement specifications. Program operators may begin implementing the expanded geographic preference option in their procurement processes immediately following this rule's effective date. Program operators remain responsible for complying with all Federal, State, and local procurement regulations. NSLP and SBP program operators' compliance with Federal procurement regulations will continue to be monitored through State agency oversight of procurement.

Section 20: Miscellaneous Changes

In addition to the major provisions of this rulemaking, USDA is finalizing a variety of miscellaneous changes to the child nutrition program regulations. The miscellaneous changes update terminology used in the regulations, remove outdated information, and correct cross references. However, as detailed below, this rule does not finalize the proposed terminology change for the meats/meat alternates component. Additionally, USDA is finalizing a severability clause in this rulemaking, as detailed below. In the event any changes made by this rulemaking are to be held invalid or unenforceable, USDA intends that the other changes will remain. USDA has further specified what requirement would replace the invalidated change.

Terminology Change: Protein Sources Component [Not Finalized]

Current child nutrition program regulations use the term ''meats/meat alternates'' for the meal component that includes beans and peas, whole eggs, tofu, tempeh, meat, poultry, fish, cheese, yogurt, soy yogurt, peanut butter and other nut or seed butters, and nuts and seeds. USDA proposed to change the name of the meats/meat alternates meal component in the NSLP, SBP, and CACFP regulations to ''protein sources.'' Under this proposal, all references in 7 CFR parts 210, 220, and 226 to ''meats/meat alternates'' would change to ''protein sources.'' The foods within this meal component would remain unchanged.

Public Comments

USDA received 240 comments on this proposed terminology change, including 131 unique comments. Of these, 57 supported the proposal, all of which were unique comments, 120 were opposed, including 31 unique comments, and 63 were mixed, including 43 unique comments. Comments were submitted by State agencies, school nutrition professionals, advocacy groups, industry respondents, dietitians, and CACFP sponsoring organizations.

A dietitian argued that the proposed meal component name of ''protein sources'' sounded ''much more appealing'' than meats/meat alternates. Another respondent suggested protein sources ''makes more sense'' as a meal component name compared to meats/meat alternates. An advocacy group supported the change, maintaining that the term ''meats/meat alternates'' creates a negative perception of plant-based foods and is confusing to child nutrition operators, families, and students. A school district agreed, suggesting the proposed terminology change would help in communications with families. Similarly, an advocacy group suggested that ''terminology has changed'' and renaming the component would improve understanding for school nutrition professionals and families. A school district noted that children struggle to understand the current term and maintained that ''protein'' is a universally understood term that better describes the component. A State agency supported the change, but requested USDA consider the burden some States may face to revise and reprint resources due to the change.

Opponents argued that the change would require costly updates to materials, would require significant retraining, and would make it difficult to determine which foods are creditable under the protein source meal component. For example, an industry respondent stated that renaming the meats/meat alternates component to the protein sources component is akin to renaming the milk component to the calcium component, describing the proposal as inaccurate and misleading. An advocacy group agreed, citing concerns about potential confusion with protein-labeled food items, or specific products such as protein bars and protein shakes, which do not credit toward the meats/meat alternates component (and would not credit toward the protein sources component, if the change is finalized). This respondent argued that implementing this change would require significant technical assistance. Further, the same advocacy group maintained that the proposed terminology change would create financial burden for retraining providers and developing new documents and materials. A State agency provided similar feedback, asserting that the proposed terminology change would require a ''tremendous'' number of staff hours to update documents. Another State agency also cited concerns about the burden of implementing this change and noted that they have not encountered problems with the current terminology.

Conversely, one school district acknowledged that updating and reprinting materials may be costly, but still supported the change. This respondent saw renaming the component as an opportunity to ''update and refresh'' the program with terms participants would understand. An industry respondent suggested that phasing in the change over several years would allow industry to plan label inventories and resource allocation to minimize the anticipated impact of making the terminology change.

A few respondents offered mixed feedback or alternative suggestions. One State agency recommended keeping the meal component names ''simple'' and suggested aligning with MyPlate, which includes the following food groups: fruits, vegetables, grains, protein foods, and dairy. However, this respondent noted that, due to the requirement to offer milk with school meals, the MyPlate dairy group would need to be replaced with a milk group. An industry respondent suggested that USDA name the meal component ''proteins'' instead of ''protein sources'' for brevity. An advocacy group recommended that USDA allow quinoa to credit toward the protein sources component. Additionally, this respondent recommended that tofu and soy products and beans, peas, and lentils be allowed to credit as protein sources even if they are not visually recognizable. An advocacy group encouraged USDA to provide ''a national list of definitive protein sources'' for child nutrition program operators. A different advocacy group stated that making this change in some child nutrition programs, but not SFSP, would create confusion for operators that participate in multiple programs. A State agency, school district, and another respondent strongly encouraged USDA to prioritize making similar changes in SFSP to address inconsistencies and align terminology across all child nutrition programs.

Final Rule

In response to public comments, USDA is not finalizing the proposal to change the name of the meats/meat alternates meal component in the NSLP, SBP, and CACFP regulations to ''protein sources.'' USDA appreciates concerns that respondents raised with the proposed terminology change, including the challenge of updating State and

local materials to reflect the change. Although these changes could have been accomplished over time, and State and local operators would not have been penalized for using the prior terminology, USDA will not finalize this proposed change given respondent concerns. In addition, many respondents from the CACFP community recommended that USDA assess the potential impacts of terminology changes on all child nutrition program operators prior to making them. USDA will consider this suggestion when considering potential terminology changes in the future.

USDA also appreciates comments regarding potential confusion about foods that would credit toward the ''protein sources'' component. Although the proposed terminology change would not have changed current guidelines regarding foods that may credit toward the existing meats/meat alternates component,[163] [164] USDA appreciates that use of the word ''source'' in the proposed component name could have created confusion for operators. The child nutrition programs use a food-based menu planning approach, which helps to ensure that children are offered (and learn to build) meals that include key food groups recommended by the *Dietary Guidelines*. In the near term, based on input from respondents, USDA has determined the meats/meat alternates component name better reflects the food-based menu planning approach.

USDA appreciates respondent suggestions for other potential component names, such as ''proteins'' and ''protein foods.'' USDA also appreciates respondent feedback on other changes USDA could make to the meal components, including which meal component certain foods credit toward. However, for the reasons detailed above, this final rule maintains the meats/meat alternates component name and does not make any changes to food crediting guidelines for this component.

[163] For information on crediting the meat/meat alternate component, see the *Food Buying Guide for Child Nutrition Programs,* available at: *https://www.fns.usda.gov/tn/food-buying-guide-for-child-nutrition-programs*.

[164] Exceptions include certain smoothie ingredients and pasta products made from vegetable flours. See Question 104: U.S. Department of Agriculture, *Meal Requirements Under the NSLP & SBP: Q&A for Program Operators Updated to Support the Transitional Standards Effective July 1, 2022,* March 2, 2022. Available at: *https://www.fns.usda.gov/cn/sp052022-questions-answers-program-operators*.

Terminology Change: Beans, Peas, and Lentils

The *Dietary Guidelines, 2020–2025,* changed the terminology for the ''legumes (beans and peas)'' vegetable subgroup to ''beans, peas, and lentils.'' [165] The foods within this vegetable subgroup did not change. USDA proposed to change the name of the ''legumes (beans and peas)'' vegetable subgroup in the school meal pattern regulations to align with the *Dietary Guidelines*. Under this proposal, all references in 7 CFR parts 210 and 220 to ''legumes (beans and peas)'' would change to ''beans, peas, and lentils'' for consistency with the terminology used in the *Dietary Guidelines*. The foods within this vegetable subgroup and the related requirements would remain unchanged. USDA also proposed to change references to ''beans and peas (legumes)'' in 7 CFR part 226 to ''beans, peas, and lentils''.

Public Comments

USDA received 134 comments on this proposed terminology change, including 45 unique comments. Comments were submitted by State agencies, advocacy groups, and individuals. An advocacy group stated that the proposed change ''brings the school nutrition language into alignment with the language used in the *Dietary Guidelines*.'' A State agency agreed, suggesting that this change would improve ''consistency with terminology used in the *Dietary Guidelines*.'' A few other respondents, including advocacy groups and individuals, expressed support for the terminology change.

While fewer respondents opposed the ''beans, peas, and lentils'' terminology change compared to the ''protein sources'' terminology change, those who did gave similar reasons for their opposition. For example, a State agency opposed the change, suggesting that terminology changes would require all materials that use the terms to be redone and redistributed which would be costly and time consuming. A few respondents, including a State agency, did not oppose the change, but suggested adding ''dry'' in ''beans, peas, and lentils'' to avoid confusing vegetables in this subgroup with fresh green beans and peas, which count toward the ''other'' vegetable subgroup and the starchy vegetable subgroup, respectively.

[165] See ''About Beans, Peas, and Lentils,'' page 31. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition*. December 2020. Available at: *https://www.dietaryguidelines.gov/*.

Final Rule

USDA is finalizing the proposal to change the name of the ''legumes (beans and peas)'' vegetable subgroup in the school meal pattern regulations and to change references to ''beans and peas (legumes)'' in CACFP regulations. This final rule will instead refer to ''beans, peas, and lentils,'' consistent with the terminology used in the *Dietary Guidelines*. Additionally, USDA is extending this change to SFSP based on public input encouraging consistent terminology across child nutrition programs.

USDA acknowledges that some respondents recommended including the word ''dry'' before the NSLP vegetable subgroup name ''beans, peas, and lentils,'' to differentiate from green peas and green beans. However, USDA has opted to maintain the proposed terminology change without modification. As noted, the vegetable subgroup name in the *Dietary Guidelines* is ''beans, peas, and lentils.'' Therefore, the terminology for the NSLP vegetable subgroup name finalized in this rule aligns with the *Dietary Guidelines*. To clarify, the vegetables that count toward this subgroup in the school meal programs have not changed; only the name of the subgroup has changed. Green peas will continue to count toward the starchy vegetable subgroup, and fresh green beans will continue to count toward the ''other'' vegetable subgroup.[166]

While USDA encourages stakeholders to update materials to reflect this change, USDA anticipates a transition period and does not expect these updates to happen immediately. State and local operators will not be penalized for using the prior terminology.

Accordingly, this final rule amends 7 CFR parts 210, 220, 225, and 226 to change references to ''legumes (beans and peas)'' and ''beans and peas (legumes)'' to ''beans, peas, and lentils.'' Child nutrition program operators are not required to change menus or

[166] According to the *Dietary Guidelines,* ''Green peas and green (string) beans are not counted in the beans, peas, and lentils subgroup because the nutrient content of these vegetables is more similar to vegetables in other subgroups.'' The *Dietary Guidelines* consider green peas to be a starchy vegetable, and green beans to be part of the ''other'' vegetable subgroup. NSLP regulations for the vegetable subgroups reflect the *Dietary Guidelines*. See ''About Beans, Peas, and Lentils,'' page 31. U.S. Department of Agriculture and U.S. Department of Health and Human Services. *2020–2025 Dietary Guidelines for Americans. 9th Edition*. December 2020. Available at: *https://www.dietaryguidelines.gov/*.

operations as a result of this terminology change, but are encouraged to proactively transition to the new terminology.

Technical Corrections

This final rule makes several additional technical corrections to the regulations, which are outlined by regulatory section below. These proposed technical corrections would not make substantive changes to the child nutrition programs. Instead, the proposed corrections, which are reflected in the proposed amendatory language, generally fall into the following categories:

- Removing outdated terminology or updating terminology and definitions for consistency across regulations.
- Removing outdated implementation dates.
- Removing requirements that are no longer in effect.
- Reordering the school meal pattern meal component paragraphs to reflect the order used in the meal pattern tables.
- Revising meal pattern tables to improve usability.
- Correcting erroneous cross-references.

Please see *Note about Amendatory Instructions,* below, for information about how these changes are addressed in the amendatory instructions.

7 CFR part 210: National School Lunch Program

7 CFR 210.2 Definitions

- Remove definition of *CND,* which is no longer in use.
- Replace the definition of *Food component* with the definition of *Meal component*.
- Redesignate paragraphs to use numbers instead of letters (*e.g.,* (1) and (2) instead of (a) and (b)) in the definitions of *Reduced price lunch, School, State agency,* and *State educational agency*.
- Remove outdated language in the definition of *Residential child care institution*.
- Revise the definition of *Yogurt* to reflect changes to the FDA standard of identity of yogurt.

7 CFR 210.3 Administration

- 7 CFR 210.3(a): Remove sentence referring to ''the CND,'' a term no longer in use.

7 CFR 210.4 Cash and Donated Food Assistance to States

- 7 CFR 210.4(b)(3): Remove incorrect cross-reference to afterschool snacks section of regulations (§ 210.10(n)) and add the correct cross-reference (§ 210.10(o)).

7 CFR 210.7 Reimbursement for School Food Authorities

- 7 CFR 210.7(d): Remove erroneous cross-reference to § 220.23, which is no longer in effect.
- 7 CFR 210.7(e): Correct erroneous cross-reference to afterschool snacks section of regulation (from § 210.10(n)(1) to § 210.10(o)(1)).

7 CFR 210.9 Agreement With State Agency

- 7 CFR 210.9(b)(21): Remove outdated implementation date.
- 7 CFR 210.9(c): Remove incorrect cross-reference to afterschool snacks section of regulations (§ 210.10(n)(1)) and add the correct cross-reference (§ 210.10(o)(1)).

7 CFR 210.10 Meal Requirements for Lunches and Requirements for Afterschool Snacks

- Change all references from ''food components'' to ''meal components''.
- 7 CFR 210.10(c): Add minimum creditable amount for all meal components in meal pattern table footnotes.
- In meal pattern tables, add or revise titles for clarity.
- In meal pattern tables, change footnotes to use numbers instead of letters and combine related footnotes to improve readability.

7 CFR 210.11 Competitive Food Service and Standards

- 7 CFR 210.11(m) (redesignated to paragraph (l)): Combine fluid milk and milk alternatives paragraphs and cross-reference § 210.10(d)(1) and (2) instead of repeating milk standards in § 210.11.
- 7 CFR 210.11(m) (redesignated to paragraph (l)): Adjust punctuation to improve readability.
- 7 CFR 210.11(i) and (n): Remove outdated implementation dates.

7 CFR 210.12 Student, Parent, and Community Involvement

- 7 CFR 210.12(e): Correct erroneous cross-reference to local school wellness policies by replacing § 210.30(d) with § 210.31(d).

7 CFR 210.14 Resource Management

- 7 CFR 210.14(e): Remove outdated implementation date.
- 7 CFR 210.14(e)(5)(ii)(D): Remove outdated implementation date.
- 7 CFR 210.14(e)(6)(iii): Remove outdated language.
- 7 CFR 210.14(f): Remove outdated implementation date.

7 CFR 210.15 Reporting and Recordkeeping

- 7 CFR 210.15(b)(9): Correct erroneous cross-reference to local school wellness policies by replacing § 210.30(f) with § 210.31(f).

7 CFR 210.18 Administrative Reviews

- 7 CFR 210.18(h)(2)(x): Correct erroneous cross-reference to local school wellness policies by replacing § 210.30 with § 210.31.

7 CFR 210.19 Additional Responsibilities

- 7 CFR 210.19(f): Remove outdated implementation date.

7 CFR 210.20 Reporting and Recordkeeping

- 7 CFR 210.20(a)(6) and (7): Remove requirements that are no longer in effect.
- 7 CFR 210.20(b)(10): Remove requirement that is no longer in effect.

7 CFR 210.29 Management Evaluations

- 7 CFR 210.29(d)(3): Remove incorrect physical address for the Food and Nutrition Service.

7 CFR Part 220: School Breakfast Program

7 CFR 220.2 Definitions

- Remove erroneous cross-references to § 220.23, which is no longer in effect.
- Remove definitions of *CND, OA,* and *OI,* which are no longer in use.
- Revise definitions of *Department, Distributing agency, Fiscal year, FNS, FNSRO, Free breakfast, Reduced price breakfast, Reimbursement, School Food Authority,* and *State agency* for consistency with definitions in 7 CFR 210.2.
- Remove the definition of *Food component* and instead add the definition of *Meal component*.
- Remove the definitions of *Menu item* and *Nutrient Standard Menu Planning/Assisted Nutrient Standard Menu Planning,* which are no longer in use under food-based menu planning.
- Remove the second definition of *Non-profit,* which is duplicative and outdated.
- Remove outdated language in the definition of *Residential child care institution.*
- Revise the definition of *Yogurt* to reflect changes to the FDA standard of identity of yogurt.

7 CFR 220.3 Administration

- 7 CFR 220.3(a): Remove sentence referring to ''the CND,'' a term no longer in use.

7 CFR 220.7 Requirements for Participation

- 7 CFR 220.7(e)(2), (4), (5), (9), and (13): Revise language for clarity and remove outdated references.
- 7 CFR 220.7(h): Correct erroneous cross-reference to local school wellness policies by replacing § 210.30 with § 210.31.

7 CFR 220.8 Meal Requirements for Breakfasts

- Change all references from ''food components'' to ''meal components''.
- 7 CFR 220.8(a)(2): Change reference from ''reimbursable lunch'' to ''reimbursable breakfast''.
- 7 CFR 210.10(c): Add minimum creditable amount for all meal components in meal pattern table footnotes.
- In meal pattern tables, add or revise titles for clarity.
- In meal pattern tables, change footnotes to use numbers instead of letters and combine related footnotes to improve readability.
- 7 CFR 210.10(c)(2)(i)(A): Remove reference to crediting enriched macaroni at lunch.
- 7 CFR 210.10(c)(2)(v): Add fluid milk as a listed meal component in paragraph (c)(2).

7 CFR 220.13 Special Responsibilities of State Agencies

- 7 CFR 220.13(b)(3): Remove requirements that are no longer in effect.
- 7 CFR 220.13(c): Remove outdated references to ''OI''.
- 7 CFR 220.13(f)(3): Remove erroneous cross-reference to § 220.23, which is no longer in effect.
- 7 CFR 220.13(l): Remove requirement that is no longer in effect.

7 CFR 220.14 Claims Against School Food Authorities

- Remove references to the term ''CND'', which is no longer in use.

7 CFR Part 225: Summer Food Service Program

7 CFR 225.16 Meal Service Requirements

- Change all references from ''food components'' to ''meal components''.

7 CFR part 226: Child and Adult Care Food Program

7 CFR 226.2 Definitions

- Remove outdated language in the definition of ''Functionally impaired adult''.
- Add definition for ''meal component''.

7 CFR 226.20 Requirements for Meals

- Change all references from ''food components'' to ''meal components''.
- Change all references from ''grains'' to ''grain items'' within the footnotes to meal pattern tables.
- Update the meats/meat alternates row at 7 CFR 226.20(c) in the Meal Patterns for Children Age 1 through 18 and Adult Participants to use ounce equivalents and refer to meats/meat alternates sources generally, instead of listing specific foods within the category.
- In meal pattern tables, revise certain footnotes for clarity and combine related footnotes to improve readability.

Note About Amendatory Instructions

As detailed above, USDA is making a variety of minor technical changes in this rulemaking. For example, this rule removes outdated implementation dates and makes minor wording changes throughout the school meal program regulations to reflect current terminology. At the direction of the Office of the Federal Register,[167] instead of drafting the specific and targeted amendatory instructions to make these individual changes, USDA is providing full context for these changes by including not only the revised content, but also the unchanged content that appears adjacent to the changed text. As such, large sections of the existing regulations are reprinted in the amendatory instructions of this rule without change, beyond the minor technical corrections detailed above. All substantive changes made by this rulemaking are explained in this preamble.

Severability

USDA is finalizing a severability clause for changes to the meal pattern requirements made by this rulemaking. In the event any changes made by this rulemaking were to be held invalid or unenforceable, USDA intends the remainder of the changes to remain in place. USDA further specifies what requirement would replace the invalidated change. This final rule adds a new paragraph (r) to 7 CFR 210.10 (NSLP meal pattern requirements) providing that if any provision of such section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstances, it shall be severable from that section and not affect the remainder thereof. In the event of such holding of invalidity or unenforceability of a provision, the regulations provide that the meal pattern requirement covered by that provision would revert to the version that immediately preceded the invalidated provision. This final rule adds similar paragraphs to 7 CFR 220.8 (SBP meal pattern requirements), and 7 CFR 226.20 (CACFP meal pattern requirements).

[167] Office of the Federal Register. *Amendatory instruction: Revise and Republish.* Available at: *https://www.archives.gov/federal-register/write/ddh/revise-republish.*

Section 21: Summary of Changes

This section provides a high-level overview of the provisions finalized in this rulemaking. It includes:

- A descriptive summary of changes; and
- A table detailing the changes, including the child nutrition program or programs that the changes apply to, and their implementation dates.

21A: Descriptive Summary of Changes

This section provides a narrative summary of the changes finalized in this rulemaking, including the implementation dates.

Section 2: Added Sugars

This rulemaking finalizes the following added sugars limits in the school lunch and breakfast programs:

- *Product-based limits:* this rulemaking implements the following product-based limits for school meals; these limits must be implemented by SY 2025–2026:
- *Breakfast cereals:* limited to no more than 6 grams of added sugars per dry ounce.
- *Yogurt:* limited to no more than 12 grams of added sugars per 6 ounces.
- Flavored milk: limited to no more than 10 grams of added sugars per 8 fluid ounces or, for flavored milk sold as a competitive food for middle and high schools, 15 grams of added sugars per 12 fluid ounces.
- *Weekly dietary limit:* this rulemaking implements a dietary specification limiting added sugars to less than 10 percent of calories per week in the school lunch and breakfast programs; this weekly limit, which must be implemented by SY 2027–2028, is in addition to the product-based limits described above.

This rulemaking also extends the product-based added sugars limits for breakfast cereals and yogurt to CACFP; this change must be implemented by October 1, 2025. These added sugars limits replace the existing total sugars limits for breakfast cereals and yogurt in CACFP.

Section 3: Milk

Section 3A: Flavored Milk

This final rule maintains the current regulation allowing all schools to offer fat-free and low-fat milk, flavored and unflavored, to K–12 students, with the new proposed added sugars limit for flavored milk. This final rule also continues to allow SMP and CACFP operators to offer fat-free and low-fat milk, flavored and unflavored, to participants ages 6 and older. Because this rule finalizes the current flavored milk requirements, child nutrition program operators will not need to make changes to their menus to comply with this provision, beyond complying with the product-based added sugars limit for flavored milk in *Section 2: Added Sugars* upon implementation.

Section 3B: Fluid Milk Substitutes: Responses to Request for Input

This final rule reorganizes the NSLP regulatory text related to fluid milk substitutes for non-disability reasons. This rule moves the regulatory text explaining the non-disability fluid milk substitute requirements from paragraph (m) of 7 CFR 210.10—which discusses exceptions and variations allowed in reimbursable meals—to paragraph (d) of 7 CFR 210.10—which discusses the fluid milk requirements. Schools are not required to change menus or operations as a result of this technical change.

This final rule does not make any substantive changes to the non-disability fluid milk substitute request process outlined in regulation; USDA does not have the authority to change the statutory requirements for non-disability fluid milk substitutes.

Section 3C: Fluid Milk Substitutes: Nutrient Requirements

As a conforming amendment, this final rule changes the units for vitamin A and vitamin D requirements for fluid milk substitutes in all child nutrition programs. Instead of 500 IUs, the unit for the vitamin A requirement is now 150 mcg retinol activity equivalents (RAE) per 8 fluid ounces. Instead of 100 IUs, the unit for the vitamin D requirement is now 2.5 mcg per 8 fluid ounces. Child nutrition program operators are not required to change menus or operations as a result of this technical change.

Section 4: Whole Grains

This final rule maintains the current whole grains requirement that at least 80 percent of the weekly grains offered in the school lunch and breakfast programs are whole grain-rich, based on ounce equivalents of grains offered. It also codifies the definition of ''whole grain-rich'' in NSLP, SBP, and CACFP regulations, to mean that the grain content of a product is between 50 and 100 percent whole grain. Lastly, this final rule updates the definition of ''entrée item'' in the competitive food service regulations to clarify that both whole-grain rich and enriched grain entrées offered as part of a reimbursable school meal may qualify as an ''entrée item'' when sold à la carte as a ''Smart Snack.'' Because this rule finalizes the current whole grain-rich requirements and whole grain-rich definition, child nutrition program operators will not need to make changes to comply with the whole grain-rich provision of this rule.

Section 5: Sodium

This final rule maintains current sodium limits at school lunch and breakfast through June 30, 2027, and implements one reduction in school lunch and breakfast sodium limits that schools must implement by July 1, 2027. As suggested by numerous stakeholders, this final rule also commits to conducting a study on potential associations between sodium reduction and student participation in school meals.

Section 6: Meats/Meat Alternates at Breakfast

This final rule codifies the combined grains and meats/meat alternates meal component at K–12 breakfast and removes the requirement for schools to offer 1.0 ounce equivalent of grains each day at breakfast. Schools may offer grains, meats/meat alternates, or a combination of both to meet the minimum ounce equivalents in this combined component requirement. This change provides schools with more menu planning flexibility at breakfast. Schools are not required to change menus or operations as a result of this provision.

Section 7: Substituting Vegetables for Grains in Tribal Communities

The final rule codifies the proposal to add school food authorities and schools that are tribally operated, operated by the Bureau of Indian Education, and that serve primarily American Indian or Alaska Native children to the list of schools at 7 CFR 210.10(c)(3) and 220.8(c)(3) that may serve vegetables to meet the grains requirement in NSLP and SBP. For SFSP and CACFP, USDA finalizes the proposal to revise 7 CFR 225.16(f)(3) and 226.20(f) to allow sponsors, institutions, and facilities, as applicable, that serve primarily American Indian or Alaska Native participants to substitute vegetables for grains or breads. Additionally, this final rule allows all schools, sponsors, institutions, and facilities in Guam and Hawaii to serve vegetables to meet the grains or breads requirement. These changes provide child nutrition program operators an optional menu planning flexibility. Program operators are not required to change menus or operations as a result of this provision.

Section 8: Traditional Indigenous Foods

This final rule codifies the proposal to explicitly state in regulation that traditional Indigenous foods may be served in reimbursable school meals. Regulations at 7 CFR 210.10(c)(7) and 220.8(c)(4) will include the definition of traditional foods from the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)), which defines traditional food as ''food that has traditionally been prepared and consumed by an [American] Indian tribe,'' including wild game meat, fish, seafood, marine mammals, plants, and berries. Schools are not required to change menus or operations as a result of this technical change.

Section 9: Afterschool Snacks

This final rule aligns NSLP snack meal pattern requirements for K–12 children with the CACFP snack meal pattern requirements, as required by the National School Lunch Act (NSLA, 42 U.S.C. 1766a(d)). Additionally, this rule finalizes the provision from the 2020 proposed rule to revise the definition of *Child.* This change clarifies that children who are age 18 and under at the start of the school year may receive reimbursable NSLP snacks, consistent with statute (NSLA, 42 U.S.C. 1766a(b)). As with the proposed rule, this final rule changes all regulatory references in 7 CFR part 210 from ''meal supplements'' to ''afterschool snacks.'' The change to NSLP snack meal pattern requirements must be implemented by July 1, 2025.

Section 10: Substituting Vegetables for Fruits at Breakfast

This final rule continues to allow schools to substitute vegetables for fruits in the SBP and simplifies the vegetable variety requirement. Under this final rule, schools choosing to offer vegetables at breakfast one day per school week have the option to offer any vegetable, including a starchy vegetable. Schools that choose to substitute vegetables for fruits at breakfast on two or more days per school week are required to offer vegetables from at least two different subgroups. The vegetable subgroups that schools may choose from

include dark green, red/orange, beans, peas, and lentils, starchy, and ''other'' vegetables.

Section 11: Nuts and Seeds

This final rule codifies the proposal to allow nuts and seeds to credit for the full meats/meat alternates component in all child nutrition programs and meals, removing the 50 percent crediting limit for nuts and seeds at breakfast, lunch, and supper. This change provides child nutrition program operators more menu planning flexibility. Program operators are not required to change menus or operations as a result of this provision.

Section 12: Beans, Peas, and Lentils at Lunch

This final rule codifies the option for schools to count beans, peas, and lentils offered as a meat alternate at lunch toward the weekly beans, peas, and lentils vegetable subgroup requirement. Under this option, as with the current requirement, menu planners would determine which overall meal component beans, peas, and lentils would count toward: the vegetable meal component, or the meats/meat alternates meal component. Beans, peas, and lentils offered to students as either vegetables or meat alternates can count toward the weekly requirement to offer ½ cup of beans, peas, and lentils. This change provides schools with more menu planning flexibility at lunch. Schools are not required to change menus or operations as a result of this provision.

Section 13: Competitive Foods: Bean Dip Exemption

This final rule adds *bean dip* to the list of foods exempt from the total fat standard in the Smart Snacks regulations. This exemption applies to products marketed as hummus, as well as bean dips made from any variety of beans, peas, or lentils. Bean dip will continue to be subject to the saturated fat standard for Smart Snacks, as well as all other Smart Snacks requirements. This change provides schools the option to sell bean dip as a Smart Snack. Schools are not required to change operations as result of this provision.

Section 14: Meal Modifications

This final rule codifies in regulation that State licensed healthcare professionals and registered dietitians may write medical statements to request meal modifications on behalf of child or adult participants with disabilities in the school meal programs and CACFP. It also defines a State licensed healthcare professional as an individual authorized to write medical prescriptions under State law. The change requiring schools, institutions, and facilities to accept medical statements from registered dietitians must be implemented by July 1, 2025, for the school meal programs, and by October 1, 2025, for CACFP. This final rule also updates and reorganizes the regulatory text to distinguish between disability and non-disability requests more clearly. Regarding non-disability requests, this final rule also encourages schools, institutions, and facilities to meet participants' non-disability dietary preferences when planning and preparing school and CACFP meals.

Section 15: Clarification on Potable Water Requirements

This final rule maintains the requirement that schools make plain potable water available and accessible without restriction to children at no charge during the meal service. To clarify this requirement, this final rule adds the word ''plain'' to the potable water regulations. Schools are not required to change menus or operations as a result of this technical change.

Section 16: Synthetic Trans Fats

This final rule removes the dietary specification prohibiting synthetic *trans* fat in the school lunch and breakfast programs, and in foods sold to children on campus during the school day. Under this change, schools will no longer need to include the synthetic *trans* fat prohibition in their procurement documentation, and State agencies will no longer need to review product labels or manufacturer specifications during Administrative Reviews for compliance with the synthetic *trans* fat dietary specification.

Section 17: Professional Standards: Hiring Exception for Medium and Large Local Educational Agencies

This final rule codifies the proposal to allow State agency discretion to approve the hiring of an individual to serve as a school nutrition program director in a medium or large local educational agency, for individuals who have 10 years or more of school nutrition program experience but who do not hold a bachelor's or an associate's degree. Directors hired under this exception must have a high school diploma or GED. At the discretion of the State agency, this change provides local educational agencies an optional hiring flexibility. Schools are not required to change menus or operations as a result of this provision.

Section 18: Buy American

18A: Limited Exceptions to the Buy American Requirement

This final rule maintains the following limited exceptions for the Buy American provision and codifies them in regulation. The two limited circumstances when school food authorities may purchase non-domestic foods are when:

• The product is listed on the FAR 25.104 Nonavailable articles list and/or is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or

• Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

This final rule will also gradually phase in a cap on non-domestic food costs. This cap applies to total commercial food costs. The non-domestic food costs cap will be phased in as follows:

• Beginning in SY 2025–2026, the non-domestic food cost cap will be 10 percent.

• Beginning in SY 2028–2029, the non-domestic food cost cap will be 8 percent.

• Beginning in SY 2031–2032, the non-domestic food cost cap will be 5 percent.

18B: Exception Documentation and Reporting Requirements

This final rule requires school food authorities to maintain documentation to demonstrate use of one of the two limited exceptions for non-domestic food purchases, as detailed in Section 18A. In response to public comments, this final rule exempts products on the FAR 25.104 Nonavailable articles lists from the documentation requirement.

18C: Procurement Procedures

This final rule requires school food authorities to include the Buy American requirements in documented procurement procedures, solicitations, and contracts for foods and food products procured for the school lunch and breakfast programs.

18D: Definition of ''Substantially''

This final rule codifies the following definition of ''substantially'' in the Buy American regulations: ''Substantially using agriculture commodities that are produced in the United States means over 51 percent of a food product must consist of agricultural commodities that were grown domestically.'' This change is consistent with existing USDA policy guidance. Therefore, schools are not expected to need to change menus or

operations as a result of this technical change.

18E: Clarification of Requirements for Harvested Farmed and Wild Caught Fish

This final rule codifies language in regulations regarding how the Buy American requirements apply to fish and fish products offered in the school lunch and breakfast programs. In order to be compliant with Buy American requirements, under this final rule:

- Farmed fish must be harvested within the United States or any territory or possession of the United States.
- Wild caught fish must be harvested within the Exclusive Economic Zone of the United States or by a United States flagged vessel.

This change is consistent with statutory requirements and existing USDA policy guidance. Therefore, schools are not required to change menus or operations as a result of this technical change.

Section 19: Geographic Preference

This final rule expands the geographic preference option by allowing ''locally grown'', ''locally raised'', or ''locally caught'' as procurement specifications (a written description of the product or service that the vendor must meet to be considered responsive and responsible) for unprocessed or minimally processed food items in the child nutrition programs. The definition of unprocessed, and the minimal food handling and processing techniques allowed within that definition, remains unchanged in this final rule. This final rule continues to allow State agencies and program operators to adopt their own definition of ''local'' and does not prescribe a Federal definition of ''local'' for the purpose of procuring local foods for child nutrition programs.

Section 20: Miscellaneous Changes

This final rule makes a variety of miscellaneous changes to the child nutrition program regulations. This rule:

- Removes outdated terminology and updates terminology and definitions for consistency across regulations.
- Removes outdated implementation dates and requirements that are no longer in effect.
- Makes a variety of other technical corrections and changes to the regulations, as detailed in *Section 20: Miscellaneous Changes.*

Child nutrition program operators are not required to change menus or operations as a result of the miscellaneous changes in this rulemaking.

21B: Table of Changes by Program

The chart below details each provision of the rule, the section of the rule that covers the provision, the programs impacted, and the implementation date. For ease of reference, the acronyms used in the chart below are:

- NSLP—National School Lunch Program (7 CFR part 210)
- SMP—Special Milk Program (7 CFR part 215)
- SBP—School Breakfast Program (7 CFR part 220)
- SFSP—Summer Food Service Program (7 CFR part 225)
- CACFP—Child and Adult Care Food Program (7 CFR part 226)

As noted in the *Implementation Dates* column, certain provisions of this rule address requirements that are already in effect. This rulemaking provides an implementation date for these provisions to account for minor corrections and reorganization of the regulatory text. Child nutrition program operators will not need to make any changes to comply with requirements that are already in effect. Additionally, many provisions of this rule provide optional administrative or operational flexibilities. Child nutrition program operators are not required to change menus or operations to comply with provisions that provide optional administrative or operational flexibilities. These provisions are noted in the *Implementation Dates* column.

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Provision	Rule Section	Programs Impacted	Implementation Date
Added Sugars: Product-based Limits for Breakfast Cereals	Section 2	NSLP, SBP, CACFP	NSLP/SBP: July 1, 2025 CACFP: October 1, 2025 *Note: CACFP total sugars limits remain in place through September 30, 2025*
Added Sugars: Product-based Limits for Yogurt	Section 2	NSLP, SBP, CACFP	NSLP/SBP: July 1, 2025 CACFP: October 1, 2025 *Note: CACFP total sugars limits remain in place through September 30, 2025*
Added Sugars: Product-based Limits for Flavored Milks	Section 2	NSLP, NSLP Smart Snacks in School, SBP	July 1, 2025
Added Sugars: Weekly Limit	Section 2	NSLP, SBP	July 1, 2027
Milk: Flavored Milk	Section 3A	NSLP, NSLP Smart Snacks in School, SMP, SBP, CACFP	July 1, 2024 *Note: this rule finalizes the current flavored milk requirements; child nutrition operators will not need to make changes to comply with this requirement, beyond those changes described in Section 2: Added Sugars*
Milk: Fluid Milk Substitutes: Responses to Request for Input	Section 3B	NSLP, SBP	July 1, 2024 *Note: schools are not required to change menus or operations as a result of this provision*
Milk: Fluid Milk Substitutes: Nutrient Requirements	Section 3C	NSLP, SMP, SBP, CACFP	July 1, 2024 *Note: child nutrition program operators are not required to change menus or operations as a result of this provision*
Whole Grains: Whole Grain-rich Requirement	Section 4	NSLP, SBP	July 1, 2024 *Note: this rule finalizes the current whole grain-rich requirements; child nutrition operators will not need to make changes to comply with this requirement*
Whole Grains: Whole Grain-rich Definition	Section 4	NSLP, SBP, CACFP	July 1, 2024 *Note: this rule codifies existing whole grain-rich*

			definition; child nutrition operators will not need to make changes to comply with this requirement
Sodium	Section 5	NSLP, SBP	July 1, 2024 *Note: this rule maintains the current sodium limits for the first three years of implementation; schools will not be required to implement further sodium reductions until July 1, 2027*
Meats/Meat Alternates at Breakfast	Section 6	SBP	July 1, 2024 *Note: schools are not required to change menus or operations as a result of this provision*
Substituting Vegetables for Grains in Tribal Communities	Section 7	NSLP, SBP, SFSP, CACFP	July 1, 2024 *Note: child nutrition program operators are not required to change menus or operations as a result of this provision*
Traditional Indigenous Foods	Section 8	NSLP, SBP	July 1, 2024 *Note: schools are not required to change menus or operations as a result of this provision*
Afterschool Snacks: NSLP Snacks Meal Pattern Requirements	Section 9	NSLP Snacks	July 1, 2025
Afterschool Snacks: All Other Changes	Section 9	NSLP Snacks	July 1, 2024 *Note: schools following the current regulatory requirement are not required to change menus or operations as a result of this provision*
Substituting Vegetables for Fruits at Breakfast	Section 10	SBP	July 1, 2024 *Note: schools following the current regulatory requirement are not required to change menus or operations as a result of this provision*
Nuts and Seeds	Section 11	NSLP, SBP, SFSP, CACFP	July 1, 2024 *Note: child nutrition program operators are not required to change menus or operations as a result of this provision*
Beans, Peas, and Lentils at Lunch	Section 12	NSLP	July 1, 2024 *Note: schools are not required to change menus or operations as a result of this provision*
Competitive Foods: Bean Dip Exemption	Section 13	NSLP Smart Snacks in Schools	July 1, 2024

			Note: schools are not required to change menus or operations as a result of this provision
Meal Modifications: Requirement to Accept Medical Statements from Registered Dietitians	Section 14	NSLP, SBP, CACFP	NSLP/SBP: July 1, 2025 CACFP: October 1, 2025
Meal Modifications: All Other Changes	Section 14	NSLP, SBP, CACFP	July 1, 2024 *Note: child nutrition program operators are not required to change menus or operations as a result of this provision*
Clarification on Potable Water Requirements	Section 15	NSLP, SBP	July 1, 2024 *Note: schools are not required to change menus or operations as a result of this provision*
Synthetic Trans Fat	Section 16	NSLP, NSLP Smart Snacks in School, SBP	July 1, 2024 *Note: schools are not required to change menus or operations as a result of this provision*
Professional Standards: Hiring Exception for Medium and Large Local Educational Agencies	Section 17	NSLP, SBP	July 1, 2024 *Note: schools are not required to change menus or operations as a result of this provision*
Buy American	Section 18A-18E	NSLP, SBP	July 1, 2024 *Note: the cap for non-domestic food purchases will be gradually phased in over time*
Geographic Preference	Section 19	NSLP, SMP, SBP, SFSP, CACFP	July 1, 2024 *Note: child nutrition program operators are not required to change menus or operations as a result of this provision*
Terminology Change: Beans, Peas, and Lentils	Section 20	NSLP, SBP, SFSP, CACFP	July 1, 2024 *Note: child nutrition program operators are not required to change menus or operations as a result of this provision*

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Section 22: Procedural Matters

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, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking has been determined to be significant under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094, and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

Regulatory Impact Analysis

As required for all rules that have been designated as significant under section 3(f)(1) Executive Order 12866 by the Office of Management and Budget, a Regulatory Impact Analysis was developed for this rule. It follows this rule as an Appendix. The following summarizes the conclusions of the regulatory impact analysis:

Need for Action: This rule establishes requirements that align school meals with the goals of the *Dietary Guidelines for Americans, 2020–2025,* and that support the continued provision of nutritious school meals. To develop this rule, USDA considered broad stakeholder input, including written comments received in response to the 2023 proposed rule, oral comments submitted during listening sessions, and a comprehensive review of the *Dietary Guidelines for Americans, 2020–2025.* The proposed rule included a focus on sodium, whole grains, milk, and added sugars. This rule represents the next stage of the rulemaking process to permanently update and improve school meal pattern requirements. In response to public comments, this rule revises the proposed implementation of sodium reductions and maintains current milk requirements allowing schools to offer flavored milk to all K–12 children. Further, this rule finalizes a variety of changes to school meal requirements from the 2020 proposed rule, *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs.* Updates for the Child and Adult Care Food Program (CACFP) and Summer Food Service Program (SFSP) are also included in certain provisions of this rule. Finally, this rulemaking will strengthen Buy American requirements.

Benefits: Making the changes outlined in this rule can lead to improved health outcomes in the long-term. The Regulatory Impact Analysis details potential health benefits because of sodium reductions and added sugars limits over time, as well as information regarding the methodology for selecting specific limits. Sections of this rule on traditional Indigenous foods may have some potential health benefits for American Indian and Alaska Native children and allow for schools to serve more culturally relevant ingredients. This rule maintains the current milk requirements from the transitional standards rule, allowing all schools to offer flavored or unflavored milks to K–12 children. USDA also maintains the requirements that at least 80 percent of the weekly grain offerings in school meals each week are whole grain-rich. This rule builds on the progress schools have already made in improving school meals to support healthy diets for school children while also allowing for operational or administrative flexibilities for geographic preference, meats/meat alternates at breakfast, nuts and seeds, and beans, peas and lentils at lunch. Minor shifts and technical corrections are included in other provisions, such as updating definitions and terminology in the regulations.

Costs: USDA estimates this rule would cost schools between $0.02 and $0.04 per meal or an average of $206 million annually including both the SBP and NSLP starting in SY 2024–2025, accounting for the fact that the requirements will be implemented gradually and adjusting for annual inflation.[168] While some changes—such as aligning the NSLP snack meal pattern with that of CACFP or simplifying requirements for schools that choose to substitute vegetables for fruits at breakfast—are estimated to reduce school food costs or have no cost impact, others are estimated to increase food costs. The costs to schools are mainly due to a shift in purchasing patterns and increased labor costs. An increase in cost due to the Buy American final rule is a result of additional labor and food costs. The changes in this rulemaking are gradual, achievable, and realistic for schools and recognize the need for strong nutrition requirements in school meals. There are no estimated changes in Federal costs due to the changes in this final rule, as the rule does not impact the Federal reimbursement rate for school meals and is not expected to significantly impact baseline participation.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. This rule would have a significant impact on a substantial number of small entities.

The requirements established by this rule apply to school districts, which meet the definitions of ''small governmental jurisdiction'' and ''small entity'' in the Regulatory Flexibility Act. Overall, about 60 percent of school food authorities operating child nutrition programs are considered ''small,'' or having less than 999 students.[169] Under the National School Lunch Act (NSLA, 42 U.S.C. 1758(f)), schools participating in the school lunch or breakfast program are required to serve meals that are consistent with the goals of the most recent *Dietary Guidelines* and that consider the nutrient needs of children who may be at risk for inadequate food intake and food insecurity. This final rule amends 7 CFR parts 210 and 220 that govern school lunch and breakfast program requirements, including the nutrition requirements that schools are required to meet to receive Federal reimbursement for program meals. The changes in this final rule further align school nutrition requirements with the goals of the *Dietary Guidelines for Americans, 2020–2025,* consistent with statute.

Significant Alternatives

As discussed in *Section 3A: Flavored Milk* and *Section 4: Whole Grains,* USDA considered two proposals for the milk provision and a proposal and alternative for the whole grains provision.

For milk, the proposed rule included two alternatives:

- Alternative A: Proposed to allow flavored milk (fat-free and low-fat) at school lunch and breakfast for high school children only, effective SY 2025–2026. Under this alternative, USDA proposed that children in grades K–8 would be limited to a variety of unflavored milk. The proposed regulatory text for Alternative A would allow flavored milk for high school children only (grades 9–12). Flavored milk would be subject to the new proposed added sugars limit.
- Alternative B: Proposed to continue to allow all schools to offer fat-free and low-fat milk, flavored and unflavored, to K–12 children, with the new proposed added sugars limit for flavored milk.

[168] Using 2023 dollars and not adjusting for annual inflation results in $1.256 billion dollars over eight school years (over nine fiscal years) or $52 to $227 million annually ($0.03 per meal), see appendix.

[169] See Appendix A. U.S. Department of Agriculture. *Results of USDA's Food and Nutrition Service-Administered School Food Authority Survey II on Supply Chain Disruption and Student Participation.* July 2023. Available at: *https://fns-prod.azureedge.us/sites/default/files/resource-files/SFASurvey-II-Supply-Chain-072523.pdf.*

For whole grains, the proposed rule included a proposal and an alternative:

- The rule proposed to maintain the current requirement that at least 80 percent of the weekly grains offered in the school lunch and breakfast programs are whole grain-rich, based on ounce equivalents.
- The rule requested public input on an alternative that would require that all grains offered in the school lunch and breakfast programs be whole grain-rich, except that one day each school week, schools may offer enriched grains.

USDA encouraged public input on the options provided for the milk and whole grains provisions, as well as all other aspects of the proposed rule. In some cases, USDA posed specific questions for public input to help inform the final rule. For example, as noted in *Section 2: Added Sugars,* USDA requested public input on whether the proposed implementation dates would provide appropriate lead time to successfully implement the proposed added sugars limits. As noted in *Section 4: Sodium,* USDA requested input on what sodium limits would be achievable for schools and industry, while supporting lower-sodium meals for children. USDA also requested public input on the proposed implementation schedule, as well as the number and level of sodium reductions proposed in the rule. USDA indicated that the Department would use public input received in response to the proposed rule to help inform the final rule.

USDA received 130 public comments from school districts or schools, as well as about 340 comments from school nutrition professionals. Some of these respondents provided details about their school type, and several addressed specific concerns of small or rural schools. For example, one respondent indicated that they work in a ''small school district'' with no central kitchen ''and not enough staff,'' and suggested that these factors make it very hard to do scratch cooking. Another respondent who noted they work at a small charter school also raised concerns about meal preparation, noting that they ''do not have the space, equipment and staff to cook meals from scratch.'' An advocacy group representing small and rural schools added that schools would need to prepare more meals from scratch to further limit sodium. The same respondent noted that smaller schools may not have the funds to hire registered dietitians to assist with menu planning. A school food service professional noted that ''small school systems will struggle to make menu adjustments'' to meet the proposed sodium reductions. Another school food service professional noted that in small schools, staff ''wear many hats'' and have limited time and resources. This respondent was especially concerned about further sodium reductions. While they expressed support for reducing sodium, they suggested USDA consider the impact to student participation and consumption of meals when determining further reductions. An advocacy group representing State rural education associations asserted that the proposed sodium limits would reduce compliant products available to rural schools, which would make it difficult to meet the updated sodium limits.

Regarding the proposed added sugars limits, a State agency suggested that requiring product-based limits and a weekly limit would make it more difficult to successfully administer the programs, especially for smaller schools. An advocacy group representing rural schools asserted that the proposed added sugars limits and sodium reductions would reduce student participation, increase costs, and make it harder for rural schools to procure compliant products. An industry respondent maintained that rural schools may have an easier time implementing the proposed product-based added sugars limits, compared to the proposed weekly added sugars limit. However, a State agency argued that small and rural schools often face limited product options and may not have access to products that meet the proposed product-based added sugars limits. Regarding the proposed limit on grain-based desserts at breakfast, a respondent who works at a small charter school asserted that USDA would need to ''come up with some solutions for what to serve for breakfast grains'' if grain-based desserts, such as toaster pastries and fruit turnovers, are limited at breakfast under the final rule.

A few respondents provided input on the milk and whole grain proposals from the small or rural school perspective. A State agency noted that they have several schools where students from grades 6–12 attend school in the same building. This State agency noted that these smaller schools would face challenges implementing milk Alternative A. For example, smaller schools may not have extra refrigeration space to store flavored milk during the K–5 meal service. Other State agencies raised similar concerns, noting that in some smaller schools, elementary and middle school students may share one breakfast or lunch period, and it would be difficult to restrict flavored milk for some students but not others. An advocacy group representing small and rural schools raised concerns about the potential decrease in student consumption of milk, if flavored milk is restricted.

Regarding whole grains, one school food service professional who stated that they work at a ''small school with limited access to distributors'' supported the proposal to maintain the 80 percent whole grain-rich requirement. This respondent suggested the 80 percent whole grain-rich requirement allows them to occasionally offer enriched tortillas and egg noodles. A respondent that identified as a small and rural school agreed, stating support for the 80 percent whole-grain rich requirement. Another respondent representing small and rural schools suggested that USDA not ''confuse menu planners by changing the whole grain-rich requirements'' and supported maintaining the current 80 percent whole grain-rich requirement.

As discussed throughout the preamble, this rulemaking is based on a comprehensive review of the *Dietary Guidelines,* robust stakeholder input on school nutrition requirements, and lessons learned from prior rulemakings. With this rule, USDA aims to integrate each of these factors in a way that prioritizes children's health while ensuring that the nutrition requirements are achievable for all schools. USDA recognizes that small school districts, like all school districts, will face increased costs and potential challenges in implementing this rule. These costs are not significantly greater for small school districts than for larger ones, as implementation costs are driven primarily by factors other than school district size. Additionally, as noted, about 60 percent of school food authorities operating child nutrition programs are considered ''small,'' or having less than 999 students.[170] Considering that the majority of school food authorities are small, USDA expects the cost impact data presented in the Regulatory Impact Analysis reflects small school food authorities and that there would not be significant differential impacts on them as a result of this rule. Nevertheless, USDA does not discount the special challenges that some smaller school districts may face. As a group, small school districts may have less flexibility to adjust resources in response to immediate budgetary needs. As noted in public comments, some respondents cited challenges that

[170] See appendix A. U.S. Department of Agriculture. *Results of USDA's Food and Nutrition Service-Administered School Food Authority Survey II on Supply Chain Disruption and Student Participation.* July 2023. Available at: *https://fns-prod.azureedge.us/sites/default/files/resource-files/SFASurvey-II-Supply-Chain-072523.pdf.*

small school districts face with limited time and resources, which could make making menu changes at a rapid pace challenging. Therefore, USDA expects that the phased-in implementation period for meal pattern changes finalized in this rule will provide these school districts opportunity for advance planning.

In addition, USDA considered public comments from small and rural school districts, and organizations representing them when determining the final requirements. For example, as discussed in *Section 3A: Flavored Milk,* USDA recognized that implementing Alternative A would be operationally challenging for small schools, where children from many grade levels may share cafeteria space. USDA also appreciates concerns that respondents raised regarding a lack of refrigerated storage space for flavored milk in small schools. This rule finalizes milk Alternative B, which maintains the current requirement allowing all schools to offer fat-free and low-fat milk, flavored and unflavored, to K–12 children. As discussed in *Section 4: Whole Grains,* this final rule maintains the current requirement that at least 80 percent of the weekly grains offered by ounce equivalent are whole grain-rich, which respondents noted has been successfully implemented by many schools. USDA also considered respondent input on other provisions in this rulemaking. For example, based on stakeholder feedback, this rule does not finalize the proposed limit on grain-based desserts offered at breakfast. Additionally, based on public input, this final rule allows schools more time to gradually reduce sodium and includes a commitment from USDA to conduct a study on the potential associations between sodium reduction and student participation. USDA expects that this change from the proposed rule will make the sodium limits more achievable for schools, including small schools, as it will allow more time for menu adjustments and product reformulation. With this rule, USDA intends to improve the school meal nutrition requirements in a way that is practical and attainable for all schools.

More detailed information about the costs associated with provisions of this rulemaking may be found in the Regulatory Impact Analysis.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of $146 million or more (when adjusted for inflation; GDP deflator source: Table 1.1.9 at *http://www.bea.gov/iTable*) in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule. This rule has UMRA impacts, discussed in the Regulatory Impact Analysis conducted by USDA in connection with this rule which includes a cost/benefit analysis and explains the options considered to update the school meal patterns based on the *Dietary Guidelines for Americans, 2020–2025.*

Executive Order 12372

The NSLP, SMP, SBP, SFSP, and CACFP are listed in the Catalog of Federal Domestic Assistance under NSLP No. 10.555, SMP No. 10.556, SBP No. 10.553, SFSP No. 10.559, and CACFP No. 10.558, respectively, and are subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials (see 2 CFR chapter IV). Since the child nutrition programs are State-administered, USDA's FNS Regional Offices have formal and informal discussions with State and local officials, including representatives of Indian Tribal Organizations, on an ongoing basis regarding program requirements and operations. This provides USDA with the opportunity to receive regular input from program administrators and contributes to the development of feasible program requirements.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. This rule has federalism impacts which are discussed below.

Prior Consultation With State Officials

As detailed in the proposed rule, USDA received input from various stakeholders through listening sessions and public comments prior to drafting the proposed rule. USDA held over 50 listening sessions with stakeholder groups that represent national, State, and local interests.[171] USDA also received over 8,000 public comments on the transitional standards final rule prior to drafting the proposed rule. These comments, from State agencies, advocacy groups, school districts, and other stakeholders, helped to inform the proposed rule. To develop this rule, USDA considered over 136,000 public comments received on the proposed rule. State agencies, school nutrition professionals, advocacy groups, industry respondents, professional associations, school districts, CACFP sponsoring organizations, dietitians, and individuals submitted public comments on the proposed rule.

Nature of Concerns and the Need To Issue This Rule

As noted in *Section 1: Background,* child nutrition program stakeholders that commented on the proposed rule raised concerns that changes to the school meal patterns could negatively impact student participation and consumption of meals. Stakeholders also cited issues with product availability, suggesting that the proposed added sugars limits and sodium reductions would cause vendors to leave the school nutrition market and make it more difficult for schools to procure products for meals. The proposed implementation timeframes were also a concern for some stakeholders, who argued that schools would need more time to successfully implement the changes. Stakeholders also raised concerns about school food finances. For example, a school district respondent suggested that transitioning to new or updated requirements would involve purchasing new products, which they asserted would be more expensive. This respondent also raised concerns about the potential for reduced student participation under the updated requirements, which they noted could

[171] As detailed in the proposed rule, USDA held listening sessions with Academy of Nutrition and Dietetics, American Beverage Association, American Commodity Distribution Association, American Heart Association, Center for Science in the Public Interest, Education Trust, FoodCorps, Friends of the Earth, International Dairy Foods Association, National Congress of American Indians, National Indian Education Association, School Nutrition Association, State agencies, Urban School Food Alliance, Whole Grains Council members, and local school districts, including tribally-run schools, and others.

negatively impact school food finances. Another respondent raised similar concerns in connection to the sodium proposal, suggesting that reduced sodium could result in less palatable meals. This respondent suggested that less palatable meals could lead to reduced student participation in school meals, which could negatively impact school food finances. Other respondents suggested that schools are still dealing with high food costs and supply chain issues or provided general comments asserting that more nutritious foods (such as foods with less added sugars) could be more expensive compared to foods that schools currently offer. Stakeholders from the CACFP community expressed concern that USDA did not adequately engage the CACFP community prior to publishing the proposed rule.

USDA greatly appreciates input that child nutrition program stakeholders provided in advance of the proposed rule and through the public comment process. In developing this rule, USDA considered the *Dietary Guidelines,* robust stakeholder input, and lessons learned from prior rulemakings. Further, according to the National School Lunch Act (NSLA, 42 U.S.C. 1758(f)), schools participating in the school lunch or breakfast program are required to serve lunches and breakfasts that are consistent with the goals of the most recent *Dietary Guidelines* and that consider the nutrient needs of children who may be at risk for inadequate food intake and food insecurity. This rulemaking also advances the mission of USDA, which includes a focus on providing effective, science-based public policy leadership in food and nutrition.[172]

Extent To Which We Meet Those Concerns

Through this rulemaking, USDA is updating the school meal patterns in a practical and durable manner for the long-term. USDA has considered the impact of this rulemaking on State agencies, schools, and other child nutrition program operators. This rule aims to update the meal patterns to align with the goals of the *Dietary Guidelines for Americans, 2020–2025* in the most effective and least burdensome manner. For example, while USDA considered a more restrictive milk alternative in the proposed rule, this rule will continue to allow schools to offer all K–12 students flavored milk. Similarly, while USDA considered an alternative approach in the proposed rule, this rule will maintain the current whole grains requirement for school meals, preventing State agencies and schools from needing to implement a new whole grains requirement. When compared to the proposed rule, this rule also allows schools even more time to gradually reduce sodium in school meals and does not go as far as the proposed rule. USDA has also committed to conducting a study on potential associations between sodium reduction and student participation in the school meal programs. Further, this rulemaking includes changes that simplify program operations, for example, by easing restrictions around substituting vegetables for fruits at breakfast; aligning crediting for nuts and seeds, and nut and seed butters, across child nutrition programs; allowing schools to more easily offer meats/meat alternates at breakfast; and providing an additional exception to the professional standards hiring requirements for medium and large local educational agencies. This rulemaking retains other existing regulatory provisions to the extent possible.

Executive Order 12988, Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule permits State or local agencies operating the school lunch or breakfast programs to establish more rigorous nutrition requirements or additional requirements for school meals that are not inconsistent with the nutritional provisions of the rulemaking. Such additional requirements are permissible as part of an effort by a State or local agency to enhance school meals or the school nutrition environment. To illustrate, State or local agencies are permitted to establish more restrictive sodium limits. The sodium limits are stated as maximums (*e.g.,* ≤) and could not be exceeded; however, lesser amounts than the maximum could be served. Likewise, State or local agencies are permitted to accelerate implementation of the dietary specification for added sugars in an effort to reduce added sugars in school meals at an earlier date. However, State or local agencies cannot, for example, allow schools to exceed the added sugars limits in this rulemaking as that would be inconsistent with the rulemaking's provisions. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed the rule, in accordance with Departmental Regulation 4300–004, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on participants on the basis of age, race, color, national origin, sex (including gender identity and sexual orientation), or disability. Due to the unavailability of data, FNS is unable to determine whether this rule will have an adverse or disproportionate impact on protected classes among entities that administer and participate in Child Nutrition Programs. However, the FNS Civil Rights Division finds that the current mitigation and outreach strategies outlined in the regulations and this Civil Rights Impact Analysis (CRIA) provide ample consideration to applicants' and participants' ability to participate in the NSLP, SBP, SMP, and CACFP. The promulgation of this rule will impact school food authorities and CACFP institutions and facilities by updating certain program requirements, including nutrition requirements.

Participants in the NSLP, SMP, SBP, and CACFP may be impacted when the requirements under the rule are implemented by school food authorities and CACFP institutions and facilities. The changes are expected to provide participants in NSLP, SBP, SMP, and CACFP wholesome and appealing meals that reflect the goals of the *Dietary Guidelines* and meet their needs and preferences.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that 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. What follows is a summary of Tribal

[172] USDA's mission is: ''To serve all Americans by providing effective, innovative, science-based public policy leadership in agriculture, food and nutrition, natural resource protection and management, rural development, and related issues with a commitment to deliverable equitable and climate-smart opportunities that inspire and help America thrive.'' See: U.S. Department of Agriculture. *Strategic Plan Fiscal Years 2022–2026.* Available at: *https://www.usda.gov/sites/default/files/documents/usda-fy-2022-2026-strategic-plan.pdf.*

implications are present and consultation/coordination taken to date.

This regulation has Tribal implications. As noted in the proposed rule, USDA held listening sessions with Tribal stakeholders in summer 2022, and took feedback received during those listening session into account when developing the proposed rule. USDA held a Tribal consultation on May 23, 2023, during which Tribal leaders provided feedback and input on the proposed rule. Tribal leaders supported improving children's health and nutrition, for example, by reducing sugars in children's diets. Regarding the term ''traditional foods,'' Tribal leaders supported use of the term as detailed in Section 8: Traditional Indigenous Foods and confirmed that it is a recognizable term. Tribal leaders maintained that traditional Indigenous foods can be more expensive to procure compared to other foods and requested additional reimbursement to provide traditional Indigenous foods in school meals. Although USDA does not have the authority to provide additional reimbursement, USDA appreciates Tribal leaders sharing this concern. If a Tribe requests additional consultation in the future, USDA's Office of Tribal Relations will ensure meaningful consultation is provided.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. Chap. 35; 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all collection of information requirements by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB Control Number. This rulemaking finalizes long-term school nutrition requirements based on the goals of the *Dietary Guidelines for Americans, 2020–2025,* robust stakeholder input, and lessons learned from prior rulemakings. Notably, this rulemaking gradually phases in added sugars limits for the school lunch and breakfast programs and in the Child and Adult Care Food Program (CACFP), updates total sugars limits for breakfast cereals and yogurt to added sugars limits. As a reflection of feedback from stakeholders, this rule implements a single sodium reduction in the school lunch and breakfast programs and commits to studying the potential associations between sodium reduction and student participation. This rulemaking addresses a variety of other school meal requirements, including establishing long-term milk and whole grain requirements. Finally, this rulemaking strengthens Buy American requirements. While this rulemaking takes effect school year (SY) 2024–2025, the Department is gradually phasing in required changes over time.

In accordance with the PRA, this rule contains new information collection requirements, which are subject to review and approval by OMB. These new requirements will be added into the following information collections: OMB Control Number 0584–0006 7 CFR part 210 National School Lunch Program (expiration date September 30, 2026), OMB Control Number 0584–0012 7 CFR part 220 (expiration date August 31, 2025), OMB Control Number 0584–0055 Child and Adult Care Food Program (expiration date August 31, 2025), and OMB Control Number 0584–0280 7 CFR part 225, Summer Food Service Program (expiration date September 30, 2025). This rulemaking finalizes new reporting and recordkeeping requirements for State agencies and school food authorities administering the National School Lunch Program (NSLP) and School Breakfast Program (SBP). This rulemaking also finalizes one recordkeeping requirement on Summer Food Service Program (SFSP) and CACFP operators. The final rule contains existing information collections in the form of recordkeeping requirements that have been approved by OMB under OMB Control Number 0584–0006 7 CFR part 210 National School Lunch Program (expiration date September 30, 2026) and OMB Control Number 0584–0012 7 CFR part 220 School Breakfast Program (expiration date August 31, 2025); however, the provisions in this rule do not impact these requirements or their associated burden. Therefore, they are not included in the discussion concerning the burden impact resulting from the provisions in this rulemaking. This rulemaking does not impact existing and approved information collection requirements.

USDA is submitting for public comment the information collection burden that will result from adoption of the new recordkeeping and reporting requirements finalized in the rulemaking. The establishment of the information requirements in the rule is contingent upon OMB approval. When the rulemaking information collection request is approved, the Department will publish a separate notice in the **Federal Register** announcing OMB's approval.

Comments on the information collection requirements addressed in the rule may be submitted. Comments must be received by June 24, 2024. Send comments to Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20403, Fax: 202–395–7285, or email to *oira_submission@omb.eop.gov.* Please also send a copy of your comments to School Meals Policy Division, Food and Nutrition Service, 1320 Braddock Place, Alexandria, VA 22314. For further information, please contact Marlana Bates at *marlana.bates@usda.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

USDA published a proposed rule on February 7, 2023 (88 FR 8050), and received comments from the public concerning the reporting and recordkeeping requirements and their associated burden. Consequently, USDA has revised certain provisions in the rule, and therefore has updated the reporting and recordkeeping information requirement burden estimates from the estimates reported in the proposed rule. In response to public input, USDA made changes to the Buy American provision which impacts the information collection. The rule will now gradually phase in the proposed non-domestic food cap of 5 percent. USDA will introduce a 10 percent cap in SY 2025–2026, an 8 percent cap in SY 2028–2029, and a 5 percent cap in SY 2031–2032. Additionally, USDA is including in this rule that when a school food authority purchases a food item found on the Federal Acquisition Regulations (FAR) 25.104 Nonavailable articles list, no further documentation is required. Food products from the FAR Nonavailable articles list must be included in the non-domestic food cap calculation. Despite the changes to the Buy American provision, the hourly burden calculations are unlikely to decrease substantially from a quarter of an hour per record. For the menu planning options for substituting vegetables for grains in Tribal communities, the estimated burden has

been extended by a quarter of an hour per record for SFSP and CACFP operators in response to public comment that the estimate in the proposed rule was too low. USDA originally estimated that it would take an hour to complete this requirement. Based on the public comment and further evaluation of the requirement and comparison to other similar menu planning requirements, USDA now estimates it will take an additional 15 minutes to complete this requirement. The revised time estimate for this requirement is now one hour and 15 minutes.

The estimated numbers of responses, and burden hours for the information collection requirements that were included in the February 7, 2023, proposed rule are being revised in the final rule. In addition, the baseline for one of the affected collections (OMB Control Number 0584–0006) has been revised since the issuance of the proposed rule. These revisions are based on updating previous information collections rather than creating a new collection as was in the proposed rule. Between the publication of the proposed rule and the final rule, the following ICR expired: OMB Control Number 0584–0006. Because this collection has since been renewed and updated with an expiration date of September 30, 2026, the decision was made to switch to revisions of previous collections rather than a new information collection. The number of respondents now align with those in the four previous information collections. Burden was also added to account for the changes in the NSLP and SBP, instead of a combined estimate for both programs for the three applicable provisions. Additionally, burden was added to account for menu development, which had not been considered in previous information collections. As a result, the number of responses and burden hours for this rule have increased over those estimated for the proposed rule.

USDA now estimates that this rule will have an estimated 19,705 respondents, 763,892 responses, and 635,196 burden hours. This is the same number of respondents, an increase of 549,934 responses, and an increase of 204,897 burden hours in comparison to the estimations included in the proposed rule. These estimates are totaled from four information collections, each of which is detailed in sections below. First, an overview of each part of the rule that adds burden is below, including professional standards exception, Buy American, substituting vegetables for grains in Tribal communities, menu planning options, and annualized costs.

Professional Standards Exception

This rulemaking codifies the proposed hiring exception to allow State agencies to approve the hiring of an individual to serve as a school nutrition program director in medium (2,500 to 9,999 students) or large (10,000 or more students) local educational agencies, for individuals who have 10 years or more of school nutrition program experience but who do not hold a bachelor's or associate's degree.

Buy American

The National School Lunch Act (NSLA, 42 U.S.C. 1760(n)) and program regulations at 7 CFR 210.21(d)(2)(i) and 220.16(d)(2)(i), require school food authorities to purchase domestic commodities or products "to the maximum extent practicable." This provision, known as the Buy American provision, was initially implemented in 1998 and supports the mission of the child nutrition programs, which is to serve children nutritious meals and support American agriculture. There are two limited exceptions to the Buy American provision that school food authorities may implement when purchasing domestic foods is not feasible. The exceptions apply when a product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality, or when competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

The final rule maintains the current two limited exceptions to the Buy American provision and clarifies in regulation that it is the responsibility of the school food authority to determine whether an exception applies. In addition, in response to public comment, USDA is including in this rule that when a school food authority purchases a food item found on the Federal Acquisition Regulations (FAR) 25.104 Nonavailable articles list, no further documentation is required. The Nonavailable articles list is a list of items that have been deemed not available in the U.S. and excepted from the Buy American statute.[173] Food products from the FAR Nonavailable articles list must be included in the non-domestic food cap calculation. Also, in response to public comments that suggested a 5 percent cap is too restrictive under current procurement conditions, USDA will use a phased approach to gradually reach the proposed 5 percent of total costs per school year cap on non-domestic food purchases.

The phased approach will be as follows:

- Beginning in SY 2025–2026, the non-domestic food cost cap will be 10 percent.
- Beginning in SY 2028–2029, the non-domestic food cost cap will be 8 percent.
- Beginning in SY 2031–2032, the non-domestic food cost cap will be 5 percent.

For oversight purposes, the final rule codifies a recordkeeping requirement for school food authorities to maintain documentation to demonstrate that their non-domestic food purchases do not exceed the above specified annual threshold by year. This recordkeeping requirement would codify a requirement to maintain documentation for use of exceptions to the Buy American provision. While school food authorities may already maintain documentation to demonstrate compliance with the Buy American provision in accordance with guidance made available by USDA, the need to maintain this documentation is currently not discussed in the regulations governing the Buy American provisions. Therefore, the rule element to codify recordkeeping requirements to document compliance with the Buy American provision, including the use of exceptions to the provision, and their associated burden are addressed as a revision in the information collection request for the rule.

Lastly, the rule requires school food authorities to include the Buy American provision in procurement procedures, solicitations, and contracts for foods and food products procured using informal and formal procurement methods, and in awarded contracts. These recordkeeping requirements are being added to the information collection associated with the rule.

Substituting Vegetables for Grains in Tribal Communities

The rulemaking codifies the proposal to allow school food authorities that are tribally operated, operated by the Bureau of Indian Education, and that serve primarily American Indian or Alaska Native children to serve vegetables to meet the grains requirement in NSLP and SBP. In addition, the rulemaking codifies the proposal to extend this menu planning option to SFSP and CACFP sponsors,

[173] 41 U.S.C chapter 83 is the Buy American statute that requires public agencies to procure articles, materials, and supplies that were mined, produced, or manufactured in the United States, substantially all from domestic components. Available at: *https://www.acquisition.gov/far/part-25*.

institutions, and facilities that serve primarily American Indian or Alaska Native participants. Additionally, this rule allows all schools, sponsors, institutions, and facilities in Guam and Hawaii to serve vegetables to meet the grains or breads requirement. The menu planning option aims to improve the child nutrition programs for American Indian and Alaska Native children and build on USDA's commitment to support traditional foodways.

Menu Planning Options

This rulemaking makes a variety of changes to school meal nutrition requirements, including to implement quantitative limits for the following leading sources of added sugars in school meals: breakfast cereals, yogurt, and flavored milk. The rulemaking will also implement a dietary specification limiting added sugars to less than 10 percent of calories per week in the school lunch and breakfast programs. USDA acknowledges these changes will be reflected in schools' production and menu records that show how meals offered at school contribute to the required food components and food quantities for each age/grade group every day.

Longstanding recordkeeping requirements established at 7 CFR 210.10(a)(3) and 7 CFR 220.8(a)(3) require schools to maintain menu records for the meals produced and served in schools participating in the NSLP and SBP, but additional burden must be addressed for developing menus. This includes developing menus that meet existing and updated USDA menu specifications, including but not limited to, whole grains, milk, sodium, and added sugars. USDA expects there to be additional burden in this information collection from the requirements to limit added sugars in the NSLP and SBP or any other changes to school meal nutrition requirements included in this rulemaking, affecting OMB Control Number 0584–0006 7 CFR part 210 National School Lunch Program and OMB Control Number 0584–0012 7 CFR part 220 School Breakfast Program.

Annualized Costs

As a result of the implementation of the provisions in this rule, there will be some start-up and maintenance costs. In public comments, these included costs such as extra supplies or funding to implement the updated meal patterns, as well as updating costs to update websites, materials, menus, and recipes. Another potential cost for school food authorities detailed in public comments includes updating meal planning databases. Public comments also pointed to start-up costs for implementing the Buy American provision over time, mainly due to updated forms and labor associated with updating ordering procedures/documentation.

USDA estimates a cost of $50,000 per State agency to account for maintenance and start-up costs associated with the rule, and an additional $1000 per school food authority to account for maintenance of databases, menu planning, materials, and other rule related costs for the NSLP, under OMB Control Number 0584–0006. This would result in a total of $2,800,000 in costs for State agencies and $19,019,000 in costs for school food authorities, or $21,819,000 in total costs as a result of this final rule. This $21,819,000 would only be added to OMB Control Number 0584–0006 since these State agencies and school food authorities operate both the NSLP and SBP.

For CACFP OMB Control Number 0584–0055, an additional $305,000 should be added to account for the start-up costs associated with menu changes for CACFP operators. For SFSP OMB Control Number 0584–0280, an additional $10,000 should be added to account for the start-up costs associated with menu changes for SFSP operators. These totals result from an additional $500 per operator affected by the menu changes.

Information Collections

Title: 7 CFR part 210 National School Lunch Program

Form Number: None

OMB Control Number: 0584–0006

Expiration Date: September 30, 2026

Type of Request: Revision of a currently approved collection

Abstract: This is a revision of a currently approved information collection to add new reporting and recordkeeping information requirements that are discussed in the rule, into the collection. Below is a summary of the changes in the final rule and the accompanying reporting and recordkeeping requirements that will impact the burden that program requirements have on State governments and school food authorities. USDA has updated the number of responses and burden hours associated with the collection of information requirements included in the rule since publication of the proposed rule, *Child Nutrition Programs: Revisions to Meal Patterns Consistent with the 2020 Dietary Guidelines for Americans,* published on February 7, 2023. Revisions are based on adding in burden for menu development including the development resulting from the provisions in the new rule.

Reporting

The changes in this rule will add new reporting requirements related to professional standards to the existing requirements that are currently approved under OMB Control Number 0584–0006.

State Agencies

The hiring exception for professional standards introduces a reporting requirement at 7 CFR 210.30(b)(1)(iv) for State agencies, who would be required to review and respond to each request submitted on behalf of school food authorities. USDA estimates 56 State agencies would review and either approve or deny each approximately 17 requests received per each State agency, for a total of 951 responses, and that it takes approximately 30 minutes (.5 hours) to review and respond to each request, for a total of 476 hours. USDA estimates that this new requirement will add 476 burden hours and 951 responses to the currently approved burden for OMB Control Number 0584–0006.

School Food Authorities

The hiring exception for professional standards adds a new requirement for the school food authorities at 7 CFR 210.30(b)(1)(iv). USDA estimates 951 school food authorities would submit 1 request to their respective State agencies to hire an individual to serve as the school nutrition program director in medium or large local educational agencies each year, and that each respondent will take approximately 30 minutes (.5 hours) to develop and submit this request for a total of 476 hours. USDA estimates that this new requirement will add an estimated 476 burden hours and 951 responses into the currently approved burden for OMB Control Number 0584–0006.

Recordkeeping

The changes in this rule will add new recordkeeping requirements related to professional standards, Buy American, substituting vegetables for grains in Tribal communities, and menu planning options to the existing requirements that are currently approved under OMB Control Number 0584–0006.

State Agencies

In addition to the reporting requirements associated with the hiring exception to allow State agencies to approve the hiring of individuals who do not meet the educational criteria but have 10 years or more of school

nutrition program experience to serve as the school nutrition program director, State agencies would be required to maintain the requests that the school food authorities developed and submitted to them for review and approval, as stated in 7 CFR 210.30(b)(1)(iv). The new requirement would impact an estimated 56 State agencies, who will be reviewing an estimated 17 requests, for 951 responses. USDA estimates it takes the State agencies approximately 15 minutes (.25 hours) to maintain each record annually, for a total of 238 hours. USDA estimates that this new requirement will add 238 hours and 951 responses to the currently approved burden for OMB Control Number 0584–0006.

School Food Authorities

The new requirement at 7 CFR 210.30(b)(1)(iv) also requires school food authorities to maintain documentation of requests to hire individuals under the Professional Standards Exception provision. This requirement adds an estimated 238 burden hours and 951 responses into the collection. USDA estimates that the same burden estimates will be added to the existing burden approved for OMB Control Number 0584–0006 once these requirements are merged into that collection.

USDA estimates the recordkeeping requirement at 7 CFR 210.21(d)(5) for school food authorities to maintain documentation to demonstrate that their non-domestic food purchases do not exceed the proposed specified annual threshold will impact approximately 19,019 school food authorities. USDA estimates these 19,019 respondents will develop and maintain 10 records each year, for a total of 190,190 responses, and that it takes approximately 15 minutes (.25 hours) each month to complete the requirement for each record. This requirement adds a total of 47,548 annual burden hours and 190,190 responses into the information collection request for OMB Control Number 0584–0006. In addition, USDA estimates the final recordkeeping requirement at 7 CFR 210.21(d)(3) to include the Buy American provision in procurement procedures, solicitations, and contracts would impact approximately 19,019 school food authorities. USDA estimates these 19,019 respondents will revise their procurement procedures, solicitations, and contracts and maintain these records, and estimates they would spend approximately 10 hours each year meeting this requirement. This requirement would add a total of 190,190 annual burden hours and 19,019 responses into the information collection request for OMB Control Number 0584–0006.

Alongside the final provision is a requirement that the school food authorities using this option maintain documentation that they are tribally operated, are operated by the Bureau of Indian Education, or serve primarily American Indian or Alaska Native students. As described in the proposed rule, school food authorities and schools ‘‘serving primarily American Indian or Alaska Native children’’ include school food authorities and schools where American Indian or Alaska Native children represent the largest demographic group of enrolled children. This documentation would be maintained for program reviews. This recordkeeping requirement at 7 CFR 210.10(c)(3) establishes a collection of information for school food authorities that participate in the school meals programs and elect to implement the operational flexibility to serve vegetables in place of grains in school meals. USDA estimates 317 school food authorities operating the NSLP would maintain documentation each year to demonstrate schools using the menu planning option meet the criteria, and that it would take approximately 1 hour to collect and maintain such documentation annually. This requirement for school food authorities would add an estimated 317 annual burden hours and 317 responses into the currently approved burden for OMB Control Number 0584–0006.

Another requirement in the rule includes menu planning options, in which school food authorities develop menu records (beyond regular menu maintenance) that meet updated and new USDA specifications from the rule, under 7 CFR 210.10(a)(3). This also includes following all previous rule menu specifications. USDA estimates 19,019 school food authorities would develop menu records in 30 minutes (0.5 hours), 10 times per year. This requirement would add an estimated 95,095 annual burden hours and 190,190 responses into the currently approved burden for OMB Control Number 0584–0006.

Summary

USDA estimates that the burden for the new reporting and recordkeeping information requirements that are impacted by this final rule will have 19,075 respondents, 403,520 responses, and 334,576 burden hours. Once the information collection requests related to this rule is approved by OMB, USDA expects that the total information collection burden for OMB Control Number 0584–0006 7 CFR part 210 National School Lunch Program will be 115,935 respondents, 48,035,516 responses, and 10,143,277 burden hours. This is an estimated increase of 403,520 responses and 334,576 hours, with no increase in respondents, from the currently approved burden for this collection.

Respondents (Affected Public): State Agencies (State governments), and School Food Authorities (local governments).

Reporting

Estimated Number of Respondents: 1,007.

Estimated Number of Responses per Respondent: 1.89.

Estimated Total Annual Responses: 1,902.

Estimated Time per Response: 30 minutes (.50 hours).

Estimate Total Annual Burden on Respondents: 951 hours.

Recordkeeping

Estimated Number of Respondents: 19,075.

Estimated Number of Responses per Respondent: 21.05.

Estimated Total Annual Responses: 401,618.

Estimated Time per Response: Approximately 50 minutes (0.83 hours).

Estimate Total Annual Burden on Respondents: 333,625.

BILLING CODE 3410–30–P

Reporting for OMB Control Number 0584-0006								
Description of Activities	**Regulation Citation**	**Estimated # of Respondents**	**Frequency of Response**	**Total Annual Responses**	**Average Burden Hours per Response**	**Estimated Total Annual Burden Hours Due to Final Rulemaking**	**Hours Currently Approved**	**Estimated Total Difference**
State agencies review and approve/deny each request to hire a school nutrition program director in a medium or large local educational agency who does not meet professional standards educational criteria	210.30(b)(1)(iv)	56	17	951	.5	476	0	476
Total State Agency Reporting		**56**		**951**		**476**	**0**	**476**
School food authorities develop and submit requests to hire a school nutrition program director in a medium or large local educational agency who does not meet professional standards educational criteria	210.30(b)(1)(iv)	951	1	951	.5	476	0	476
Total School Food Authority Reporting		**951**		**951**		**476**	**0**	**476**
Total Reporting		**1,007**	**1.89**	**1,902**	**.50**	**951**	**0**	**951**

Recordkeeping for OMB Control Number 0584-0006								
Description of Activities	**Regulation Citation**	**Estimated # of Respondents**	**Frequency of Response**	**Total Annual Responses**	**Average Burden Hours per Response**	**Estimated Total Annual Burden Hours Due to Final Rulemaking**	**Hours Currently Approved**	**Estimated Total Difference**
State agencies maintain school food authorities requests to hire individuals in medium or large local educational agencies who do not meet professional standards educational criteria	210.30(b)(1)(iv)	56	17	951	0	238	0	238
Total State Agency Recordkeeping		**56**		**951**		**238**	**0**	**238**
School food authorities maintain documentation of requests to hire individuals in medium or large local educational agencies who do not meet professional standards educational criteria	210.30(b)(1)(iv)	951	1	951	0	238	0	238
School food authorities maintain documentation demonstrating compliance with the Buy American provision	210.21(d)(5)	19,019	10	190,190	0	47,548	0	47,548
School food authorities include language requiring Buy American in all procurement procedures, solicitations, and contracts and maintain such documentation	210.21(d)(3)	19,019	1	19,019	10	190,190	0	190,190
School food authorities maintain records to demonstrate that schools are tribally operated, are	210.10(c)(3)	317	1	317	1	317	0	317

operated by the Bureau of Indian Education, or serve primarily American Indian or Alaska Native students								
School food authorities develop menu records (beyond regular menu maintenance) that meet updated and new USDA specifications from the rule	210.10(a)(3)	19,019	10	190,190	1	95,095	0	95,095
Total School Food Authority Recordkeeping		**19,019**		**400,667**		**333,387**	**0**	**333,387**
Total Recordkeeping Burden		**19,075**		**401,618**		**333,625**	**0**	**333,625**

SUMMARY OF BURDEN: RECORDKEEPING AND REPORTING	
TOTAL NO. RESPONDENTS	115,935
AVERAGE NO. RESPONSES PER RESPONDENT	414.33
TOTAL ANNUAL RESPONSES	48,035,516
AVERAGE HOURS PER RESPONSE	0.21
TOTAL BURDEN HOURS	10,143,277

BILLING CODE 3410–30–C

Title: 7 CFR part 220, School Breakfast Program.

Form Number: None.

OMB Control Number: 0584–0012.

Expiration Date: August 31, 2025.

Type of Request: Revision of a currently approved collection.

Abstract: This is a revision of a currently approved information collection, that adds new recordkeeping information requirements that are discussed in the final rule into the collection. Below is a summary of the changes in the final rule and the accompanying recordkeeping requirements that will impact the burden that program requirements have on school food authorities. The burden was separated out for the SBP from the NSLP, and burden hours were added to account for menu development, both of which added additional recordkeeping burden hours.

Recordkeeping

The changes in this rule will add new recordkeeping requirements related to Buy American, substituting vegetables for grains in Tribal communities, and menu planning options to the existing requirements that are currently approved under OMB Control Number 0584–0012.

School Food Authorities

USDA estimates the requirement at 7 CFR 220.16(d)(5) for school food authorities to maintain documentation to demonstrate that their non-domestic food purchases do not exceed the proposed specified annual threshold will impact approximately 17,117 school food authorities. USDA estimates these 17,117 respondents will develop and maintain 10 records each year, for a total of 171,170 responses, and that it takes approximately 15 minutes (.25 hours) each month to complete the requirement for each record. This requirement adds a total of 42,793 annual burden hours and 171,170 responses into the currently approved burden for OMB Control Number 0584–0012.

USDA estimates the requirement at 7 CFR 220.16(d)(3) to include the Buy American provision in procurement procedures, solicitations, and contracts would impact approximately 17,117 school food authorities. USDA estimates these 17,117 respondents will revise their procurement procedures, solicitations, and contracts and maintain these records, and estimates they would spend approximately 10 hours each year meeting this requirement. This requirement would add a total of 171,170 annual burden hours and 17,117 responses into the currently approved burden for OMB Control Number 0584–0012.

This requirement at 7 CFR 220.8(c)(3) establishes a collection of information for school food authorities that participate in the school meals programs and elect to implement the operational flexibility to serve vegetables in place of grains in school meals. USDA estimates 285 school food authorities operating the SBP would maintain documentation each year to demonstrate schools using the menu planning option meet the criteria, and that it would take approximately 1 hour to collect and maintain such documentation annually. USDA estimates that this new requirement for school food authorities

would add an estimated 285 annual burden hours and 285 responses into the currently approved burden for OMB Control Number 0584–0012.

Another requirement in the rule, includes menu planning options, in which school food authorities develop menu records (beyond regular menu maintenance) that meet updated and new USDA specifications from the rule, under 7 CFR 220.8(a)(3). This also includes following all previous rule menu specifications. USDA estimates 17,117 school food authorities would develop breakfast menu records in 30 minutes (0.5 hours), 10 times per year. This requirement would add an estimated 85,585 annual burden hours and 171,170 responses into the currently approved burden for OMB Control Number 0584–0012.

Summary

USDA estimates that the burden for the new recordkeeping information requirements that are impacted by this final rule will have 17,117 respondents, 359,742 responses, and 299,833 burden hours. Once the information collection requests related to this rule is approved by OMB, USDA expects that the total information collection burden for OMB Control Number 0584–0012 7 CFR part 220 School Breakfast Program will be 105,700 respondents, 33,462,278 responses, and 4,036,508 burden hours. This is an estimated increase of 359,742 responses and 299,833 hours, with no increase in respondents, from the currently approved burden for this collection.

Respondents (Affected Public): School Food Authorities (local governments).

Recordkeeping

Estimated Number of Respondents: 17,117.

Estimated Number of Responses per Respondent: 21.02.

Estimated Total Annual Responses: 359,742.

Estimated Time per Response: Approximately 50 minutes (0.83 hours).

Estimate Total Annual Burden on Respondents: 299,833.

BILLING CODE 3410–30–P

Recordkeeping for OMB Control Number 0584-0012								
Description of Activities	**Regulation Citation**	**Estimated # of Respondents**	**Frequency of Response**	**Total Annual Responses**	**Average Burden Hours per Response**	**Estimated Total Annual Burden Hours Due to Final Rulemaking**	**Hours Currently Approved**	**Estimated Total Difference**
School food authorities maintain documentation demonstrating compliance with the Buy American provision	220.16(d)(5)	17,117	10	171,170	0	42,793	0	42,793
School food authorities include language requiring Buy American in all procurement procedures, solicitations, and contracts and maintain such documentation	220.16(d)(3)	17,117	1	17,117	10	171,170	0	171,170
School food authorities maintain records to demonstrate that schools are tribally operated, are operated by the Bureau of Indian Education, or serve primarily American Indian or Alaska Native students	220.8(c)(3)	285	1	285	1	285	0	285
School food authorities develop menu records (beyond regular menu maintenance) that meet updated and new USDA specifications from the rule	220.8(a)(3)	17,117	10	171,170	1	85,585	0	85,585
Total School Food Authority Recordkeeping		17,117		359,742		299,833	0	299,833
Total Recordkeeping		17,117		359,742		299,833	0	299,833

SUMMARY OF BURDEN: RECORDKEEPING AND REPORTING	
TOTAL NO. RESPONDENTS	105,700
AVERAGE NO. RESPONSES PER RESPONDENT	316.5778
TOTAL ANNUAL RESPONSES	33,462,278
AVERAGE HOURS PER RESPONSE	0.1206
TOTAL BURDEN HOURS	4,036,508

BILLING CODE 3410–30–C

Title: Child and Adult Care Food Program.

Form Number: None.

OMB Control Number: 0584–0055.

Expiration Date: August 31, 2025.

Type of Request: Revision of a currently approved collection.

Abstract: This is a revision of a currently approved information collection, that adds new recordkeeping information requirements that are discussed in the final rule into the collection. Below is a summary of the changes in the final rule and the accompanying recordkeeping requirements that will impact the burden that program requirements have on program operators in the CACFP. Burden was split up by institutions and facilities for the menu planning options, which is an update from the proposed rule, in which estimates were combined. In response to public comment, time to maintain documentation was added to estimates from the proposed rule.

Recordkeeping

The changes in this rule will add new recordkeeping requirements related to substituting vegetables for grains in Tribal communities to the existing requirements that are currently approved under OMB Control Number 0584–0055.

CACFP—Businesses

The provision for substituting grains for vegetables in Tribal communities adds a new requirement for CACFP businesses (facilities and institutions) serving primarily American Indian or Alaska Native participants and electing to implement this menu planning option. CACFP operators electing to serve vegetables to meet the grains requirement under this provision are also required to maintain documentation demonstrating that the site qualifies for the menu planning option.

Institutions

USDA estimates the recordkeeping requirement at 7 CFR 226.20(f) would require approximately 70 institutions to collect and maintain documentation each year to demonstrate that the site serves primarily American Indian or Alaska Native participants, and that it takes approximately 1.25 hours to collect and maintain such documentation. USDA estimates this collection of information would add an estimated 88 annual burden hours and 70 responses for CACFP operators and the information collection request associated with this provision under OMB Control Number 0584–0055.

Facilities

USDA estimates the recordkeeping requirement at 7 CFR 226.20(f) would require approximately 540 facilities to collect and maintain documentation each year to demonstrate that the site serves primarily American Indian or Alaska Native participants, and that it takes approximately 1.25 hours to collect and maintain such documentation. USDA estimates this collection of information would add an estimated 675 annual burden hours and 540 responses for CACFP operators and the information collection request associated with this provision under OMB Control Number 0584–0055.

Summary

USDA estimates that the burden related to the new recordkeeping information requirements that are discussed in this final rule will have 610 respondents, 610 responses, and 763 burden hours. Once the information collection requests related to this rule is approved by OMB, USDA expects that the total information collection burden for OMB Control Number 0584–0055 Child and Adult Care Food Program will be 3,794,949 respondents, 16,213,703 responses, and 4,213,973 burden hours. This is an estimated increase of 610 responses and 763 burden hours from the currently approved burden for this collection, with no change in the number of respondents.

Respondents (Affected Public): Child and Adult Care Food Program (businesses, which include institutions and facilities).

Recordkeeping

Estimated Number of Respondents: 610.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 610.

Estimated Time per Response: Approximately 75 minutes (1.25 hours).

Estimate Total Annual Burden on Respondents: 763.

BILLING CODE 3410–30–P

Recordkeeping for OMB Control Number 0584-0055								
Description of Activities	**Regulation Citation**	**Estimated # of Respondents**	**Frequency of Response**	**Total Annual Responses**	**Average Burden Hours per Response**	**Estimated Total Annual Burden Hours Due to Final Rulemaking**	**Hours Currently Approved**	**Estimated Total Difference**
Child and Adult Care Food Program Operators (**institutions**) maintain documentation demonstrating that service sites qualify for the menu planning option to serve vegetables to meet the grains requirement by serving primarily American Indian and Alaska Native children	226.20(f)	70	1	70	1	88	0	88
Child and Adult Care Food Program Operators (**facilities**) maintain documentation demonstrating that service sites qualify for the menu planning option to serve vegetables to meet the grains requirement by serving primarily American Indian and Alaska Native children	226.20(f)	540	1	540	1	675	0	675
Total Child and Adult Care Food Program Operators (facility and institution level) Recordkeeping		610		610		763	0	763
Total Recordkeeping OMB Control Number 0584-0055		610		610		763	0	763

SUMMARY OF BURDEN: RECORDKEEPING AND REPORTING	
TOTAL NO. RESPONDENTS	3,794,949
AVERAGE NO. RESPONSES PER RESPONDENT	4.272
TOTAL ANNUAL RESPONSES	16,213,703
AVERAGE HOURS PER RESPONSE	0.260
TOTAL BURDEN HOURS	4,213,973

BILLING CODE 3410–30–C

Title: 7 CFR part 225, Summer Food Service Program.

Form Number: None.

OMB Control Number: 0584–0280.

Expiration Date: September 30, 2025.

Type of Request: Revision of a currently approved collection.

Abstract: This is a revision of a currently approved information collection that adds a recordkeeping information requirement that is discussed in the final rule into the collection. Below is a summary of the changes in the final rule and the accompanying recordkeeping requirement that will impact the burden that program requirements have on the program operators in the SFSP. Substituting vegetables for grains in Tribal communities is the only provision in the final rule adding burden to this collection.

Recordkeeping

The changes in this rule will add a new recordkeeping requirement related to substituting vegetables for grains in Tribal communities to the existing requirements that are currently approved under OMB Control Number 0584–0280.

Businesses (Operators)

The provision to substitute grains for vegetable establishes a recordkeeping requirement for SFSP operators serving primarily American Indian or Alaska Native participants and electing to implement this menu planning option. SFSP operators electing to serve vegetables to meet the grains requirement under this provision are also required to maintain documentation demonstrating that the site qualifies for the menu planning option.

USDA estimates the recordkeeping requirement under 7 CFR 225.16(f)(3) would require approximately 20 SFSP operators to collect and maintain documentation each year to demonstrate that the site serves primarily American Indian or Alaska Native participants, and that it takes approximately 1.25 hours to collect and maintain such documentation, for 25 hours. USDA estimates that this new requirement would add 25 annual burden hours and 20 responses into the burden for OMB Control Number 0584–0280.

Summary

As a result of the changes outlined in this rulemaking, USDA estimates that the burden for rule-related requirements for OMB Control Number 0584–0280 will be 20 respondents, 20 responses, and 25 burden hours. Once the information collection requests related to this rule is approved by OMB, USDA expects that the total information collection burden for OMB Control Number 0584–0280 Summer Food Service Program will be 63,942 respondents, 391,815 responses, and 462,724 burden hours. This is an estimated increase of 20 responses and 25 burden hours from the currently approved burden for this collection, with no change in the number of respondents.

Respondents (Affected Public): Summer Food Service Program operators (non-profit institutions and camps).

Recordkeeping

Estimated Number of Respondents: 20.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 20.

Estimated Time per Response: Approximately 75 minutes (1.25 hours).

Estimate Total Annual Burden on Respondents: 25.

BILLING CODE 3410–30–P

Recordkeeping for OMB Control Number 0584-0280								
Description of Activities	**Regulation Citation**	**Estimated # of Respondents**	**Frequency of Response**	**Total Annual Responses**	**Average Burden Hours per Response**	**Estimated Total Annual Burden Hours Due to Final Rulemaking**	**Hours Currently Approved**	**Estimated Total Difference**
Summer Food Service Program sponsors maintain documentation demonstrating that service sites qualify for the menu planning option to serve vegetables to meet the grains requirement by serving primarily American Indian and Alaska Native children	225.16(f)(3)	20	1	20	1	25	0	25
Total Summer Food Service Program Operators (business level) Recordkeeping		20	1	20	1	25	0	25
Total Recordkeeping OMB Control Number 0584-0280		20	1	20	1	25	0	25

SUMMARY OF BURDEN: RECORDKEEPING AND REPORTING	
TOTAL NO. RESPONDENTS	63,942
AVERAGE NO. RESPONSES PER RESPONDENT	6.13
TOTAL ANNUAL RESPONSES	391,815
AVERAGE HOURS PER RESPONSE	1.181
TOTAL BURDEN HOURS	462,724

BILLING CODE 3410–30–C

E-Government Act Compliance

The Department 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.

List of Subjects

7 CFR Part 210

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Penalties, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

7 CFR Part 215

Food assistance programs, Grant programs—education, Grant program—health, Infants and children, Milk, Reporting and recordkeeping requirements.

7 CFR Part 220

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping

requirements, School breakfast and lunch programs.

7 CFR Part 225

Food assistance programs, Grant programs—health, Infants and children, Labeling, Reporting and recordkeeping requirements.

7 CFR Part 226

Accounting, Aged, Day care, Food assistance programs, Grant programs, Grant programs—health, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, FNS amends 7 CFR parts 210, 215, 220, 225, and 226 as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

■ 2. Revise and republish § 210.2 to read as follows:

§ 210.2 Definitions.

For the purposes of this part:

2 CFR part 200, means the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published by OMB. The part reference covers applicable: Acronyms and Definitions (subpart A), General Provisions (subpart B), Post Federal Award Requirements (subpart D), Cost Principles (subpart E), and Audit Requirements (subpart F). (NOTE: Pre-Federal Award Requirements and Contents of Federal Awards (subpart C) does not apply to the National School Lunch Program).

Act means the National School Lunch Act, as amended.

Afterschool care program means a program providing organized child care services to enrolled school-age children afterschool hours for the purpose of care and supervision of children. Those programs must be distinct from any extracurricular programs organized primarily for scholastic, cultural or athletic purposes.

Applicable credits shall have the meaning established in 2 CFR part 200 and USDA implementing regulations 2 CFR parts 400 and 415.

Attendance factor means a percentage developed no less than once each school year which accounts for the difference between enrollment and attendance. The attendance factor may be developed by the school food authority, subject to State agency approval, or may be developed by the State agency. In the absence of a local or State attendance factor, the school food authority will use an attendance factor developed FNS. When taking the attendance factor into consideration, school food authorities will assume that all children eligible for free and reduced price lunches attend school at the same rate as the general school population.

Average Daily Participation means the average number of children, by eligibility category, participating in the Program each operating day. These numbers are obtained by dividing:

(1) The total number of free lunches claimed during a reporting period by the number of operating days in the same period;

(2) The total number of reduced price lunches claimed during a reporting period by the number of operating days in the same period; and

(3) The total number of paid lunches claimed during a reporting period by the number of operating days in the same period.

Child means:

(1) A student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (1) and (2) of the definition of ''School'' in this section, including students with a disability who participate in a school program established for persons with disabilities;

(2) A person under 21 chronological years of age who is enrolled in an institution or center as described in paragraph (3) of the definition of ''School'' in this section; or

(3) For afterschool care programs, persons aged 18 and under at the start of the school year, and persons of any age with a disability who participate in a school program established for persons with disabilities.

Child with a disability means any child who has a physical or mental impairment that substantially limits one or more major life activities of such individual, has a record of such an impairment, or has been regarded as having such an impairment.

Commodity School Program means the Program under which participating schools operate a nonprofit lunch program in accordance with this part and receive donated food assistance in lieu of general cash assistance. Schools participating in the Commodity School Program will also receive special cash and donated food assistance in accordance with § 210.4(c).

Contractor means a commercial enterprise, public or nonprofit private organization or individual that enters into a contract with a school food authority.

Cost reimbursable contract means a contract that provides for payment of incurred costs to the extent prescribed in the contract, with or without a fixed fee.

Days means calendar days unless otherwise specified.

Department means the United States Department of Agriculture.

Distributing agency means a State agency which enters into an agreement with the Department for the distribution to schools of donated foods pursuant to part 250 of this chapter.

Donated foods means food commodities donated by the Department for use in nonprofit lunch programs.

Fiscal year means a period of 12 calendar months beginning October 1 of any year and ending with September 30 of the following year.

Fixed fee means an agreed upon amount that is fixed at the inception of the contract. In a cost reimbursable contract, the fixed fee includes the contractor's direct and indirect administrative costs and profit allocable to the contract.

Fixed-price contract means a contract that charges a fixed cost per meal, or a fixed cost for a certain time period. Fixed-price contracts may include an economic price adjustment tied to a standard index.

FNS means the Food and Nutrition Service, United States Department of Agriculture.

FNSRO means the appropriate Regional Office of the Food and Nutrition Service of the Department.

Food item means a specific food offered within a food component.

Food service management company means a commercial enterprise or a nonprofit organization which is or may be contracted with by the school food authority to manage any aspect of the school food service.

Free lunch means a lunch served under the Program to a child from a household eligible for such benefits under part 245 of this chapter and for which neither the child nor any member of the household pays or is required to work.

Local educational agency means a public board of education or other public or private nonprofit authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public or private nonprofit elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a

combination of school districts or counties that is recognized in a State as an administrative agency for its public or private nonprofit elementary schools or secondary schools. The term also includes any other public or private nonprofit institution or agency having administrative control and direction of a public or private nonprofit elementary school or secondary school, including residential child care institutions, Bureau of Indian Affairs schools, and educational service agencies and consortia of those agencies, as well as the State educational agency in a State or territory in which the State educational agency is the sole educational agency for all public or private nonprofit schools.

Lunch means a meal service that meets the meal requirements in § 210.10 for lunches.

Meal component means one of the food groups which comprise reimbursable meals. The meal components are: fruits, vegetables, grains, meats/meat alternates, and fluid milk.

National School Lunch Program means the Program under which participating schools operate a nonprofit lunch program in accordance with this part. General and special cash assistance and donated food assistance are made available to schools in accordance with this part.

Net cash resources means all monies, as determined in accordance with the State agency's established accounting system, that are available to or have accrued to a school food authority's nonprofit school food service at any given time, less cash payable. Such monies may include, but are not limited to, cash on hand, cash receivable, earnings on investments, cash on deposit and the value of stocks, bonds or other negotiable securities.

Nonprofit means, when applied to schools or institutions eligible for the Program, exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1986.

Nonprofit school food service means all food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.

Nonprofit school food service account means the restricted account in which all of the revenue from all food service operations conducted by the school food authority principally for the benefit of school children is retained and used only for the operation or improvement of the nonprofit school food service. This account will include, as appropriate, non-Federal funds used to support paid lunches as provided in § 210.14(e), and proceeds from nonprogram foods as provided in § 210.14(f).

OIG means the Office of the Inspector General of the Department.

Paid lunch means a lunch served to children who are either not certified for or elect not to receive the free or reduced price benefits offered under part 245 of this chapter. The Department subsidizes each paid lunch with both general cash assistance and donated foods. The prices for paid lunches in a school food authority must be determined in accordance with § 210.14(e).

Point of Service means that point in the food service operation where a determination can accurately be made that a reimbursable free, reduced price, or paid lunch has been served to an eligible child.

Program means the National School Lunch Program and the Commodity School Program.

Reduced price lunch means a lunch served under the Program:

(1) To a child from a household eligible for such benefits under part 245 of this chapter;

(2) For which the price is less than the school food authority designated full price of the lunch and which does not exceed the maximum allowable reduced price specified under part 245 of this chapter; and

(3) For which neither the child nor any member of the household is required to work.

Reimbursement means Federal cash assistance including advances paid or payable to participating schools for lunches meeting the requirements of § 210.10 and served to eligible children.

Revenue, when applied to nonprofit school food service, means all monies received by or accruing to the nonprofit school food service in accordance with the State agency's established accounting system including, but not limited to, children's payments, earnings on investments, other local revenues, State revenues, and Federal cash reimbursements.

School means:

(1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings;

(2) Any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; or

(3) Any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, except for residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes.

School food authority means the governing body which is responsible for the administration of one or more schools; and has the legal authority to operate the Program therein or be otherwise approved by FNS to operate the Program.

School nutrition program directors are those individuals directly responsible for the management of the day-to-day operations of school food service for all participating schools under the jurisdiction of the school food authority.

School nutrition program managers are those individuals directly responsible for the management of the day-to-day operations of school food service for a participating school(s).

School nutrition program staff are those individuals, without managerial responsibilities, involved in day-to-day operations of school food service for a participating school(s).

School week means the period of time used to determine compliance with the meal requirements in § 210.10. The period will be a normal school week of five consecutive days; however, to accommodate shortened weeks resulting from holidays and other scheduling needs, the period must be a minimum of three consecutive days and a maximum of seven consecutive days. Weeks in which school lunches are offered less than three times must be combined with either the previous or the coming week.

School year means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

Seamless Summer Option means the meal service alternative authorized by Section 13(a)(8) of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1761(a)(8), under which public or nonprofit school food authorities participating in the National School Lunch Program or School Breakfast Program offer meals at no cost to children during the traditional summer vacation periods and, for year-round schools, vacation periods longer than 10 school days.

Secretary means the Secretary of Agriculture.

State means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

State agency means:

(1) The State educational agency;

(2) Any other agency of the State which has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools, as specified in § 210.3(b) of this chapter; or

(3) The FNSRO, where the FNSRO administers the Program as specified in § 210.3(c) of this chapter.

State educational agency means, as the State legislature may determine,

(1) The chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or

(2) A board of education controlling the State department of education.

State licensed healthcare professional means an individual who is authorized to write medical prescriptions under State law. This may include, but is not limited to, a licensed physician, nurse practitioner, or physician's assistant, depending on State law.

Tofu means a soybean-derived food, made by a process in which soybeans are soaked, ground, mixed with water, heated, filtered, coagulated, and formed into cakes. Basic ingredients are whole soybeans, one or more food-grade coagulants (typically a salt or an acid), and water. Tofu products must conform to FNS guidance to count toward the meats/meat alternates component.

USDA implementing regulations include the following: 2 CFR part 400, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; 2 CFR part 415, General Program Administrative Regulations; 2 CFR part 416, General Program Administrative Regulations for Grants and Cooperative Agreements to State and Local Governments; and 2 CFR part 418, New Restrictions on Lobbying.

Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched.

Whole grains means grains that consist of the intact, ground, cracked, or flaked grain seed whose principal anatomical components—the starchy endosperm, germ and bran—are present in the same relative proportions as they exist in the intact grain seed.

Yogurt means commercially prepared coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements and to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Definition and Standard of Identity for yogurt, 21 CFR 131.200, and low-fat yogurt and non-fat yogurt covered as a standardized food under 21 CFR 130.10.

■ 3. In § 210.3, revise and republish paragraph (a) to read as follows:

§ 210.3 Administration.

(a) *FNS.* FNS will act on behalf of the Department in the administration of the Program.

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■ 4. In § 210.4, revise and republish paragraphs (a) and (b)(3) and (4) to read as follows:

§ 210.4 Cash and donated food assistance to States.

(a) *General.* To the extent funds are available, FNS will make cash assistance available in accordance with the provisions of this section to each State agency for lunches and afterschool snacks served to children under the National School Lunch and Commodity School Programs. To the extent donated foods are available, FNS will provide donated food assistance to distributing agencies for each lunch served in accordance with the provisions of this part and part 250 of this chapter.

(b) * * *

(3) *Cash assistance for afterschool snacks.* For those eligible schools (as defined in § 210.10(o)(1)) operating afterschool care programs and electing to serve afterschool snacks to enrolled children, funds will be made available to each State agency, each school year in an amount no less than the sum of the products obtained by multiplying:

(i) The number of afterschool snacks served in the afterschool care program within the State to children from families that do not satisfy the income standards for free and reduced price school meals by 2.75 cents;

(ii) The number of afterschool snacks served in the afterschool care program within the State to children from families that satisfy the income standard for free school meals by 30 cents; and

(iii) The number of afterschool snacks served in the afterschool care program within the State to children from families that satisfy the income standard for reduced price school meals by 15 cents.

(4) *Annual adjustments for cash assistance for afterschool snacks.* The rates in paragraph (b)(3) of this section are the base rates established in August 1981 for the Child and Adult Care Food Program (CACFP). FNS will prescribe annual adjustments to these rates in the same Notice as the National Average Payment Rates for lunches. These adjustments will ensure that the reimbursement rates for afterschool snacks served under this part are the same as those implemented for afterschool snacks in the CACFP.

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■ 5. In § 210.7, revise and republish paragraphs (a), (c) introductory text, (c)(1), (d), and (e) to read as follows:

§ 210.7 Reimbursement for school food authorities.

(a) *General.* Reimbursement payments to finance nonprofit school food service operations will be made only to school food authorities operating under a written agreement with the State agency. Subject to the provisions of § 210.8(c), such payments may be made for lunches and afterschool snacks served in accordance with provisions of this part and part 245 of this chapter in the calendar month preceding the calendar month in which the agreement is executed. These reimbursement payments include general cash assistance for all lunches served to children under the National School Lunch Program and special cash assistance payments for free or reduced-price lunches served to children determined eligible for such benefits under the National School Lunch and Commodity School Programs. Reimbursement payments will also be made for afterschool snacks served to eligible children in afterschool care programs in accordance with the rates established in § 210.4(b)(3). Approval will be in accordance with part 245.

* * * * *

(c) *Reimbursement limitations.* To be entitled to reimbursement under this part, each school food authority must ensure that Claims for Reimbursement are limited to the number of free, reduced price, and paid lunches and afterschool snacks that are served to children eligible for free, reduced price, and paid lunches and afterschool snacks, respectively, for each day of operation.

(1) *Lunch count system.* To ensure that the Claim for Reimbursement accurately reflects the number of lunches and afterschool snacks served to eligible children, the school food authority must, at a minimum:

(i) Correctly approve each child's eligibility for free and reduced price lunches and afterschool snacks based on

the requirements prescribed under part 245 of this chapter;

(ii) Maintain a system to issue benefits and to update the eligibility of children approved for free or reduced price lunches and afterschool snacks. The system must:

(A) Accurately reflect eligibility status as well as changes in eligibility made after the initial approval process due to verification findings, transfers, reported changes in income or household size, etc.; and

(B) Make the appropriate changes in eligibility after the initial approval process on a timely basis so that the mechanism the school food authority uses to identify currently eligible children provides a current and accurate representation of eligible children. Changes in eligibility which result in increased benefit levels must be made as soon as possible but no later than 3 operating days of the date the school food authority makes the final decision on a child's eligibility status. Changes in eligibility which result in decreased benefit levels must be made as soon as possible but no later than 10 operating days of the date the school food authority makes the final decision on the child's eligibility status;

(iii) Base Claims for Reimbursement on lunch counts, taken daily at the point of service, which correctly identify the number of free, reduced price and paid lunches served to eligible children;

(iv) Correctly record, consolidate and report those lunch and afterschool snack counts on the Claim for Reimbursement; and

(v) Ensure that Claims for Reimbursement do not request payment for any excess lunches produced, as prohibited in § 210.10(a)(2), or non-Program lunches (*i.e.,* a la carte or adult lunches) or for more than one afterschool snack per child per day.

* * * * *

(d) *Performance-based cash assistance.* The State agency must provide performance-based cash assistance as authorized under § 210.4(b)(1) for lunches served in school food authorities certified by the State agency to be in compliance with meal pattern and nutrition requirements set forth in § 210.10 and, if the school food authority participates in the School Breakfast Program (part 220 of this chapter), § 220.8 of this chapter, as applicable. State agencies must establish procedures to certify school food authorities for performance-based cash assistance in accordance with guidance established by FNS. Such procedures must ensure State agencies:

(1) Make certification procedures readily available to school food authorities and provide guidance necessary to facilitate the certification process.

(2) Require school food authorities to submit documentation to demonstrate compliance with meal pattern requirements set forth in § 210.10 and § 220.8 of this chapter, as applicable. Such documentation must reflect meal service at or about the time of certification.

(3) State agencies must review certification documentation submitted by the school food authority to ensure compliance with meal pattern requirements set forth in § 210.10, or § 220.8 of this chapter, as applicable. For certification purposes, State agencies should consider any school food authority compliant:

(i) If when evaluating daily and weekly range requirements for grains and meat/meat alternates, the certification documentation shows compliance with the daily and weekly minimums for these two components, regardless of whether the school food authority has exceeded the maximums for the same components.

(ii) If when evaluating the service of frozen fruit, the school food authority serves products that contain added sugar.

(4) Certification procedures must ensure that no performance-based cash assistance is provided to school food authorities for meals served prior to October 1, 2012.

(5) Within 60 calendar days of a certification submission or as otherwise authorized by FNS, review submitted materials and notify school food authorities of the certification determination, the date that performance-based cash assistance is effective, and consequences for non-compliance,

(6) Disburse performance-based cash assistance for all lunches served beginning with the start of certification provided that documentation reflects meal service in the calendar month the certification materials are submitted or, in the month preceding the calendar month of submission.

(e) *Reimbursements for afterschool snacks.* The State agency will reimburse the school food authority for afterschool snacks served in eligible schools (as defined in § 210.10(o)(1)) operating afterschool care programs under the National School Lunch Program (NSLP) in accordance with the rates established in § 210.4(b).

■ 6. In § 210.8, revise and republish paragraphs (c) and (d) to read as follows:

§ 210.8 Claims for reimbursement.

* * * * *

(c) *Content of claim.* The Claim for Reimbursement must include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Report of School Program Operations required under § 210.5(d). Such data must include, at a minimum, the number of free, reduced price, and paid lunches and afterschool snacks served to eligible children. The claim must be signed by a school food authority official.

(1) *Consolidated claim.* The State agency may authorize a school food authority to submit a consolidated Claim for Reimbursement for all schools under its jurisdiction, provided that, the data on each school's operations required in this section are maintained on file at the local office of the school food authority and the claim separates consolidated data for commodity schools from data for other schools. Unless otherwise approved by FNS, the Claim for Reimbursement for any month must include only lunches and afterschool snacks served in that month except if the first or last month of Program operations for any school year contains 10 operating days or less, such month may be combined with the Claim for Reimbursement for the appropriate adjacent month. However, Claims for Reimbursement may not combine operations occurring in two fiscal years. If a single State agency administers any combination of the Child Nutrition Programs, a school food authority will be able to use a common claim form with respect to claims for reimbursement for meals served under those programs.

(2) *October data.* For the month of October, the State agency must also obtain, either through the Claim for Reimbursement or other means, the total number of children approved for free lunches and afterschool snacks, the total number of children approved for reduced price lunches and afterschool snacks, and the total number of children enrolled in the school food authority as of the last day of operation in October. The school food authority must submit this data to the State agency no later than December 31 of each year. State agencies may establish shorter deadlines at their discretion. In addition, the State agency may require school food authorities to provide this data for a more current month if for use in the State agency claims review process.

(d) *Advance funds.* The State agency may advance funds available for the Program to a school food authority in an amount equal to the amount of reimbursement estimated to be needed for one month's operation. Following the receipt of claims, the State agency

will make adjustments, as necessary, to ensure that the total amount of payments received by the school food authority for the fiscal year does not exceed an amount equal to the number of lunches and afterschool snacks by reimbursement type served to children times the respective payment rates assigned by the State in accordance with § 210.7(b). The State agency must recover advances of funds to any school food authority failing to comply with the 60-day claim submission requirements in paragraph (b) of this section.

■ 7. In § 210.9, revise and republish paragraphs (b)(21) and (c) to read as follows:

§ 210.9 Agreement with State agency.

* * * * *

(b) * * *

(21) No later than December 31 of each year, provide the State agency with a list of all schools under its jurisdiction in which 50 percent or more of enrolled children have been determined eligible for free or reduced price meals as of the last operating day the preceding October. The State agency may designate a month other than October for the collection of this information, in which case the list must be provided to the State agency within 60 calendar days following the end of the month designated by the State agency. In addition, each school food authority must provide, when available for the schools under its jurisdiction, and upon the request of a sponsoring organization of day care homes of the Child and Adult Care Food Program, information on the boundaries of the attendance areas for the schools identified as having 50 percent or more of enrolled children certified eligible for free or reduced price meals.

(c) *Afterschool care requirements.* Those school food authorities with eligible schools (as defined in § 210.10(o)(1)) that elect to serve afterschool snacks during afterschool care programs, must agree to:

(1) Serve afterschool snacks which meet the minimum requirements prescribed in § 210.10;

(2) Price the afterschool snack as a unit;

(3) Serve afterschool snacks free or at a reduced price to all children who are determined by the school food authority to be eligible for free or reduced price school meals under part 245 of this chapter;

(4) If charging for meals, the charge for a reduced price afterschool snack must not exceed 15 cents;

(5) Claim reimbursement at the assigned rates only for afterschool snacks served in accordance with the agreement;

(6) Claim reimbursement for no more than one afterschool snack per child per day;

(7) Review each afterschool care program two times a year; the first review must be made during the first four weeks that the school is in operation each school year, except that an afterschool care program operating year round must be reviewed during the first four weeks of its initial year of operation, once more during its first year of operation, and twice each school year thereafter; and

(8) Comply with all requirements of this part, except that, claims for reimbursement need not be based on ''point of service'' afterschool snack counts (as required by § 210.9(b)(9)).

■ 8. In § 210.10:

■ a. Revise and republish paragraph (a)(1)(i);

■ b. Revise paragraphs (a)(3) and (b) through (f);

■ c. Revise and republish paragraph (g);

■ d. Revise paragraph (h);

■ e. Revise and republish paragraphs (i), (j), and (k)(2);

■ f. Revise paragraphs (m), (o), (p), and (q); and

■ g. Add paragraph (r).

The revisions and addition read as follows:

§ 210.10 Meal requirements for lunches and requirements for afterschool snacks.

(a) * * *

(1) * * *

(i) *Requirements for lunch.* School lunches offered to children age 5 or older must meet, at a minimum, the meal requirements in paragraph (b) of this section. Schools must follow a food-based menu planning approach and produce enough food to offer each child the quantities specified in the meal pattern established in paragraph (c) of this section for each age/grade group served in the school. In addition, school lunches must meet the dietary specifications in paragraph (f) of this section. Schools offering lunches to children ages 1 through 4 and infants must meet the meal pattern requirements in paragraphs (p) and (q) of this section, as applicable. Schools must make plain potable water available and accessible without restriction to children at no charge in the place(s) where lunches are served during the meal service.

* * * * *

(3) *Production and menu records.* Schools or school food authorities, as applicable, must keep production and menu records for the meals they produce. These records must show how the meals offered contribute to the required meal components and food quantities for each age/grade group every day. Schools or school food authorities must maintain records of the latest nutritional analysis of the school menus conducted by the State agency. Information on maintaining production and menu records may be found in FNS guidance.

(b) *Meal requirements for school lunches.* School lunches for children ages 5 and older must reflect food and nutrition requirements specified by the Secretary. Compliance with these requirements is measured as follows:

(1) On a daily basis:

(i) Meals offered to each age/grade group must include the meal components and food quantities specified in the meal pattern in paragraph (c) of this section; and

(ii) The meal selected by each student must have the number of meal components required for a reimbursable meal and include at least one fruit or vegetable.

(2) Over a 5-day school week:

(i) Average calorie content of meals offered to each age/grade group must be within the minimum and maximum calorie levels specified in paragraph (f) of this section;

(ii) Average saturated fat content of the meals offered to each age/grade group must be less than 10 percent of total calories;

(iii) By July 1, 2027, average added sugars content of the meals offered to each age/grade group must be less than 10 percent of total calories; and

(iv) Average sodium content of the meals offered to each age/grade group must not exceed the maximum level specified in paragraph (f) of this section.

(c) *Meal pattern for school lunches.* Schools must offer the meal components and quantities required in the lunch meal pattern established in the following table:

TABLE 1 TO PARAGRAPH (c) INTRODUCTORY TEXT—NATIONAL SCHOOL LUNCH PROGRAM MEAL PATTERN

Meal components	Amount of food[1] per week (minimum per day)		
	Grades K–5	Grades 6–8	Grades 9–12
Fruits (cups)[2]	2½ (½)	2½ (½)	5 (1)
Vegetables (cups)[2]	3¾ (¾)	3¾ (¾)	5 (1)
Dark Green Subgroup[3]	½	½	½
Red/Orange Subgroup[3]	¾	¾	1¼
Beans, Peas, and Lentils Subgroup[3]	½	½	½
Starchy Subgroup[3]	½	½	½
Other Vegetables Subgroup[3,4]	½	½	¾
Additional Vegetables from Any Subgroup to Reach Total	1	1	1½
Grains (oz. eq.)[5]	8–9 (1)	8–10 (1)	10–12 (2)
Meats/Meat Alternates (oz. eq.)[6]	8–10 (1)	9–10 (1)	10–12 (2)
Fluid Milk (cups)[7]	5 (1)	5 (1)	5 (1)
Dietary Specifications: Daily Amount Based on the Average for a 5-Day Week[8]			
Minimum-Maximum Calories (kcal)	550–650	600–700	750–850
Saturated Fat (% of total calories)	<10	<10	<10
Added Sugars (% of total calories)	<10	<10	<10
Sodium Limit: In place through June 30, 2027	≤1,110 mg	≤1,225 mg	≤1,280 mg
Sodium Limit: Must be implemented by July 1, 2027	≤935 mg	≤1,035 mg	≤1,080 mg

[1] Food items included in each group and subgroup and amount equivalents.
[2] Minimum creditable serving is ⅛ cup. One quarter-cup of dried fruit counts as ½ cup of fruit; 1 cup of leafy greens counts as ½ cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100 percent full-strength.
[3] Larger amounts of these vegetables may be served.
[4] This subgroup consists of "Other vegetables" as defined in paragraph (c)(2)(ii)(E) of this section. For the purposes of the NSLP, the "Other vegetables" requirement may be met with any additional amounts from the dark green, red/orange, and bean, peas, and lentils vegetable subgroups as defined in paragraph (c)(2)(ii) of this section.
[5] Minimum creditable serving is 0.25 oz. eq. At least 80 percent of grains offered weekly (by ounce equivalents) must be whole grain-rich as defined in § 210.2 and the remaining grains items offered must be enriched.
[6] Minimum creditable serving is 0.25 oz. eq.
[7] Minimum creditable serving is 8 fluid ounces. All fluid milk must be fat-free (skim) or low-fat (1 percent fat or less) and must meet the requirements in paragraph (d) of this section.
[8] By July 1, 2027, schools must meet the dietary specification for added sugars. Schools must meet the sodium limits by the dates specified in this chart. Discretionary sources of calories may be added to the meal pattern if within the dietary specifications.

(1) *Age/grade groups.* Schools must plan menus for students using the following age/grade groups: Grades K–5 (ages 5–10), grades 6–8 (ages 11–13), and grades 9–12 (ages 14–18). If an unusual grade configuration in a school prevents the use of these established age/grade groups, students in grades K–5 and grades 6–8 may be offered the same food quantities at lunch provided that the calorie and sodium standards for each age/grade group are met. No customization of the established age/grade groups is allowed.

(2) *Meal components.* Schools must offer students in each age/grade group the meal components specified in this paragraph (c).

(i) *Fruits component.* Schools must offer fruits daily as part of the lunch menu. Fruits that are fresh, frozen, or dried, or canned in light syrup, water or fruit juice may be offered to meet the requirements of this paragraph (c)(2)(i). All fruits are credited based on their volume as served, except that ¼ cup of dried fruit counts as ½ cup of fruit. Only pasteurized, full-strength fruit juice may be offered, and may be credited to meet no more than one-half of the fruits component.

(ii) *Vegetables component.* Schools must offer vegetables daily as part of the lunch menu. Fresh, frozen, or canned vegetables and dry beans, peas, and lentils may be offered to meet this requirement. All vegetables are credited based on their volume as served, except that 1 cup of leafy greens counts as ½ cup of vegetables and tomato paste and puree are credited based on calculated volume of the whole food equivalency. Pasteurized, full-strength vegetable juice may be offered to meet no more than one-half of the vegetables component. Vegetable offerings at lunch over the course of the week must include the following vegetable subgroups, as defined in this section in the quantities specified in the meal pattern in paragraph (c) of this section:

(A) *Dark green vegetables subgroup.* This subgroup includes vegetables such as bok choy, broccoli, collard greens, dark green leafy lettuce, kale, mesclun, mustard greens, romaine lettuce, spinach, turnip greens, and watercress;

(B) *Red/orange vegetables subgroup.* This subgroup includes vegetables such as acorn squash, butternut squash, carrots, pumpkin, tomatoes, tomato juice, and sweet potatoes;

(C) *Beans, peas, and lentils vegetable subgroup.* This subgroup includes vegetables such as black beans, black-eyed peas (mature, dry), garbanzo beans (chickpeas), kidney beans, lentils, navy beans pinto beans, soybeans, split peas, and white beans. Cooked dry beans, peas, and lentils may be counted as either a vegetable or as a meat alternate but not as both in the same dish. When offered toward the protein sources component, beans, peas, and lentils may count toward the weekly beans, peas, and lentils vegetable subgroup requirement, but may not count toward the daily or weekly vegetable component requirement;

(D) *Starchy vegetables subgroup.* This subgroup includes vegetables such as black-eyed peas (not dry), corn, cassava, green bananas, green peas, green lima beans, plantains, taro, water chestnuts, and white potatoes; and

(E) *Other vegetables subgroup.* This subgroup includes all other fresh, frozen, and canned vegetables, cooked or raw, such as artichokes, asparagus, avocados, bean sprouts, beets, Brussels sprouts, cabbage, cauliflower, celery, cucumbers, eggplant, green beans, green peppers, iceberg lettuce, mushrooms,

okra, onions, parsnips, turnips, wax beans, and zucchini.

(iii) *Grains component.* Schools must offer grains daily as part of the lunch menu.

(A) *Whole grain-rich requirement.* Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched. At least 80 percent of grains offered at lunch weekly must, based on ounce equivalents, meet the whole grain-rich criteria as defined in § 210.2, and the remaining grain items offered must be enriched.

(B) *Breakfast cereals.* By July 1, 2025, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce.

(C) *Desserts.* Schools may count up to two ounce equivalents of grain-based desserts per week toward meeting the grains requirement at lunch. Information on crediting grain-based desserts may be found in FNS guidance.

(D) *Daily and weekly servings.* The grains component is based on minimum daily servings plus total servings over a 5-day school week. Schools serving lunch 6 or 7 days per week must increase the weekly grains quantity by approximately 20 percent (1⁄5) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (1⁄5) for each day less than 5.

(iv) *Meats/meat alternates component.* Schools must offer meats/meat alternates daily as part of the lunch meal pattern. The quantity of the meat/meat alternate must be the edible portion as served. This component must be served in a main dish or in a main dish and only one other food item. Schools without daily choices in this component should not serve any one meat/meat alternate or form of meat/meat alternate (for example, ground, diced, pieces) more than three times in the same week. If a portion size of this component does not meet the daily requirement for a particular age/grade group, schools may supplement it with another meat/meat alternate to meet the full requirement. Schools may adjust the daily quantities of this component provided that a minimum of one ounce is offered daily to students in grades K–8 and a minimum of two ounces is offered daily to students in grades 9–12, and the total weekly requirement is met over a 5-day period. Information on crediting meats/meat alternates may be found in FNS guidance.

(A) *Enriched macaroni.* Enriched macaroni with fortified protein as defined in appendix A to this part may be used to meet part of the meats/meat alternates requirement when used as specified in appendix A to this part. An enriched macaroni product with fortified protein as defined in appendix A to this part may be used to meet part of the meats/meat alternates component or the grains component but may not meet both food components in the same lunch.

(B) *Nuts and seeds.* Nuts and seeds and their butters are allowed as a meat alternate. Acorns, chestnuts, and coconuts do not credit as meat alternates because of their low protein and iron content. Nut and seed meals or flours may credit only if they meet the requirements for Alternate Protein Products established in appendix A to this part.

(C) *Yogurt.* Yogurt may be offered to meet all or part of the meats/meat alternates component. Yogurt may be plain or flavored, unsweetened or sweetened. By July 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce). Noncommercial and/or non-standardized yogurt products, such as frozen yogurt, drinkable yogurt products, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruits and/or nuts or similar products are not creditable. Four ounces (weight) or 1⁄2 cup (volume) of yogurt is one ounce equivalent of meats/meat alternates.

(D) *Tofu and soy products.* Commercial tofu and soy products may be offered to meet all or part of the meats/meat alternates component. Noncommercial and/or non-standardized tofu and soy products are not creditable.

(E) *Beans, peas, and lentils.* Cooked dry beans, peas, and lentils may be offered to meet all or part of the meats/meat alternates component. Beans, peas, and lentils are identified in this section and include foods such as black beans, garbanzo beans, lentils, kidney beans, mature lima beans, navy beans, pinto beans, and split peas. Cooked dry beans, peas, and lentils may be counted as either a vegetable or as a meat alternate but not as both in the same dish. When offered as a meat alternate, beans, peas, and lentils may count toward the weekly beans, peas, and lentils vegetable subgroup requirement, but may not count toward the daily or weekly vegetable component requirements.

(F) *Other meat alternates.* Other meat alternates, such as cheese and eggs, may be used to meet all or part of the meats/meat alternates component.

(v) *Fluid milk component.* Fluid milk must be offered daily in accordance with paragraph (d) of this section.

(3) *Grain substitutions.* (i) Schools in American Samoa, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands may serve any vegetable, including vegetables such as breadfruit, prairie turnips, plantains, sweet potatoes, and yams, to meet the grains component.

(ii) School food authorities and schools that are tribally operated, operated by the Bureau of Indian Education, and that serve primarily American Indian or Alaska Native children, may serve any vegetable, including vegetables such as breadfruit, prairie turnips, plantains, sweet potatoes, and yams, to meet the grains component.

(4) *Adjustments to school menus.* Schools must adjust future menu cycles to reflect production and how often food items are offered. Schools may need to change the foods offerings given students' selections and may need to modify recipes and other specifications to make sure that meal requirements are met.

(5) *Standardized recipes.* All schools must develop and follow standardized recipes. A standardized recipe is a recipe that was tested to provide an established yield and quantity using the same ingredients for both measurement and preparation methods. Standardized recipes developed by USDA/FNS are in the Child Nutrition Database. If a school has its own recipes, they may seek assistance from the State agency or school food authority to standardize the recipes. Schools must add any local recipes to their local databases. Additional information may be found in FNS guidance.

(6) *Processed foods.* The Child Nutrition Database includes a number of processed foods. Schools may use purchased processed foods that are not in the Child Nutrition Database. Schools or the State agency must add any locally purchased processed foods to their local database. The State agencies must obtain the levels of calories, saturated fat, added sugars, and sodium in the processed foods. Additional information may be found in FNS guidance.

(7) *Traditional Indigenous foods.* Traditional Indigenous foods may credit toward the required meal components. Information on food crediting may be found in FNS guidance. Schools are encouraged to serve traditional Indigenous foods as part of their lunch and afterschool snack service. Per the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)) traditional foods means food that has traditionally been prepared and

consumed by an American Indian tribe, including wild game meat; fish; seafood; marine mammals; plants; and berries.

(d) *Fluid milk requirements*—(1) *Types of fluid milk.* (i) Schools must offer students a variety (at least two different options) of fluid milk at lunch daily. All milk must be fat-free (skim) or low-fat (1 percent fat or less). Milk with higher fat content is not creditable. Low-fat or fat-free lactose-free and reduced-lactose fluid milk may also be offered.

(ii) All fluid milk served in the Program must be pasteurized fluid milk which meets State and local standards for such milk. All fluid milk must have vitamins A and D at levels specified by the Food and Drug Administration and must be consistent with State and local standards for such milk.

(iii) Milk varieties may be unflavored or flavored, provided that unflavored milk is offered at each meal service. By July 1, 2025, flavored milk must contain no more than 10 grams of added sugars per 8 fluid ounces, or for flavored milk sold as competitive food for middle and high schools, 15 grams of added sugars per 12 fluid ounces.

(2) *Fluid milk substitutes for non-disability reasons.* School food authorities may offer fluid milk substitutes to students with dietary needs that are not disabilities. For disability-related meal modifications, see paragraph (m) of this section.

(i) Prior to providing a fluid milk substitute for a non-disability reason, a school food authority must obtain a written request from the student's parent or guardian, a State licensed healthcare professional, or a registered dietitian that identifies the reason for the substitute. A school food authority choosing to offer fluid milk substitutes for a non-disability reason is not required to offer the specific fluid milk substitutes requested but may offer the fluid milk substitutes of its choice, provided the fluid milk substitutes offered meet the requirements of paragraph (d)(2)(ii) of this section. A school food authority must inform the State agency if any schools choose to offer fluid milk substitutes for non-disability reasons.

(ii) If a school food authority chooses to offer one or more fluid milk substitutes for non-disability reasons, the fluid milk substitutes must provide, at a minimum, the nutrients listed in the following table. Fluid milk substitutes must be fortified in accordance with fortification guidelines issued by the Food and Drug Administration.

TABLE 2 TO PARAGRAPH (d)(2)(ii)—NUTRIENT REQUIREMENTS FOR FLUID MILK SUBSTITUTES

Nutrient	Per cup (8 fl. oz.)
Calcium	276 mg.
Protein	8 g.
Vitamin A	150 mcg. retinol activity equivalents (RAE).
Vitamin D	2.5 mcg.
Magnesium	24 mg.
Phosphorus	222 mg.
Potassium	349 mg.
Riboflavin	0.44 mg.
Vitamin B–12	1.1 mcg.

(iii) Expenses incurred when providing fluid milk substitutes that exceed program reimbursements must be paid by the school food authority; costs may be paid from the nonprofit school food service account.

(iv) The fluid milk substitute approval must remain in effect until the student's parent or guardian, the State licensed healthcare professional, or the registered dietitian revokes the request in writing, or until the school food authority changes its fluid milk substitute policy.

(3) *Inadequate fluid milk supply.* If a school food authority cannot get a supply of fluid milk, it can still participate in the Program under the following conditions:

(i) If emergency conditions temporarily prevent a school food authority that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may allow the school food authority to serve meals during the emergency period with an alternate form of fluid milk or without fluid milk.

(ii) If a school food authority is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may approve the service of meals without fluid milk if the school food authority uses an equivalent amount of canned milk or dry milk in the preparation of the meals. In Alaska, American Samoa, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands, if a sufficient supply of fluid milk cannot be obtained, ''fluid milk'' includes reconstituted or recombined fluid milk, or as otherwise allowed by FNS through a written exception.

(4) *Restrictions on the sale of fluid milk.* A school food authority participating in the Program, or a person approved by a school food authority participating in the Program, must not directly or indirectly restrict the sale or marketing of fluid milk (as identified in paragraph (d)(1) of this section) at any time or in any place on school premises or at any school-sponsored event.

(e) *Offer versus serve for grades K through 12.* School lunches must offer daily the five meal components specified in the meal pattern in paragraph (c) of this section. Under offer versus serve, students must be allowed to decline two components at lunch, *except that* the students must select at least 1/2 cup of either the fruit or vegetable component. Senior high schools (as defined by the State educational agency) must participate in offer versus serve. Schools below the senior high level may participate in offer versus serve at the discretion of the school food authority.

(f) *Dietary specifications*—(1) *Calories.* School lunches offered to each age/grade group must meet, on average over the school week, the minimum and maximum calorie levels specified in the following table:

TABLE 3 TO PARAGRAPH (f)(1)—NATIONAL SCHOOL LUNCH PROGRAM CALORIE RANGES

	Grades K–5	Grades 6–8	Grades 9–12
Average Daily Minimum-Maximum Calories (kcal) [1]	550–650	600–700	750–850

[1] The average daily calories must fall within the minimum and maximum levels. Discretionary sources of calories may be added to the meal pattern if within the dietary specifications.

(2) *Saturated fat.* School lunches offered to all age/grade groups must, on average over the school week, provide less than 10 percent of total calories from saturated fat.

(3) *Added sugars.* By July 1, 2027, school lunches offered to all age/grade groups must, on average over the school week, provide less than 10 percent of total calories from added sugars.

(4) *Sodium.* School lunches offered to each age/grade group must meet, on average over the school week, the sodium limits specified in the following table within the established deadlines:

TABLE 4 TO PARAGRAPH (f)(4)—NATIONAL SCHOOL LUNCH PROGRAM SODIUM LIMITS

Age/grade group	Sodium limit: in place through June 30, 2027 (mg)	Sodium limit: must be implemented by July 1, 2027 (mg)
Grades K–5	≤1,110	≤935
Grades 6–8	≤1,225	≤1,035
Grades 9–12	≤1,280	≤1,080

(g) *Compliance assistance.* The State agency and school food authority must provide technical assistance and training to assist schools in planning lunches that meet the meal pattern in paragraph (c) of this section; the dietary specifications established in paragraph (f) of this section; and the meal pattern requirements in paragraphs (o) through (q) of this section, as applicable. Compliance assistance may be offered during trainings, onsite visits, and/or administrative reviews.

(h) *Monitoring dietary specifications.* When required by the Administrative Review process set forth in § 210.18, the State agency must conduct a weighted nutrient analysis to evaluate the average levels of calories, saturated fat, added sugars, and sodium of the lunches offered to students in grades K–12 during one week of the review period. The nutrient analysis must be conducted in accordance with the procedures established in paragraph (i)(3) of this section. If the results of the nutrient analysis indicate that school lunches do not meet the specifications for calories, saturated fat, added sugars, and sodium specified in paragraph (f) of this section, the State agency or school food authority must provide technical assistance and require the reviewed school to take corrective action to meet the requirements.

(i) *Nutrient analyses of school meals*—(1) *Conducting the nutrient analysis.* Any nutrient analysis, whether conducted by the State agency under § 210.18 or by the school food authority, must be performed in accordance with the procedures established in paragraph (i)(3) of this section. The purpose of the nutrient analysis is to determine the average levels of calories, saturated fat, added sugars, and sodium in the meals offered to each age grade group over a school week. The weighted nutrient analysis must be performed as required by FNS guidance.

(2) *Software elements*—(i) *The Child Nutrition Database.* The nutrient analysis is based on the USDA Child Nutrition Database. This database is part of the software used to do a nutrient analysis. Software companies or others developing systems for schools may contact FNS for more information about the database.

(ii) *Software evaluation.* FNS or an FNS designee evaluates any nutrient analysis software before it may be used in schools. FNS or its designee determines if the software, as submitted, meets the minimum requirements. The approval of software does not mean that FNS or USDA endorses it. The software must be able to perform a weighted average analysis after the basic data is entered. The combined analysis of the lunch and breakfast programs is not allowed.

(3) *Nutrient analysis procedures*—(i) *Weighted averages.* The nutrient analysis must include all foods offered as part of the reimbursable meals during one week within the review period. Foods items are included based on the portion sizes and serving amounts. They are also weighted based on their proportionate contribution to the meals offered. This means that food items offered more frequently are weighted more heavily than those not offered as frequently. The weighted nutrient analysis must be performed as required by FNS guidance.

(ii) *Analyzed nutrients.* The analysis determines the average levels of calories, saturated fat, added sugars, and sodium in the meals offered over a school week. It includes all food items offered by the reviewed school over a one-week period.

(4) *Comparing the results of the nutrient analysis.* Once the procedures in paragraph (i)(3) of this section are completed, State agencies must compare the results of the analysis to the calorie, saturated fat, added sugars, and sodium levels established in § 210.10 or § 220.8 of this chapter, as appropriate, for each age/grade group to evaluate the school's compliance with the dietary specifications.

(j) *Responsibility for monitoring meal requirements.* Compliance with the meal requirements in paragraph (b) of this section, including the dietary specifications, and paragraphs (o) through (q) of this section, as applicable, will be monitored by the State agency through administrative reviews authorized in § 210.18.

(k) * * *

(2) *Opportunity to select.* Schools that choose to offer a variety of reimbursable lunches, or provide multiple serving lines, must make all required meal components available to all students, on every lunch line, in at least the minimum required amounts.

* * * * *

(m) *Modifications and variations in reimbursable meals and afterschool snacks*—(1) *Modifications for disability reasons.* School food authorities must make meal modifications, including

substitutions in lunches and afterschool snacks, for children with a disability and whose disability restricts their diet. The modification requested must be related to the disability or limitations caused by the disability and must be offered at no additional cost to the child or household.

(i) In order to receive Federal reimbursement when a modified meal does not meet the meal pattern requirements specified in this section, the school food authority must obtain from the household a written medical statement signed by a State licensed healthcare professional. By July 1, 2025, school food authorities must also accept a medical statement signed by a registered dietitian. The medical statement must provide sufficient information about the child's dietary restrictions, such as foods to be omitted and recommended alternatives, if appropriate. Modified meals that meet the meal pattern requirements in this section are reimbursable with or without a medical statement.

(ii) School food authorities must ensure that parents, guardians, and children have notice of the procedure for requesting meal modifications for disabilities and the process for procedural safeguards related to meal modifications for disabilities. See §§ 15b.6(b) and 15b.25 of this title.

(iii) Expenses incurred when making meal modifications that exceed program reimbursement rates must be paid by the school food authority; costs may be paid from the nonprofit food service account.

(2) *Variations for non-disability reasons.* School food authorities should consider children's dietary preferences when planning and preparing meals and afterschool snacks. Any variations must be consistent with the meal pattern requirements specified under this section. Expenses incurred from meal pattern variations that exceed program reimbursement rates must be paid by the school food authority; costs may be paid from the nonprofit food service account.

(3) *Exceptions for natural disasters.* If there is a natural disaster or other catastrophe, FNS may temporarily allow school food authorities to serve meals for reimbursement that do not meet the requirements in this section.

* * * * *

(o) *Afterschool snacks.* Eligible schools operating afterschool care programs may be reimbursed for one afterschool snack served to a child (as defined in § 210.2) per day.

(1) *Eligible schools* means schools that:

(i) Operate the National School Lunch Program; and

(ii) Sponsor afterschool care programs as defined in § 210.2.

(2) *Afterschool snack requirements for K–12 children*—(i) *Afterschool snacks served to K through 12 children.* Schools serving afterschool snacks to K–12 children must serve the meal components and quantities required in the snack meal pattern established for the Child and Adult Care Food Program, under § 226.20 of this chapter. In addition, schools serving afterschool snacks to K–12 children must comply with the requirements set forth in paragraphs (a), (c)(3) and (4), (d)(2) through (4), (g), and (m) of this section, as applicable, and § 226.20(d) of this chapter.

(ii) *Afterschool snack meal pattern table for K through 12 children.* Through June 30, 2025, afterschool snacks must either follow the requirements outlined in the following table or must contain two different components from the following four: fluid milk, meats/meat alternates, vegetable or fruit, and/or grains. By July 1, 2025, the minimum amounts of meal components to be served at afterschool snack are as follows:

TABLE 5 TO PARAGRAPH (o)(2)(ii)—AFTERSCHOOL SNACK MEAL PATTERN FOR K–12 CHILDREN

[Ages 6–18]

[Select two of the five components for a reimbursable snack]

Meal components [1]	Minimum quantities [2]
Fluid milk [3]	8 fluid ounces.
Meats/meat alternates [4].	1 ounce equivalent.
Vegetables [5]	¾ cup.
Fruits [5]	¾ cup.
Grains [6]	1 ounce equivalent.

[1] Must serve two of the five components for a reimbursable afterschool snack. Only one of the two components may be a beverage.

[2] May need to serve larger portions to children ages 13 through 18 to meet their nutritional needs.

[3] Must be fat-free (skim) or low-fat (1 percent fat or less). Milk may be unflavored or flavored.

[4] Alternate protein products must meet the requirements in appendix A to part 226 of this chapter. Yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce). Information on crediting meats/meat alternates may be found in FNS guidance.

[5] Juice must be pasteurized, full-strength juice. No more than half of the weekly fruit or vegetable offerings may be in the form of juice.

[6] At least 80 percent of grains offered weekly (by ounce equivalents) must be whole grain-rich, as defined in § 210.2, and the remaining grains items offered must be enriched. Grain-based desserts may not be used to meet the grains requirement. Breakfast cereal must have no more than 6 grams of added sugars per dry ounce. Information on crediting grain items may be found in FNS guidance.

(3) *Afterschool snack requirements for preschoolers*—(i) *Afterschool snacks served to preschoolers.* Schools serving afterschool snacks to preschoolers must serve the food components and quantities required in the snack meal pattern established for the Child and Adult Care Food Program, under § 226.20 of this chapter. In addition, schools serving afterschool snacks to preschoolers must comply with the requirements set forth in paragraphs (a), (c)(3) and (4), (d)(2) through (4), (g), and (m) of this section, as applicable, and § 226.20(d) of this chapter.

(ii) *Preschooler afterschool snack meal pattern table.* The minimum amounts of food components to be served at afterschool snack are as follows:

TABLE 5 TO PARAGRAPH (o)(3)(ii)—AFTERSCHOOL SNACK MEAL PATTERN FOR PRESCHOOLERS

[Select two of the five components for a reimbursable snack]

Meal components [1]	Minimum quantities	
	Ages 1–2	Ages 3–5
Fluid milk [2]	4 fluid ounces	4 fluid ounces.
Meats/meat alternates [3]	½ ounce equivalent	½ ounce equivalent.
Vegetables [4]	½ cup	½ cup.
Fruits [4]	½ cup	½ cup.

TABLE 5 TO PARAGRAPH (o)(3)(ii)—AFTERSCHOOL SNACK MEAL PATTERN FOR PRESCHOOLERS—Continued

[Select two of the five components for a reimbursable snack]

Meal components [1]	Minimum quantities	
	Ages 1–2	Ages 3–5
Grains [5]	½ ounce equivalent	½ ounce equivalent.

[1] Must serve two of the five components for a reimbursable afterschool snack. Only one of the two components may be a beverage.
[2] Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent) or unflavored fat-free (skim) milk for children two through five years old.
[3] Alternate protein products must meet the requirements in appendix A to part 226 of this chapter. Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce). Information on crediting meats/meat alternates may be found in FNS guidance.
[4] Pasteurized full-strength juice may only be offered to meet the vegetable or fruit requirement at one meal, including snack, per day.
[5] At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count toward meeting the grains requirement. Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce.

(4) *Afterschool snack requirements for infants*—(i) *Afterschool snacks served to infants.* Schools serving afterschool snacks to infants ages birth through 11 months must serve the meal components and quantities required in the snack meal pattern established for the Child and Adult Care Food Program, under § 226.20 of this chapter. In addition, schools serving afterschool snacks to infants must comply with the requirements set forth in paragraphs (a), (c)(3) and (4), (g), and (m) of this section, as applicable, and § 226.20(d) of this chapter.

(ii) *Infant afterschool snack meal pattern table.* The minimum amounts of meal components to be served at snack are as follows:

TABLE 6 TO PARAGRAPH (o)(4)(II)—INFANT AFTERSCHOOL SNACK MEAL PATTERN

Birth through 5 months	6 through 11 months
4–6 fluid ounces of breast milk [1] or formula [2]	2–4 fluid ounces breast milk [1] or formula; [2] and 0–½ ounce equivalent bread; [3 4] or 0–¼ ounce equivalent crackers; [3 4] or 0–½ ounce equivalent infant cereal; [2 4] or 0–¼ ounce equivalent ready-to-eat breakfast cereal; [3 4 5 6] and 0–2 tablespoons vegetable or fruit, or a combination of both. [6 7]

[1] Breast milk or formula, or portions of both, must be served; however, it is recommended that breast milk be served from birth through 11 months. For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered, with additional breast milk offered at a later time if the infant will consume more.
[2] Infant formula and dry infant cereal must be iron-fortified.
[3] A serving of grains must be whole grain-rich, enriched meal, enriched flour, bran, or germ.
[4] Information on crediting grain items may be found in FNS guidance.
[5] Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce.
[6] A serving of this component is required when the infant is developmentally ready to accept it.
[7] Fruit and vegetable juices must not be served.

(5) *Monitoring afterschool snacks.* Compliance with the requirements of this paragraph (o)(5) is monitored by the State agency as part of the Administrative Review conducted under § 210.18. If snacks offered do not meet the requirements of this paragraph, the State agency or school food authority must provide technical assistance and require corrective action and when applicable, must take fiscal action, as authorized in §§ 210.18(l) and 210.19(c).

(p) *Lunch requirements for preschoolers*—(1) *Lunches served to preschoolers.* Schools serving lunches to preschoolers under the National School Lunch Program must serve the meal components and quantities required in the lunch meal pattern established for the Child and Adult Care Food Program, under § 226.20(a), (c)(2), and (d) of this chapter. In addition, schools serving lunches to this age group must comply with the requirements set forth in paragraphs (a), (c)(3) and (4), (d)(2) through (4), (g), and (k) through (m) of this section.

(2) *Preschooler lunch meal pattern table.* The minimum amounts of meal components to be served at lunch are as follows:

TABLE 7 TO PARAGRAPH (p)(2)—PRESCHOOL LUNCH MEAL PATTERN

[Select the appropriate components for a reimbursable meal]

Meal components and food items [1]	Minimum quantities	
	Ages 1–2	Ages 3–5
Fluid milk	4 fluid ounces [2]	6 fluid ounces [3].
Meats/meat alternates [4]	1 ounce equivalent	1½ ounce equivalents.
Vegetables [5]	⅛ cup	¼ cup.
Fruits [5]	⅛ cup	¼ cup.

TABLE 7 TO PARAGRAPH (p)(2)—PRESCHOOL LUNCH MEAL PATTERN—Continued

[Select the appropriate components for a reimbursable meal]

Meal components and food items [1]	Minimum quantities	
	Ages 1–2	Ages 3–5
Grains [6]	½ ounce equivalent	½ ounce equivalent.

[1] Must serve all five components for a reimbursable meal.

[2] Must serve unflavored whole milk to children age 1.

[3] Must serve unflavored milk to children 2 through 5 years old. The milk must be fat-free, skim, low-fat, or 1 percent or less.

[4] Alternate protein products must meet the requirements in appendix A to part 226 of this chapter. Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce). Information on crediting meats/meat alternates may be found in FNS guidance.

[5] Juice must be pasteurized. Full-strength juice may only be offered to meet the vegetable or fruit requirement at one meal or snack, per day. Vegetables may be offered to meet the entire fruits requirement. When two vegetables are served at lunch or supper, two different kinds of vegetables must be served.

[6] Must serve at least one whole grain-rich serving, across all eating occasions, per day. Grain-based desserts may not be offered to meet the grains requirement. Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereal must have no more than 6 grams of added sugars per dry ounce. Information on crediting grain items may be found in FNS guidance.

(q) *Lunch requirements for infants*—(1) *Lunches served to infants.* Schools serving lunches to infants ages birth through 11 months under the National School Lunch Program must serve the meal components and quantities required in the lunch meal pattern established for the Child and Adult Care Food Program, under § 226.20(a), (b), and (d) of this chapter. In addition, schools serving lunches to infants must comply with the requirements set forth in paragraphs (a), (c)(3) and (4), (g), (l), and (m) of this section.

(2) *Infant lunch meal pattern table.* The minimum amounts of meal components to be served at lunch are as follows:

TABLE 8 TO PARAGRAPH (q)(2)—INFANT LUNCH MEAL PATTERN

Birth through 5 months	6 through 11 months
4–6 fluid ounces breast milk [1] or formula [2].	6–8 fluid ounces breast milk [1] or formula; [2] and 0–½ ounce equivalent infant cereal; [2 3] or 0–4 tablespoons meat, fish, poultry, whole egg, cooked dry beans, peas, or lentils; or 0–2 ounces of cheese; or 0–4 ounces (volume) of cottage cheese; or 0–4 ounces or ½ cup of yogurt; [4] or a combination of the above; [5] and 0–2 tablespoons vegetable or fruit, or a combination of both.[5 6]

[1] Breast milk or formula, or portions of both, must be served; however, it is recommended that breast milk be served from birth through 11 months. For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered, with additional breast milk offered at a later time if the infant will consume more.

[2] Infant formula and dry infant cereal must be iron-fortified.

[3] Information on crediting grain items may be found in FNS guidance.

[4] Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce).

[5] A serving of this component is required when the infant is developmentally ready to accept it.

[6] Fruit and vegetable juices must not be served.

(r) *Severability.* If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstances, it shall be severable from this section and not affect the remainder thereof. In the event of such holding of invalidity or unenforceability of a provision, the meal pattern requirement covered by that provision reverts to the version that immediately preceded the invalidated provision.

■ 9. In § 210.11:

■ a. Revise paragraph (a)(3);

■ b. Add paragraph (a)(7);

■ c. Revise paragraph (f)(2);

■ d. Revise and republish paragraph (f)(3);

■ e. Remove paragraph (g);

■ f. Redesignate paragraphs (h) through (m) as paragraphs (g) through (l);

■ g. Revise and republish newly redesignated paragraphs (g)(2)(i) and (ii) and (h);

■ h. Revise newly redesignated paragraph (l); and

■ i. Remove paragraph (n).

The revisions and addition read as follows:

§ 210.11 Competitive food service and standards.

(a) * * *

(3) *Entrée item* means an item that is intended as the main dish in a reimbursable meal and is either:

(i) A combination food of a meat/meat alternate and a grain;

(ii) A combination food of a vegetable or fruit and a meat/meat alternate;

(iii) A meat/meat alternate alone with the exception of yogurt, low-fat or reduced fat cheese, nuts, seeds and nut or seed butters, and meat snacks (such as dried beef jerky); or

(iv) A grain only entrée that is served as the main dish in a school breakfast.

* * * * *

(7) *Bean dip* means, for the purpose of competitive food standards, a spread made from ground pulses (beans, peas, and/or lentils), along with one or more of the following optional ingredients:

(i) Ground nut/seed butter (such as tahini [ground sesame] or peanut butter).

(ii) Vegetable oil (such as olive oil, canola oil, soybean oil).

(iii) Seasoning (such as salt, citric acid).

(iv) Vegetables and juice for flavor (such as olives, roasted pepper, garlic, lemon juice).

(v) For manufactured bean dip, contains ingredients necessary as

preservatives and/or to maintain freshness.

* * * * *

(f) * * *

(2) *Exemptions to the total fat requirement.* (i) Seafood with no added fat is exempt from the total fat requirement, but subject to the saturated fat, sugar, calorie, and sodium standards.

(ii) Bean dip (as defined in paragraph (a)(7) of this section), is exempt from the total fat standard, but subject to the saturated fat, sugar, calorie, and sodium standards. This exemption does not apply to combination products that contain bean dip with other ingredients such as crackers, pretzels, pita, manufactured, snack-type vegetable and/or fruit sticks.

(3) *Exemptions to the total fat and saturated fat requirements.* (i) Reduced fat cheese and part skim mozzarella cheese are exempt from the total fat and saturated fat standards, but subject to the sugar, calorie, and sodium standards. This exemption does not apply to combination foods.

(ii) Nuts and seeds and nut/seed butters are exempt from the total fat and saturated fat standards, but subject to the sugar, calorie, and sodium standards. This exemption does not apply to combination products that contain nuts, seeds, or nut/seed butters with other ingredients, such as peanut butter and crackers, trail mix, or chocolate covered peanuts.

(iii) Products that consist of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fat are exempt from the total fat, saturated fat, and sugar standards, but subject to the calorie and sodium standards.

(iv) Whole eggs with no added fat are exempt from the total fat and saturated fat standards, but subject to the calorie and sodium standards.

(g) * * *

(2) * * *

(i) Dried whole fruits or vegetables; dried whole fruit or vegetable pieces; and dehydrated fruits or vegetables with no added nutritive sweeteners are exempt from the sugar standard, but subject to the total fat, saturated fat, calorie, and sodium standards. There is also an exemption from the sugar standard for dried fruits with nutritive sweeteners that are required for processing and/or palatability purposes.

(ii) Products that consist of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fat are exempt from the total fat, saturated fat, and sugar standards, but subject to the calorie and sodium standards.

(h) *Calorie and sodium content for snack items and side dishes sold as competitive foods.* Snack items and side dishes sold as competitive foods must have not more than 200 calories and 200 mg of sodium per item as packaged or served, including the calories and sodium contained in any added accompaniments such as butter, cream cheese, salad dressing, etc., and must meet all of the other nutrient standards in this section. These snack items and side dishes must have not more than 200 calories and 200 mg of sodium per item as packaged or served.

* * * * *

(l) *Beverages*—(1) *Elementary schools.* Allowable beverages for elementary school-aged students are limited to:

(i) Plain water or plain carbonated water (no size limit);

(ii) Milk and fluid milk substitutes that meet the requirements outlined in § 210.10(d)(1) and (2) (no more than 8 fluid ounces); and

(iii) One hundred (100) percent fruit/vegetable juice, and 100 percent fruit/vegetable juice diluted with water, with or without carbonation and with no added sweeteners (no more than 8 fluid ounces).

(2) *Middle schools.* Allowable beverages for middle school-aged students are limited to:

(i) Plain water or plain carbonated water (no size limit);

(ii) Milk and fluid milk substitutes that meet the requirements outlined in § 210.10(d)(1) and (2) (no more than 12 fluid ounces); and

(iii) One hundred (100) percent fruit/vegetable juice, and 100 percent fruit/vegetable juice diluted with water, with or without carbonation and with no added sweeteners (no more than 12 fluid ounces).

(3) *High schools.* Allowable beverages for high school-aged students are limited to:

(i) Plain water or plain carbonated water (no size limit);

(ii) Milk and fluid milk substitutes that meet the requirements outlined in § 210.10(d)(1) and (2) (no more than 12 fluid ounces);

(iii) One hundred (100) percent fruit/vegetable juice, and 100 percent fruit/vegetable juice diluted with water, with or without carbonation and with no added sweeteners (no more than 12 fluid ounces);

(iv) Calorie-free, flavored water, with or without carbonation (no more than 20 fluid ounces);

(v) Other beverages that are labeled to contain less than 5 calories per 8 fluid ounces, or less than or equal to 10 calories per 20 fluid ounces (no more than 20 fluid ounces); and

(vi) Other beverages that are labeled to contain no more than 40 calories per 8 fluid ounces or 60 calories per 12 fluid ounces (no more than 12 fluid ounces).

■ 10. In § 210.12, revise and republish paragraph (e) to read as follows:

§ 210.12 Student, parent, and community involvement.

* * * * *

(e) *Local school wellness policies.* Local educational agencies must comply with the provisions of § 210.31(d) regarding student, parent, and community involvement in the development, implementation, and periodic review and update of the local school wellness policy.

■ 11. In § 210.14:

■ a. Revise and republish paragraphs (e) introductory text and (e)(5)(ii)(D);

■ b. Remove paragraph (e)(6)(iii); and

■ c. Revise and republish paragraph (f) introductory text.

The revisions read as follows:

§ 210.14 Resource management.

* * * * *

(e) *Pricing paid lunches.* For each school year, school food authorities must establish prices for paid lunches in accordance with this paragraph (e).

* * * * *

(5) * * *

(ii) * * *

(D) Any in-kind contributions converted to direct cash expenditures; and

* * * * *

(f) *Revenue from nonprogram foods.* School food authorities must ensure that the revenue generated from the sale of nonprogram foods complies with the requirements in this paragraph (f).

* * * * *

■ 12. In § 210.15, revise and republish paragraph (b)(9) to read as follows:

§ 210.15 Reporting and recordkeeping.

* * * * *

(b) * * *

(9) Records to document compliance with the local school wellness policy requirements as set forth in § 210.31(f).

■ 13. In § 210.18, revise and republish paragraphs (g)(2)(i) introductory text, (g)(2)(i)(B)(*1*) through (*3*), (h)(2)(v) and (x), (l)(2)(i), (l)(2)(ii)(A), and (l)(2)(iii) introductory text to read as follows:

§ 210.18 Administrative reviews.

* * * * *

(g) * * *

(2) * * *

(i) *Meal components and quantities.* For each school selected for review, the State agency must complete a USDA-approved menu tool, review documentation, and observe the meal service to ensure that meals offered by

the reviewed schools meet the meal patterns for each program. To review this area, the State agency must:

* * * * *

(B) * * *

(*1*) Observe a significant number of program meals, as described in the FNS Administrative Review Manual, at each serving line and review the corresponding documentation to determine whether all reimbursable meal service lines offer all of the required meal components/items and quantities for the age/grade groups being served, as required under § 210.10, as applicable, and § 220.8 of this chapter, as applicable. Observe meals at the beginning, middle and end of the meal service line, and confirm that signage or other methods are used to assist students in identifying the reimbursable meal. If the State agency identifies missing components or inadequate quantities prior to the beginning of the meal service, it must inform the school food authority and provide an opportunity to make corrections. Additionally, if visual observation suggests that quantities offered are insufficient or excessive, the State agency must require the reviewed schools to provide documentation demonstrating that the required amounts of each component were available for service for each day of the review period.

(*2*) Observe a significant number of the program meals counted at the point of service for each type of serving line to determine whether the meals selected by the students contain the meal components and food quantities required for a reimbursable meal under § 210.10, as applicable, and § 220.8 of this chapter, as applicable.

(*3*) If Offer versus Serve is in place, observe whether students select at least three meal components at lunch and at least three food items at breakfasts, and that the lunches and breakfasts include at least ½ cup of fruits or vegetables.

* * * * *

(h) * * *

(2) * * *

(v) *Water.* The State agency must ensure that plain potable water is available and accessible to children at no charge as specified in § 210.10(a)(1)(i) and § 220.8(a)(1) of this chapter.

* * * * *

(x) *Local school wellness.* The State agency must ensure the local educational agency complies with the local school wellness requirements set forth in § 210.31.

* * * * *

(l) * * *

(2) * * *

(i) For missing meal components or missing production records cited under paragraph (g)(2) of this section, the State agency must apply fiscal action.

(ii) * * *

(A) If the meals contain insufficient quantities of the required meal components, the deficient meals may be disallowed and reclaimed.

* * * * *

(iii) For repeated violations of the dietary specifications cited under paragraph (g)(2)(ii) of this section, the State agency has discretion to apply fiscal action to the reviewed school as follows:

* * * * *

■ 14. In § 210.19:

■ a. Revise and republish paragraph (c)(4); and

■ b. Revise paragraph (f).

The revisions read as follows:

§ 210.19 Additional responsibilities.

* * * * *

(c) * * *

(4) *Interest charge.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit, interest will be charged against the State agency from the date the demand letter was sent, at the rate established by the Secretary of Treasury.

* * * * *

(f) *Cooperation with the Child and Adult Care Food Program.* On an annual basis, the State agency must provide the State agency which administers the Child and Adult Care Food Program with a list of all schools in the State participating in the National School Lunch Program in which 50 percent or more of enrolled children have been determined eligible for free or reduced price meals as of the last operating day of the previous October, or other month specified by the State agency. The lists must be provided by February 1 of each year or, if data is based on a month other than October, within 90 calendar days following the end of the month designated by the State agency. The State agency may provide updated free and reduced price enrollment data on individual schools to the State agency which administers the Child and Adult Care Food Program only when unusual circumstances render the initial data obsolete. In addition, the State agency must provide the current list, upon request, to sponsoring organizations of day care homes participating in the Child and Adult Care Food Program.

§ 210.20 [Amended]

■ 15. In § 210.20:

■ a. Remove paragraphs (a)(6) and (7);

■ b. Redesignate paragraphs (a)(8) and (9) as paragraphs (a)(6) and (7), respectively;

■ c. Remove paragraph (b)(10); and

■ d. Redesignate paragraphs (b)(11) through (14) as paragraphs (b)(10) through (13), respectively.

■ 16. In § 210.21, revise paragraphs (d) and (g)(1) to read as follows:

§ 210.21 Procurement.

* * * * *

(d) *Buy American*—(1) *Definitions.* For the purpose of this paragraph (d):

(i) *Domestic commodity or product* means:

(A) An agricultural commodity that is produced in the United States; and

(B) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

(ii) *Substantially using agriculture commodities that are produced in the United States* means over 51 percent of a food product must consist of agricultural commodities that were grown domestically.

(2) *In general.* Subject to paragraph (d)(4) of this section, a school food authority must purchase, to the maximum extent practicable, domestic commodities or products.

(3) *Required language.* School food authorities must include language requiring the purchase of foods that meet the Buy American requirements in paragraph (d)(1) of this section in all procurement procedures, solicitations, and contracts.

(4) *Limitations.* Paragraphs (d)(2) and (3) of this section apply only to:

(i) A school food authority located in the contiguous United States; and

(ii) A purchase of domestic commodity or product for the school lunch program under this part.

(5) *Exceptions.* The purchase of foods not meeting the definition in paragraph (d)(1) of this section is only permissible when the following criteria are met:

(i) The school food authority determines that one of the following limited exceptions is met:

(A) The product is listed in the Federal Acquisitions Regulations (FAR) at 48 CFR 25.104 and/or is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or

(B) Competitive bids reveal the cost of a United States product is significantly higher than the non-domestic product.

(ii) Non-domestic food purchases (those that do not meet the definition of domestic commodity or product, as defined in paragraph (d)(1) of this section) must not exceed the following caps by the established deadlines:

(A) By July 1, 2025, non-domestic food purchases must not exceed 10 percent of total annual commercial food costs that a school food authority purchases per school year.

(B) By July 1, 2028, non-domestic food purchases must not exceed 8 percent of total annual commercial food costs that a school food authority purchases per school year.

(C) By July 1, 2031, non-domestic food purchases must not exceed 5 percent of total annual commercial food costs that a school food authority purchases per school year.

(iii) School food authorities must maintain documentation, except when the item purchased is found on the FAR at 48 CFR 25.104 when using an exception under paragraph (d)(5)(i) of this section.

(iv) School food authorities must maintain documentation, to demonstrate that when using an exception under paragraph (d)(5)(i) of this section their non-domestic food purchases do not exceed the annual threshold specified in paragraph (d)(5)(ii) of this section.

(6) *Harvested fish.* To meet the definition of a domestic commodity or product, harvested fish must meet the following requirements:

(i) Farmed fish must be harvested within the United States or any territory or possession of the United States; and

(ii) Wild caught fish must be harvested within the Exclusive Economic Zone of the United States or by a United States flagged vessel.

(7) *Applicability to Hawaii.* Paragraph (d)(2) of this section applies to school food authorities in Hawaii with respect to domestic commodities or products that are produced in Hawaii in sufficient quantities to meet the needs of meals provided under the school lunch program under this part.

(8) *Temporary accommodation.* For school food authorities that demonstrate they cannot meet the threshold, State agencies may provide an accommodation for temporary relief from the requirement as the State agency works with the school food authority to increase domestic purchases.

* * * * *

(g) * * *

(1) A school food authority participating in the Program, as well as State agencies making purchases on behalf of such school food authorities, may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products, including the use of ''locally grown'', ''locally raised'', or ''locally caught'' as procurement specifications or selection criteria for unprocessed or minimally processed food items. When utilizing the geographic preference to procure such products, the school food authority making the purchase or the State agency making purchases on behalf of such school food authorities have the discretion to determine the local area to which the geographic preference option will be applied, so long as there are an appropriate number of qualified firms able to compete;

* * * * *

■ 17. In § 210.23, revise and republish paragraph (a) to read as follows:

§ 210.23 Other responsibilities.

(a) *Free and reduced price lunches and afterschool snacks.* State agencies and school food authorities must ensure that lunches and afterschool snacks are made available free or at a reduced price to all children who are determined by the school food authority to be eligible for such benefits. The determination of a child's eligibility for free or reduced price lunches and afterschool snacks must made in accordance with part 245 of this chapter.

* * * * *

■ 18. In § 210.29, revise paragraph (d)(3) introductory text to read as follows:

§ 210.29 Management evaluations.

* * * * *

(d) * * *

(3) *School food authority appeal of FNS findings.* When administrative or follow-up review activity conducted by FNS in accordance with the provisions of paragraph (d)(2) of this section results in the denial of all or part of a Claim for Reimbursement or withholding of payment, a school food authority may appeal the FNS findings by filing a written request with the Food and Nutrition Service in accordance with the appeal procedures specified in this paragraph (d)(3):

* * * * *

■ 19. Revise and republish § 210.30 to read as follows:

§ 210.30 School nutrition program professional standards.

(a) *General.* School food authorities that operate the National School Lunch Program, or the School Breakfast Program (part 220 of this chapter), must establish and implement professional standards for school nutrition program directors, managers, and staff, as defined in § 210.2.

(b) *Minimum standards for all school nutrition program directors.* Each school food authority must ensure that all newly hired school nutrition program directors meet minimum hiring standards and ensure that all new and existing directors have completed the minimum annual training/education requirements for school nutrition program directors, as set forth below:

(1) *Hiring standards.* All school nutrition program directors hired on or after July 1, 2015, must meet the following minimum educational requirements, as applicable:

(i) *School nutrition program directors with local educational agency enrollment of 2,499 students or fewer.* Directors must meet the requirements in paragraph (b)(1)(i)(A), (B), (C), or (D) of this section. However, a State agency may approve a school food authority to use the nonprofit school food service account to pay the salary of a school nutrition program director who does not meet the hiring standards herein so long as the school food authority is complying with a State agency-approved plan to ensure the director will meet the requirements.

(A) A bachelor's degree, or equivalent educational experience, as determined by the State agency, with an academic major or concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field;

(B) A bachelor's degree, or equivalent educational experience, as determined by the State agency, with any academic major or area of concentration, and either a State-recognized certificate for school nutrition directors, or at least one year of relevant food service experience. At the discretion of the State agency, and on an individual basis, documented relevant food service experience may be unpaid;

(C) An associate's degree, or equivalent educational experience, as determined by the State agency, with an academic major or area of concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field and at least one year of relevant food service experience. At the discretion of the State agency, and on an individual basis, documented relevant food service experience may be unpaid; or

(D) A high school diploma or equivalency (such as the general educational development diploma), and at least three years of relevant food service experience. At the discretion of the State agency, and on an individual basis, documented relevant food service experience may be unpaid. Directors hired under this criterion are strongly encouraged to work toward attaining an associate's degree in an academic major

in at least one of the fields listed in paragraph (b)(1)(i)(C) of this section.

(ii) *School nutrition program directors with local educational agency enrollment of 2,500 to 9,999 students.* Directors must meet the requirements in either paragraph (b)(1)(ii)(A), (B), (C), or (D) of this section.

(A) A bachelor's degree, or equivalent educational experience, as determined by the State agency, with an academic major or concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field;

(B) A bachelor's degree, or equivalent educational experience, as determined by the State agency, with any academic major or area of concentration, and a State-recognized certificate for school nutrition directors;

(C) A bachelor's degree in any academic major and at least two years of relevant experience in school nutrition programs; or

(D) An associate's degree, or equivalent educational experience, as determined by the State agency, with an academic major or area of concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field and at least two years of relevant school nutrition program experience. Directors hired with an associate's degree are strongly encouraged to work toward attaining a bachelor's degree in an academic major in the fields listed in this paragraph (b)(1)(ii)(D).

(iii) *School nutrition program directors with local educational agency enrollment of 10,000 or more students.* Directors must meet the requirements in either paragraph (b)(1)(iii)(A), (B), or (C) of this section.

(A) A bachelor's degree, or equivalent educational experience, as determined by the State agency, with an academic major or area of concentration in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field;

(B) A bachelor's degree, or equivalent educational experience, as determined by the State agency, with any academic major or area of concentration, and a State-recognized certificate for school nutrition directors; or

(C) A bachelor's degree in any major and at least five years of experience in management of school nutrition programs.

(D) School food authorities are strongly encouraged to seek out individuals who possess a master's degree or are willing to work toward a master's degree in the fields listed in this paragraph. At least one year of management experience, preferably in school nutrition, is strongly recommended. It is also strongly recommended that directors have at least three credit hours at the university level in food service management and at least three credit hours in nutritional sciences at the time of hire.

(iv) *Exceptions to the hiring standards.* (A) For a local educational agency with less than 500 students, the State agency may approve the hire of a director who meets one of the educational criteria in paragraphs (b)(1)(i)(B) through (D) of this section but has less than the required years of relevant food service experience.

(B) For a local educational agency with 2,500 or more students, the State agency may approve the hire of a director who does not meet the educational criteria in paragraphs (b)(1)(ii)(A) through (D) or paragraphs (b)(1)(iii)(A) through (C) of this section, as applicable, but who has at least 10 years of school nutrition program experience.

(C) Acting school nutrition program directors are not required to meet the hiring standards established in this paragraph (b)(1) of this section; however, the State agency may require acting school nutrition program directors expected to serve for more than 30 business days to meet the hiring standards established in established in this paragraph (b)(1).

(v) *School nutrition program directors for all local educational agency sizes.* All school nutrition program directors, for all local educational agency sizes, must have completed at least eight hours of food safety training within five years prior to their starting date or complete eight hours of food safety training within 30 calendar days of their starting date. At the discretion of the State agency, all school nutrition program directors, regardless of their starting date, may be required to complete eight hours of food safety training every five years.

(2) [Reserved]

(c) *Continuing education/training standards for all school nutrition program directors.* Each school year, the school food authority must ensure that all school nutrition program directors (including acting directors, at the discretion of the State agency), complete 12 hours of annual continuing education/training. The annual training must include, but is not limited to, administrative practices (including training in application, certification, verification, meal counting, and meal claiming procedures), as applicable, and any other specific topics identified by FNS, as needed, to address Program integrity or other critical issues. Continuing education/training required under this paragraph (c) is in addition to the food safety training required in the first year of employment under paragraph (b)(1)(v) of this section.

(d) *Continuing education/training standards for all school nutrition program managers.* Each school year, the school food authority must ensure that all school nutrition program managers have completed 10 hours of annual continuing education/training. The annual training must include, but is not limited to, the following topics, as applicable:

(1) Administrative practices (including training in application, certification, verification, meal counting, and meal claiming procedures);

(2) The identification of reimbursable meals at the point of service;

(3) Nutrition;

(4) Health and safety standards; and

(5) Any specific topics identified by FNS, as needed, to address Program integrity or other critical issues.

(e) *Continuing education/training standards for all staff with responsibility for school nutrition programs.* Each school year, the school food authority must ensure that all staff with responsibility for school nutrition programs that work an average of at least 20 hours per week, other than school nutrition program directors and managers, completes 6 hours of annual training in areas applicable to their jobs. Part-time staff working an average of less than 20 hours per week must complete 4 hours of annual training. The annual training must include, but is not limited to, the following topics, as applicable to their positions and responsibilities:

(1) Free and reduced price eligibility;

(2) Application, certification, and verification procedures;

(3) The identification of reimbursable meals at the point of service;

(4) Nutrition;

(5) Health and safety standards; and

(6) Any specific topics identified by FNS, as needed, to address Program integrity or other critical issues.

(f) *Summary of required minimum continued education/training standards.* The annual training requirements for school nutrition program directors, managers, and staff are summarized in the following table.

TABLE 1 TO PARAGRAPH (f)—SUMMARY OF REQUIRED ANNUAL TRAINING [1 2]

School Nutrition Program Directors	Each year, at least 12 hours of annual education/training. Includes topics such as: • Administrative practices (including training in application, certification, verification, meal counting, and meal claiming procedures). • Any specific topics required by FNS, as needed, to address Program integrity and other critical issues. This required continuing education/training is in addition to the food safety training required in the first year of employment, or for all school nutrition program directors if determined by the State agency.
School Nutrition Program Managers	Each year, at least 10 hours of annual education/training. Includes topics such as: • Administrative practices (including training in application, certification, verification, meal counting, and meal claiming procedures). • The identification of reimbursable meals at the point of service. • Nutrition, health, and safety standards. • Any specific topics required by FNS, as needed, to address Program integrity or other critical issues.
School Nutrition Program Staff	Each year, at least 6 hours of annual education/training. Includes topics such as: • Free and reduced price eligibility. • Application, certification, and verification procedures. • The identification of reimbursable meals at the point of service. • Nutrition, health, and safety standards. • Any specific topics required by FNS, as needed, to address Program integrity or other critical issues. This requirement applies to staff, other than directors and managers, who work at least 20 hours per week.
Acting and Temporary Staff, Substitutes, and Volunteers.	At the discretion of the State agency, acting and temporary staff, substitutes, and volunteers must complete training in one or more of the following topics within 30 calendar days of their start date: • Free and reduced price eligibility. • Application, certification, and verification procedures. • The identification of reimbursable meals at the point of service. • Nutrition, health, and safety standards. • Any specific topics required by FNS, as needed, to address Program integrity or other critical issues.

[1] School nutrition program directors, managers, and staff may carry over excess annual training hours to an immediately previous or subsequent school year and demonstrate compliance with the training requirements over a period of two school years, provided that some training hours are completed each school year.

[2] Program directors, managers, and staff hired on or after January 1 of each school year must complete half of their required annual training hours by June 30 of the school year in which they were hired.

(g) *Use of food service funds for training costs.* Costs associated with annual continuing education/training required under paragraphs (b)(3), (c) and (d) of this section are allowed provided they are reasonable, allocable, and necessary in accordance with the cost principles set forth in 2 CFR part 225, Cost Principles for State, Local and Indian Tribal Governments (OMB Circular A–87). However, food service funds must not be used to pay for the cost of college credits incurred by an individual to meet the hiring requirements in paragraphs (b)(1)(i) through (iv) and (b)(2) of this section.

(h) *School food authority oversight.* Each school year, the school food authority director must document compliance with the requirements of this section for all staff with responsibility for school nutrition programs, including directors, managers, and staff. Documentation must be adequate to establish, to the State's satisfaction during administrative reviews, that employees are meeting the minimum professional standards. The school food authority must certify that:

(1) The school nutrition program director meets the hiring standards and training requirements set forth in paragraph (b) of this section.

(2) Each employee has completed the applicable training requirements in paragraphs (c) and (d) of this section no later than the end of each school year.

(3) Each employee tasked with Program procurement has completed annual procurement training, as required under § 210.21(h), by the end of each school year.

PART 215—SPECIAL MILK PROGRAM FOR CHILDREN

■ 20. The authority citation for part 215 continues to read as follows:

Authority: 42 U.S.C. 1772 and 1779.

■ 21. In § 215.7a, revise paragraph (b) to read as follows:

§ 215.7a Fluid milk and non-dairy milk substitute requirements.

* * * * *

(b) *Fluid milk substitutes for non-disability reasons.* (1) A school food authority or child care institution may offer fluid milk substitutes based on a written request from a child's parent or guardian, a State licensed healthcare professional, or registered dietitian. A school food authority or child care institution choosing to offer fluid milk substitutes for a non-disability reason is not required to offer the specific fluid milk substitutes requested but may offer the fluid milk substitutes of its choice, provided the fluid milk substitutes offered meet the requirements of paragraph (b)(2) of this section.

(2) If a school food authority or child care institution chooses to offer one or more fluid milk substitutes for non-disability reasons, the fluid milk substitutes must provide, at a minimum, the nutrients listed in the following table. Fluid milk substitutes must be fortified in accordance with fortification guidelines issued by the Food and Drug Administration.

TABLE 1 TO PARAGRAPH (b)(2)—NUTRIENT REQUIREMENTS FOR FLUID MILK SUBSTITUTES

Nutrient	Per cup (8 fl. oz.)
Calcium	276 mg.
Protein	8 g.
Vitamin A	150 mcg. retinol activity equivalents (RAE).
Vitamin D	2.5 mcg.
Magnesium	24 mg.
Phosphorus	222 mg.
Potassium	349 mg.
Riboflavin	0.44 mg.
Vitamin B–12	1.1 mcg.

(3) Expenses incurred when providing fluid milk substitutes that exceed program reimbursements must be paid by the school food authority or child care institution; costs may be paid from the nonprofit food service account.

■ 22. In § 215.14a, revise paragraph (e) to read as follows:

§ 215.14a Procurement standards.

* * * * *

(e) *Geographic preference.* A school food authority participating in the Program may apply a geographic preference when procuring milk, including the use of ''locally grown'', ''locally raised'', or ''locally caught'' as procurement specifications or selection criteria for unprocessed or minimally processed food items. When utilizing the geographic preference to procure milk, the school food authority making the purchase has the discretion to determine the local area to which the geographic preference option will be applied, so long as there are an appropriate number of qualified firms able to compete.

PART 220—SCHOOL BREAKFAST PROGRAM

■ 23. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779, unless otherwise noted.

■ 24. Revise and republish § 220.2 to read as follows:

§ 220.2 Definitions.

For the purpose of this part the term:

2 CFR part 200, means the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published by OMB. The part reference covers applicable: Acronyms and Definitions (subpart A), General Provisions (subpart B), Post Federal Award Requirements (subpart D), Cost Principles (subpart E), and Audit Requirements (subpart F). (NOTE: Pre-Federal Award Requirements and Contents of Federal Awards (subpart C) does not apply to the National School Lunch Program).

Act means the Child Nutrition Act of 1966, as amended.

Applicable credits shall have the meaning established in 2 CFR part 200 and USDA implementing regulations 2 CFR parts 400 and 415.

Breakfast means a meal which meets the meal requirements set out in § 220.8, and which is served to a child in the morning hours. The meal must be served at or close to the beginning of the child's day at school.

Child means:

(1) A student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (1) and (2) of the definition of ''School'' in this section, including students with a disability who participate in a school program established for persons with disabilities; or

(2) A person under 21 chronological years of age who is enrolled in an institution or center as described in paragraph (3) of the definition of ''School'' in this section.

Contractor means a commercial enterprise, public or nonprofit private organization or individual that enters into a contract with a school food authority.

Cost reimbursable contract means a contract that provides for payment of incurred costs to the extent prescribed in the contract, with or without a fixed fee.

Department means the United States Department of Agriculture.

Distributing Agency means a State agency which enters into an agreement with the Department for the distribution to schools of donated foods pursuant to part 250 of this chapter.

Fiscal year means a period of 12 calendar months beginning on October 1 of any year and ending September 30 of the following year.

Fixed fee means an agreed upon amount that is fixed at the inception of the contract. In a cost reimbursable contract, the fixed fee includes the contractor's direct and indirect administrative costs and profit allocable to the contract.

Fixed-price contract means a contract that charges a fixed cost per meal, or a fixed cost for a certain time period. Fixed-price contracts may include an economic price adjustment tied to a standard index.

FNS means the Food and Nutrition Service, United States Department of Agriculture.

FNSRO means the appropriate Regional Office of the Food and Nutrition Service of the Department.

Food item means a specific food offered within a meal component.

Free breakfast means a breakfast served under the Program to a child from a household eligible for such benefits under part 245 of this chapter and for which neither the child nor any member of the household pays or is required to work.

Infant cereal means any iron fortified dry cereal especially formulated and generally recognized as cereal for infants that is routinely mixed with breast milk or iron-fortified infant formula prior to consumption.

Infant formula means any iron-fortified infant formula intended for dietary use solely as a food for normal healthy infants excluding those formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems. Infant formula, as served, must be in liquid state at recommended dilution.

Local educational agency means a public board of education or other public or private nonprofit authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public or private nonprofit elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public or private nonprofit elementary schools or secondary schools. The term also includes any other public or private nonprofit institution or agency having administrative control and direction of a public or private nonprofit elementary school or secondary school, including residential child care institutions, Bureau of Indian Affairs schools, and educational service agencies and consortia of those agencies, as well as the State educational agency in a State or territory in which the State educational agency is the sole educational agency for all public or private nonprofit schools.

Meal component means one of the food groups which comprise reimbursable meals. The meal components are: fruits, vegetables, grains, meats/meat alternates, and fluid milk.

National School Lunch Program means the Program authorized by the National School Lunch Act.

Net cash resources means all monies as determined in accordance with the State agency's established accounting

system, that are available to or have accrued to a School Food Authority's nonprofit school food service at any given time, less cash payable. Such monies may include but are not limited to, cash on hand, cash receivable, earnings or investments, cash on deposit and the value of stocks, bonds or other negotiable securities.

Nonprofit means, when applied to schools or institutions eligible for the Program, exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1986.

Nonprofit school food service means all food service operations conducted by the school food authority principally for the benefit of school children, all of the revenue from which is used solely for the operation or improvement of such food service.

Nonprofit school food service account means the restricted account in which all of the revenue from all food service operations conducted by the school food authority principally for the benefit of school children is retained and used only for the operation or improvement of the nonprofit school food service.

OIG means the Office of the Inspector General of the Department.

Program means the School Breakfast Program.

Reduced price breakfast means a breakfast served under the Program:

(1) To a child from a household eligible for such benefits under part 245 of this chapter;

(2) For which the price is less than the school food authority designated full price of the breakfast and which does not exceed the maximum allowable reduced price specified under part 245 of this chapter; and

(3) For which neither the child nor any member of the household is required to work.

Reimbursement means Federal cash assistance including advances paid or payable to participating schools for breakfasts meeting the requirements of § 220.8 served to eligible children.

Revenue when applied to nonprofit school food service means all monies received by or accruing to the nonprofit school food service in accordance with the State agency's established accounting system including, but not limited to, children's payments, earnings on investments, other local revenues, State revenues, and Federal cash reimbursements.

School means:

(1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings;

(2) Any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; or

(3) Any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, except for residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes.

School Breakfast Program means the program authorized by section 4 of the Child Nutrition Act of 1966.

School in severe need means a school determined to be eligible for rates of reimbursement in excess of the prescribed National Average Payment Factors, based upon the criteria set forth in § 220.9(d).

School food authority means the governing body which is responsible for the administration of one or more schools; and has legal authority to operate the Program therein *or* be otherwise approved by FNS to operate the Program.

School week means the period of time used to determine compliance with the meal requirements in § 220.8. The period must be a normal school week of five consecutive days; however, to accommodate shortened weeks resulting from holidays and other scheduling needs, the period must be a minimum of three consecutive days and a maximum of seven consecutive days. Weeks in which school breakfasts are offered less than three times must be combined with either the previous or the coming week.

Seamless Summer Option means the meal service alternative authorized by Section 13(a)(8) of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1761(a)(8), under which public or nonprofit school food authorities participating in the National School Lunch Program or School Breakfast Program offer meals at no cost to children during the traditional summer vacation periods and, for year-round schools, vacation periods longer than 10 school days.

Secretary means the Secretary of Agriculture.

State means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

State agency means:

(1) The State educational agency;

(2) Such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools as specified in § 210.3(b) of this chapter; or

(3) The FNSRO, where the FNSRO administers the Program as specified in § 210.3(c) of this chapter.

State educational agency means, as the State legislature may determine:

(1) The chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or

(2) A board of education controlling the State department of education.

Tofu means a soybean-derived food, made by a process in which soybeans are soaked, ground, mixed with water, heated, filtered, coagulated, and formed into cakes. Basic ingredients are whole soybeans, one or more food-grade coagulants (typically a salt or an acid), and water. Tofu products must conform to FNS guidance to count toward the meats/meat alternates component.

USDA implementing regulations include the following: 2 CFR part 400, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; 2 CFR part 415, General Program Administrative Regulations; 2 CFR part 416, General Program Administrative Regulations for Grants and Cooperative Agreements to State and Local Governments; and 2 CFR part 418, New Restrictions on Lobbying.

Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched.

Whole grains means grains that consist of the intact, ground, cracked, or flaked grain seed whose principal anatomical components—the starchy endosperm, germ and bran—are present in the same relative proportions as they exist in the intact grain seed.

Yogurt means commercially prepared coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements and to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Definition and Standard of Identity for yogurt, 21 CFR 131.200, and low-fat yogurt and non-fat yogurt covered as a standardized food under 21 CFR 130.10.

■ 25. In § 220.3, revise and republish paragraph (a) to read as follows:

§ 220.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program covered by this part.

* * * * *

■ 26. In § 220.7:

■ a. Revise and republish paragraphs (d)(3)(ii) and (iii), (e)(1)(iii), and (e)(2);

■ b. Revise paragraph (e)(4); and

■ c. Revise and republish paragraphs (e)(5), (9), and (13) and (h).

The revisions read as follows:

§ 220.7 Requirements for participation.

* * * * *

(d) * * *

(3) * * *

(ii) The food service management company must have State or local health certification for any facility outside the school in which it proposes to prepare meals and the food service management company must maintain this health certification for the duration of the contract;

(iii) No payment is to be made for meals that are spoiled or unwholesome at time of delivery, do not meet detailed specifications as developed by the school food authority for each meal component specified in § 220.8, or do not otherwise meet the requirements of the contract. Specifications will cover items such a grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time; and

* * * * *

(e) * * *

(1) * * *

(iii) Revenues received by the nonprofit school food service must not be used to purchase land or buildings or to construct buildings;

* * * * *

(2) Serve breakfasts which meet the minimum requirements prescribed in § 220.8;

* * * * *

(4) Serve breakfast free or at a reduced price to all children who are determined by the local education agency to be eligible for such meals under part 245 of this chapter;

(5) Make no discrimination against any child because of the child's inability to pay the full price of the breakfasts;

* * * * *

(9) Purchase, in as large quantities as may be efficiently utilized in its nonprofit school food service, foods designated as plentiful by the State agency;

* * * * *

(13) Upon request, make all accounts and records pertaining to its nonprofit school food service available to the State agency and to FNS for audit or review at a reasonable time and place. Such records must be retained for a period of three years after the end of the fiscal year to which they pertain, except that if audit findings have not been resolved, the records must be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit;

* * * * *

(h) Local educational agencies must comply with the provisions of § 210.31 of this chapter regarding the development, implementation, periodic review and update, and public notification of the local school wellness policy.

■ 27. Revise and republish § 220.8 to read as follows:

§ 220.8 Meal requirements for breakfasts.

(a) *General requirements.* This section contains the meal requirements applicable to school breakfasts for students in grades K through 12, and for children under the age of 5. In general, school food authorities must ensure that participating schools provide nutritious, well-balanced, and age-appropriate breakfasts to all the children they serve to improve their diet and safeguard their health.

(1) *General nutrition requirements.* School breakfasts offered to children age 5 and older must meet, at a minimum, the meal requirements in paragraph (b) of this section. Schools must follow a food-based menu planning approach and produce enough food to offer each child the quantities specified in the meal pattern established in paragraph (c) of this section for each age/grade group served in the school. In addition, school breakfasts must meet the dietary specifications in paragraph (f) of this section. Schools offering breakfasts to children ages 1 to 4 and infants must meet the meal pattern requirements in paragraphs (o) and (p) of this section, as applicable. When breakfast is served in the cafeteria, schools must make plain potable water available and accessible without restriction to children at no charge.

(2) *Unit pricing.* Schools must price each meal as a unit. The price of a reimbursable breakfast does not change if the student does not take a food item or requests smaller portions. Schools must identify, near or at the beginning of the serving line(s), the food items that constitute the unit-priced reimbursable school meal(s).

(3) *Production and menu records.* Schools or school food authorities, as applicable, must keep production and menu records for the meals they produce. These records must show how the meals offered contribute to the required meal components and food quantities for each age/grade group every day. Schools or school food authorities must maintain records of the latest nutritional analysis of the school menus conducted by the State agency. Information on maintaining production and menu records may be found in FNS guidance.

(b) *Meal requirements for school breakfasts.* School breakfasts for children ages 5 and older must reflect food and nutrition requirements specified by the Secretary. Compliance with these requirements is measured as follows:

(1) On a daily basis:

(i) Meals offered to each age/grade group must include the meal components and food quantities specified in the meal pattern in paragraph (c) of this section;

(ii) Meal selected by each student must have the number of meal components required for a reimbursable meal and include at least one fruit or vegetable.

(2) Over a 5-day school week:

(i) Average calorie content of the meals offered to each age/grade group must be within the minimum and maximum calorie levels specified in paragraph (f) of this section;

(ii) Average saturated fat content of the meals offered to each age/grade group must be less than 10 percent of total calories as specified in paragraph (f) of this section;

(iii) By July 1, 2027, average added sugars content of the meals offered to each age/grade group must be less than 10 percent of total calories as specified in paragraph (f) of this section; and

(iv) Average sodium content of the meals offered to each age/grade group must not exceed the maximum level specified in paragraph (f) of this section.

(c) *Meal pattern for school breakfasts for grades K through 12.* A school must offer the meal components and quantities required in the breakfast meal pattern established in the following table:

TABLE 1 TO PARAGRAPH (c) INTRODUCTORY TEXT—SCHOOL BREAKFAST PROGRAM MEAL PATTERN

Meal components	Amount of food [1] per week (minimum per day)		
	Grades K–5	Grades 6–8	Grades 9–12
Fruits (cups) [2]	5 (1)	5 (1)	5 (1)
Vegetables (cups) [2]	0	0	0
Dark Green Subgroup	0	0	0
Red/Orange Subgroup	0	0	0
Beans, Peas, and Lentils Subgroup	0	0	0
Starchy Subgroup	0	0	0
Other Vegetables Subgroup	0	0	0
Grains or Meats/Meat Alternates (oz. eq) [3]	7–10 (1)	8–10 (1)	9–10 (1)
Fluid Milk (cups) [4]	5 (1)	5 (1)	5 (1)
Dietary Specifications: Daily Amount Based on the Average for a 5-Day Week [5]			
Minimum-Maximum Calories (kcal)	350–500	400–550	450–600
Saturated Fat (% of total calories)	<10	<10	<10
Added Sugars (% of total calories)	<10	<10	<10
Sodium Limit: In place through June 30, 2027	≤540 mg	≤600 mg	≤640 mg
Sodium Limit: Must be implemented by July 1, 2027	≤485 mg	≤535 mg	≤570 mg

[1] Food items included in each group and subgroup and amount equivalents.
[2] Minimum creditable serving is ⅛ cup. Schools must offer 1 cup of fruit daily and 5 cups of fruit weekly. Schools may substitute vegetables for fruit at breakfast as described in paragraphs (c)(2)(i) and (ii) of this section.
[3] Minimum creditable serving is 0.25 oz. eq. School may offer grains, meats/meat alternates, or a combination of both to meet the daily and weekly ounce equivalents for this combined component. At least 80 percent of grains offered weekly at breakfast must be whole grain-rich as defined in § 210.2 of this chapter, and the remaining grain items offered must be enriched.
[4] Minimum creditable serving is 8 fluid ounces. All fluid milk must be fat-free (skim) or low-fat (1 percent fat or less) and must meet the requirements in paragraph (d) of this section.
[5] By July 1, 2027, schools must meet the dietary specification for added sugars. Schools must meet the sodium limits by the dates specified in this chart. Discretionary sources of calories may be added to the meal pattern if within the dietary specifications.

(1) *Age/grade groups.* Schools must plan menus for students using the following age/grade groups: Grades K–5 (ages 5–10), grades 6–8 (ages 11–13), and grades 9–12 (ages 14–18). If an unusual grade configuration in a school prevents the use of the established age/grade groups, students in grades K–5 and grades 6–8 may be offered the same food quantities at breakfast provided that the calorie and sodium standards for each age/grade group are met. No customization of the established age/grade groups is allowed.

(2) *Meal components.* Schools must offer students in each age/grade group the meal components specified in meal pattern in this paragraph (c). Meal component descriptions in § 210.10 of this chapter apply to this Program.

(i) *Fruits component.* Schools must offer daily the fruit quantities specified in the breakfast meal pattern in this paragraph (c). Fruits that are fresh, frozen, or dried, or canned in light syrup, water or fruit juice may be offered to meet the fruits component requirements. Vegetables may be offered in place of all or part of the required fruits at breakfast. Schools that choose to offer vegetables in place of fruits at breakfast one day per school week may offer any vegetables, including starchy vegetables. Schools that choose to offer vegetables in place of fruits at breakfast two or more days per school week must offer at least two different vegetable subgroups as defined in § 210.10(c)(2)(ii) of this chapter. All fruits are credited based on their volume as served, except that ¼ cup of dried fruit counts as ½ cup of fruit. Only pasteurized, full-strength fruit juice may be offered, and may be credited to meet no more than one-half of the fruit component.

(ii) *Vegetables component.* Schools are not required to offer vegetables as part of the breakfast menu but may offer vegetables to meet part or all of the fruit requirement. Schools that choose to offer vegetables in place of fruits at breakfast one day per school week may offer any vegetables, including starchy vegetables. Schools that choose to offer vegetables in place of fruits at breakfast two or more days more than one day per school week must offer vegetables from at least two different vegetable subgroups as defined in § 210.10(c)(2)(ii) of this chapter. Fresh, frozen, or canned vegetables and dry beans, peas, and lentils may be offered to meet the fruit requirement. All vegetables are credited based on their volume as served, except that 1 cup of leafy greens counts as ½ cup of vegetables and tomato paste and tomato puree are credited based on calculated volume of the whole food equivalency. Pasteurized, full-strength vegetable juice may be offered to meet no more than one-half of the vegetable component. Cooked dry beans, peas, and lentils may be counted as either a vegetable or as a meat/meat alternate but not as both in the same dish.

(iii) *Grains.* Grains offered at breakfast count toward the combined grains and meats/meat alternates component. Schools may offer grains, meats/meat alternates, or a combination of both to meet the daily and weekly ounce equivalents for this combined component. Information on crediting grain items may be found in FNS guidance.

(A) *Whole grain-rich requirement.* Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched. At least 80 percent of grains offered at breakfast weekly, based on ounce equivalents, must meet the whole grain-rich criteria as defined in § 220.2, and the remaining grain items offered must be enriched.

(B) *Breakfast cereals.* By July 1, 2025, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce.

(C) *Daily and weekly servings.* The grains component is based on minimum daily servings plus total servings over a 5-day school week. Schools serving breakfast 6 or 7 days per week must increase the weekly grains quantity by approximately 20 percent (⅕) for each additional day. When schools operate less than 5 days per week, they may

decrease the weekly quantity by approximately 20 percent (1⁄5) for each day less than 5.

(iv) *Meats/meat alternates.* Meats/meat alternates offered at breakfast count toward the combined grains and meats/meat alternates component. Schools may offer grains, meats/meat alternates, or a combination of both to meet the daily and weekly ounce equivalents for this combined component. Information on crediting meats/meat alternates may be found in FNS guidance.

(A) *Enriched macaroni.* Enriched macaroni with fortified protein, as defined in appendix A to part 210 of this chapter, may be used to meet part of the meats/meat alternates requirement when used as specified in appendix A to part 210.

(B) *Nuts and seeds.* Nuts and seeds and their butters are allowed as meat alternates. Acorns, chestnuts, and coconuts do not credit as meat alternates because of their low protein and iron content. Nut and seed meals or flours may credit only if they meet the requirements for Alternate Protein Products established in appendix A to this part.

(C) *Yogurt.* Yogurt may be offered to meet all or part of the combined grains and meats/meat alternates component. Yogurt may be plain or flavored, unsweetened or sweetened. By July 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce). Noncommercial and/or non-standardized yogurt products, such as frozen yogurt, drinkable yogurt products, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruits and/or nuts or similar products are not creditable. Four ounces (weight) or 1⁄2 cup (volume) of yogurt equals one ounce of the meats/meat alternates requirement.

(D) *Tofu and soy products.* Commercial tofu and soy products may be offered to meet all or part of the combined grains and meats/meat alternates component. Noncommercial and/or non-standardized tofu and products are not creditable.

(E) *Beans, peas, and lentils.* Cooked dry beans, peas, and lentils may be used to meet all or part of the combined grains and meats/meat alternates component. Beans, peas, and lentils are identified in this section and include foods such as black beans, garbanzo beans, lentils, kidney beans, mature lima beans, navy beans, pinto beans, and split peas. Cooked dry beans, peas, and lentils may be counted as either a vegetable or as a meat/meat alternate but not as both in the same dish.

(F) *Other meat alternates.* Other meat alternates, such as cheese and eggs, may be used to meet all or part of the combined grains and meats/meat alternates component.

(v) *Fluid milk component.* Fluid milk must be offered daily in accordance with paragraph (d) of this section.

(3) *Grain substitutions.* (i) Schools in American Samoa, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands may serve any vegetable, including vegetables such as breadfruit, prairie turnips, plantains, sweet potatoes, and yams, to meet the combined grains and meats/meat alternates component.

(ii) School food authorities and schools that are tribally operated, operated by the Bureau of Indian Education, and that serve primarily American Indian or Alaska Native children, may serve any vegetable, including vegetables such as breadfruit, prairie turnips, plantains, sweet potatoes, and yams, to meet the combined grains and meats/meat alternates component.

(4) *Traditional Indigenous foods.* Traditional Indigenous foods may credit toward the required meal components. Information on food crediting may be found in FNS guidance. Schools are encouraged to serve traditional Indigenous foods as part of their breakfast service. Per the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)) traditional foods means food that has traditionally been prepared and consumed by an American Indian tribe, including wild game meat; fish; seafood; marine mammals; plants; and berries.

(d) *Fluid milk requirements.* Schools must offer students a variety (at least two different options) of fluid milk at breakfast daily. All fluid milk must be fat-free (skim) or low-fat (1 percent fat or less). Milk with higher fat content is not creditable. Low-fat or fat-free lactose-free and reduced-lactose fluid milk may also be offered. Milk may be flavored or unflavored, provided that unflavored milk is offered at each meal service. By July 1, 2025, flavored milk must contain no more than 10 grams of added sugars per 8 fluid ounces, or for flavored milk sold as competitive food for middle and high schools, 15 grams of added sugars per 12 fluid ounces. Schools must also comply with other applicable fluid milk requirements in § 210.10(d) of this chapter.

(e) *Offer versus serve for grades K through 12.* School breakfast must offer daily at least the three meal components required in the meal pattern in paragraph (c) of this section. To exercise the offer versus serve option at breakfast, a school food authority or school must offer a minimum of four food items daily as part of the required components. Under offer versus serve, students are allowed to decline one of the four food items, provided that students select at least 1⁄2 cup of the fruit component for a reimbursable meal. If only three food items are offered at breakfast, school food authorities or schools may not exercise the offer versus serve option.

(f) *Dietary specifications*—(1) *Calories.* School breakfasts offered to each age/grade group must meet, on average over the school week, the minimum and maximum calorie levels specified in the following table:

TABLE 2 TO PARAGRAPH (f)(1)—SCHOOL BREAKFAST PROGRAM CALORIE RANGES

	Grades K–5	Grades 6–8	Grades 9–12
Average Daily Minimum-Maximum Calories (kcal) [1]	350–500	400–550	450–600

[1] The average daily amount must fall within the minimum and maximum levels. Discretionary sources of calories may be added to the meal pattern if within the dietary specifications.

(2) *Saturated fat.* School breakfast offered to all age/grade groups must, on average over the school week, provide less than 10 percent of total calories from saturated fat.

(3) *Added sugars.* By July 1, 2027, school breakfasts offered to all age/grade groups must, on average over the school week, provide less than 10 percent of total calories from added sugars.

(4) *Sodium.* School breakfasts offered to each age/grade group must meet, on average over the school week, the levels of sodium specified in the following table within the established deadlines:

TABLE 3 TO PARAGRAPH (f)(4)—SCHOOL BREAKFAST PROGRAM SODIUM LIMITS

Age/grade group	Sodium limit: in place through June 30, 2027 (mg)	Sodium limit: must be implemented by July 1, 2027 (mg)
Grades K–5	≤540	≤485
Grades 6–8	≤600	≤535
Grades 9–12	≤640	≤570

(g) *Compliance assistance.* The State agency and school food authority must provide technical assistance and training to assist schools in planning breakfasts that meet the meal pattern in paragraph (c) of this section, the dietary specifications established in paragraph (f) of this section, and the meal pattern in paragraphs (o) and (p) of this section, as applicable. Compliance assistance may be offered during training, onsite visits, and/or administrative reviews.

(h) *State agency responsibilities for monitoring dietary specifications.* When required by the Administrative Review process set forth in § 210.18 of this chapter, the State agency must conduct a weighted nutrient analysis to evaluate the average levels of calories, saturated fat, added sugars, and sodium of the breakfasts offered to students in grades K–12 during one week within the review period. The nutrient analysis must be conducted in accordance with the procedures established in § 210.10(i)(3) of this chapter. If the results of the nutrient analysis indicate that the school breakfasts do not meet the specifications for calories, saturated fat, added sugars, or sodium specified in paragraph (f) of this section, the State agency or school food authority must provide technical assistance and require the reviewed school to take corrective action to meet the requirements.

(i) *Nutrient analyses of school meals.* Any nutrient analysis of school breakfasts conducted under the administrative review process set forth in § 210.18 of this chapter must be performed in accordance with the procedures established in § 210.10(i) of this chapter. The purpose of the nutrient analysis is to determine the average levels of calories, saturated fat, added sugars, and sodium in the breakfasts offered to each age grade group over a school week.

(j) *Responsibility for monitoring meal requirements.* Compliance with the applicable breakfast requirements in paragraph (b) of this section, including the dietary specifications, and paragraphs (o) and (p) of this section will be monitored by the State agency through administrative reviews authorized in § 210.18 of this chapter.

(k) *Menu choices at breakfast.* The requirements in § 210.10(k) of this chapter also apply to this Program.

(l) *Requirements for breakfast period*—(1) *Timing.* Schools must offer breakfasts meeting the requirements of this section at or near the beginning of the school day.

(2) [Reserved]

(m) *Modifications and variations in reimbursable meals.* The requirements in § 210.10(m) of this chapter also apply to this Program.

(n) *Nutrition disclosure.* The requirements in § 210.10(n) of this chapter also apply to this Program.

(o) *Breakfast requirements for preschoolers*—(1) *Breakfasts served to preschoolers.* Schools serving breakfast to preschoolers under the School Breakfast Program must serve the meal components and quantities required in the breakfast meal pattern established for the Child and Adult Care Food Program under § 226.20(a), (c)(1), and (d) of this chapter. In addition, schools serving breakfasts to this age group must comply with the requirements set forth in paragraphs (a), (c)(3), (g), and (k) through (m) of this section, as applicable.

(2) *Preschooler breakfast meal pattern table.* The minimum amounts of meal components to be served at breakfast are as follows:

TABLE 4 TO PARAGRAPH (o)(2)—PRESCHOOL BREAKFAST MEAL PATTERN

[Select the appropriate components for a reimbursable meal]

Meal components and food items [1]	Minimum quantities	
	Ages 1–2	Ages 3–5
Fluid Milk [2]	4 fluid ounces	6 fluid ounces.
Vegetables, Fruits, or portions of both [3]	¼ cup	½ cup.
Grains (oz. eq.) [4]	½ ounce equivalent	½ ounce equivalent.

[1] Must serve all three components for a reimbursable meal.

[2] Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent) or unflavored fat-free (skim) milk for children two through five years old.

[3] Pasteurized full-strength juice may only be offered to meet the vegetable or fruit requirement at one meal, including snack, per day.

[4] At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count toward meeting the grains requirement. Meats/meat alternates may be offered in place of the entire grains requirement, up to 3 times per week at breakfast. One ounce equivalent of a meat/meat alternate credits equal to one ounce equivalent of grains. Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce. Information on crediting grain items and meats/meat alternates may be found in FNS guidance.

(p) *Breakfast requirements for infants*—(1) *Breakfasts served to infants.* Schools serving breakfasts to infants ages birth through 11 months under the School Breakfast Program must serve the meal components and quantities required in the breakfast meal pattern established for the Child and Adult Care Food Program, under § 226.20(a), (b), and (d) of this chapter. In addition, schools serving breakfasts to infants must comply with the requirements set forth in paragraphs (a), (c)(3), (g), and (k) through (m) of this section as applicable.

(2) *Infant breakfast meal pattern table.* The minimum amounts of meal components to be served at breakfast are as follows:

TABLE 5 TO PARAGRAPH (p)(2)—INFANT BREAKFAST MEAL PATTERN

Birth through 5 months	6 through 11 months
4–6 fluid ounces breast milk [1] or formula [2]	6–8 fluid ounces breast milk [1] or formula; [2] and 0–½ ounce equivalent infant cereal; [2 3] or 0–4 tablespoons meat, fish, poultry, whole egg, cooked dry beans, peas, or lentils; or 0–2 ounces of cheese; or 0–4 ounces (volume) of cottage cheese; or 0–4 ounces or ½ cup of yogurt; [4] or a combination of the above; [5] and 0–2 tablespoons vegetable or fruit, or a combination of both.[5 6]

[1] Breast milk or formula, or portions of both, must be served; however, it is recommended that breast milk be served from birth through 11 months. For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered, with additional breast milk offered at a later time if the infant will consume more.
[2] Infant formula and dry infant cereal must be iron-fortified.
[3] Information on crediting grain items may be found in FNS guidance.
[4] Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce).
[5] A serving of this component is required when the infant is developmentally ready to accept it.
[6] Fruit and vegetable juices must not be served.

(q) *Severability.* If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstances, it shall be severable from this section and not affect the remainder thereof. In the event of such holding of invalidity or unenforceability of a provision, the meal pattern requirements covered by that provision reverts to the version immediately preceding the invalidated provision.

■ 28. In § 220.13:
■ a. Revise paragraph (b)(3);
■ b. Revise and republish paragraphs (c) and (f)(3); and
■ c. Remove paragraph (l);
■ d. Redesignate paragraph (m) as paragraph (l).

The revisions read as follows:

§ 220.13 Special responsibilities of State agencies.

* * * * *

(b) * * *

(3) Each State agency must keep the records supplied by school food authorities showing the number of food safety inspections obtained by schools for the current and three most recent school years.

(c) Each State agency must promptly investigate complaints received or irregularities noted in connection with the operation of either program, and must take appropriate action to correct any irregularities. State agencies must maintain on file evidence of such investigations and actions. FNS will make investigations at the request of the State agency or where FNS determines investigations are appropriate.

* * * * *

(f) * * *

(3) For the purposes of compliance with the meal requirements in § 220.8, the State agency must follow the provisions specified in § 210.18(g) of this chapter, as applicable.

* * * * *

■ 29. In § 220.14, revise and republish paragraphs (c) and (e) to read as follows:

§ 220.14 Claims against school food authorities.

* * * * *

(c) The State agency may refer to FNS for determination any action it proposes to take under this section.

* * * * *

(e) If FNS does not concur with the State agency's action in paying a claim or a reclaim, or in failing to collect an overpayment, FNS will assert a claim against the State agency for the amount of such claim, reclaim, or overpayment. In all such cases the State agency will have full opportunity to submit to FNS evidence or information concerning the action taken. If, in the determination of FNS, the State agency's action was unwarranted, the State agency must promptly pay to FNS the amount of the claim, reclaim, or overpayment.

* * * * *

■ 30. In § 220.16, revise paragraphs (d) and (f)(1) to read as follows:

§ 220.16 Procurement standards.

* * * * *

(d) *Buy American*—(1) *Definitions.* For the purpose of this paragraph (d):

(i) *Domestic commodity or product* means:

(A) An agricultural commodity that is produced in the United States; and

(B) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

(ii) *Substantially using agriculture commodities that are produced in the United States* means over 51 percent of a food product must consist of agricultural commodities that were grown domestically.

(2) *In general.* Subject to paragraph (d)(4) of this section, a school food authority must purchase, to the maximum extent practicable, domestic commodities or products.

(3) *Required language.* School food authorities must include language requiring the purchase of foods that meet the Buy American requirements in paragraph (d)(1) of this section in all procurement procedures, solicitations, and contracts.

(4) *Limitations.* Paragraphs (d)(2) and (3) of this section apply only to:

(i) A school food authority located in the contiguous United States; and

(ii) A purchase of domestic commodity or product for the school breakfast program under this part.

(5) *Exceptions.* The purchase of foods not meeting the definition in paragraph (d)(1) of this section is only permissible when the following criteria are met:

(i) The school food authority determines that one of the following limited exceptions is met:

(A) The product is listed in the Federal Acquisition Regulation (FAR) at 48 CFR 25.104 and/or is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or

(B) Competitive bids reveal the cost of a United States product is significantly higher than the non-domestic product.

(ii) Non-domestic food purchases (those that do not meet the definition of domestic commodity or product, as defined in paragraph (d)(1) of this

section) must not exceed the following caps by the established deadlines:

(A) By July 1, 2025, non-domestic food purchases must not exceed 10 percent of total annual commercial food costs that a school food authority purchases per school year.

(B) By July 1, 2028, non-domestic food purchases must not exceed 8 percent of total annual commercial food costs that a school food authority purchases per school year.

(C) By July 1, 2031, non-domestic food purchases must not exceed 5 percent of total annual commercial food costs that a school food authority purchases per school year.

(iii) School food authorities must maintain documentation, except when the item purchased is found on the FAR at 48 CFR 25.104 when using an exception under paragraph (d)(5)(i) of this section.

(iv) School food authorities must maintain documentation, to demonstrate that when using an exception under paragraph (d)(5)(i) of this section their non-domestic food purchases do not exceed the annual threshold specified in paragraph (d)(5)(ii) of this section.

(6) *Harvested fish.* To meet the definition of a domestic commodity or product, harvested fish must meet the following requirements:

(i) Farmed fish must be harvested within the United States or any territory or possession of the United States; and

(ii) Wild caught fish must be harvested within the Exclusive Economic Zone of the United States or by a United States flagged vessel.

(7) *Applicability to Hawaii.* Paragraph (d)(2) of this section applies to school food authorities in Hawaii with respect to domestic commodities or products that are produced in Hawaii in sufficient quantities to meet the needs of meals provided under the school breakfast program under this part.

(8) *Temporary accommodation.* For school food authorities that demonstrate they cannot meet the threshold, State agencies may provide an accommodation for temporary relief from the requirement as the State agency works with the school food authority to increase domestic purchases.

* * * * *

(f) * * *

(1) School food authorities participating in the Program, as well as State agencies making purchases on behalf of such school food authorities, may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products, including the use of ''locally grown'', ''locally raised'', or ''locally caught'' as procurement specifications or selection criteria for unprocessed or minimally processed food items. When utilizing the geographic preference to procure such products, the school food authority making the purchase or the State agency making purchases on behalf of such school food authorities have the discretion to determine the local area to which the geographic preference option will be applied, so long as there are an appropriate number of qualified firms able to compete;

* * * * *

PART 225—SUMMER FOOD SERVICE PROGRAM

■ 31. The authority citation for part 225 continues to read as follows:

Authority: Secs. 9, 13 and 14, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1761 and 1762a).

■ 32. In § 225.16:

■ a. Revise paragraphs (d)(1) through (3);

■ b. Revise and republish paragraph (e)(2); and

■ c. Revise paragraphs (e)(5) and (f)(3).

The revisions read as follows:

§ 225.16 Meal service requirements.

* * * * *

(d) * * *

(1) *Breakfast.* The minimum amount of meal components to be served as breakfast are as follows:

TABLE 1 TO PARAGRAPH (d)(1)—BREAKFAST MEAL PATTERN

Meal components	Minimum amount
Vegetables and Fruits	
Vegetable(s) and/or fruit(s)	½ cup.[1]
Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s), and juice.	½ cup (4 fluid ounces).
Bread and Bread Alternates [2]	
Bread or	1 slice.
Cornbread, biscuits, rolls, muffins, etc. or	1 serving.[3]
Cold dry cereal or	¾ cup or 1 ounce.[4]
Cooked cereal or cereal grains or	½ cup.
Cooked pasta or noodle products or an equivalent quantity of any combination of bread/bread alternate.	½ cup.
Milk [5]	
Milk, fluid	1 cup (½ pint, 8 fluid ounces).
Meats/Meat Alternates (Optional)	
Lean meat or poultry or fish or	1 ounce.
Alternate protein product[6] or	1 ounce.
Cheese or	1 ounce.
Egg (large) or	½.
Cooked dry beans, peas, or lentils or	¼ cup.
Peanut butter or	2 tablespoons.
Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of meats/meat alternates.	4 ounces or ½ cup.

[1] For the purposes of the requirement outlined in the table, a cup means the standard measuring cup.

[2] Bread, pasta or noodle products, and cereal grains (such as rice, bulger, or corn grits) must be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc. must be made with whole grain or enriched meal or flour; cereal must be whole grain, enriched, or fortified.
[3] Information on food crediting, including serving sizes and equivalents, may be found in FNS guidance.
[4] Either volume (cup) or weight (ounces), whichever is less.
[5] Milk must be served as a beverage or on cereal or used in part for each purpose.
[6] Must meet the requirements in appendix A of this part.

(2) *Lunch or supper.* The minimum amounts of meal components to be served as lunch or supper are as follows:

TABLE 2 TO PARAGRAPH (d)(2)—LUNCH OR SUPPER MEAL PATTERN

Meal components	Minimum amount
Meats/Meat Alternates	
Lean meat or poultry or fish or	2 ounces.
Alternate protein products [1] or	2 ounces.
Cheese or	2 ounces.
Egg (large) or	1.
Cooked dry beans, peas, or lentils or	½ cup.[2]
Peanut butter or soynut butter or other nut or seed butters or	4 tablespoons.
Peanuts or soynuts or tree nuts or seeds [3] or	2 ounces.
Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meats/meat alternates.	8 ounces or 1 cup.
Vegetables and Fruits	
Vegetables and/or fruits [4]	¾ cup total.
Bread and Bread Alternatives [5]	
Bread or	1 slice.
Cornbread, biscuits, rolls, muffins, etc. or	1 serving.[6]
Cooked pasta or noodle products or	½ cup.
Cooked cereal grains or an equivalent quantity of any combination of bread or bread alternate.	½ cup.
Milk	
Milk, fluid, served as a beverage	1 cup (½ pint, 8 fluid ounces).

[1] Must meet the requirements of appendix A of this part.
[2] For the purposes of the requirement outlined in this table, a cup means a standard measuring cup.
[3] Information on crediting meats/meat alternates, including nuts and seeds, may be found in FNS guidance.
[4] Serve 2 or more kinds of vegetable(s) and/or fruits or a combination of both. Full-strength vegetable or fruit juice may be offered to meet not more than one-half of this requirement.
[5] Bread, pasta or noodle products, and cereal grains (such as rice, bulgur, or corn grits) must be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., must be made with whole grain or enriched meal or flour; cereal must be whole grain, enriched or fortified.
[6] Information on food crediting, including serving sizes and equivalents, may be found in FNS guidance.

(3) *Snacks.* The minimum amounts of meal components to be served as snacks are as follows. Select two of the following four components. (Juice may not be served when milk is served as the only other component.)

TABLE 3 TO PARAGRAPH (d)(3)—SNACK MEAL PATTERN

Meal components	Minimum amount
Meats/Meat Alternates	
Lean meat or poultry or fish or	1 ounce.
Alternate protein products [1] or	1 ounce.
Cheese or	1 ounce.
Egg (large) or	½.
Cooked dry beans, peas, or lentils or	¼ cup.[2]
Peanut butter or soynut butter or other nut or seed butters or	2 tablespoons.
Peanuts or soynuts or tree nuts or seeds [3] or	1 ounce.
Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meats/meat alternates.	4 ounces or ½ cup.
Vegetables and Fruits	
Vegetable(s) and/or fruit(s) or	¾ cup.

TABLE 3 TO PARAGRAPH (d)(3)—SNACK MEAL PATTERN—Continued

Meal components	Minimum amount
Full-strength vegetable or fruit juice or an equivalent quantity or any combination of vegetable(s), fruit(s), and juice.	¾ cup (6 fluid ounces).
Bread and Bread Alternates [4]	
Bread or	1 slice.
Cornbread, biscuits, rolls, muffins, etc. or	1 serving.[5]
Cold dry cereal or	¾ cup or 1 ounce.[6]
Cooked cereal or	½ cup.
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate.	½ cup.
Milk [7]	
Milk, fluid	1 cup (½ pint, 8 fluid ounces).

[1] Must meet the requirements in appendix A of this part.
[2] For the purposes of the requirement outlined in this table, a cup means a standard measuring cup.
[3] Information on crediting meats/meat alternates, including nuts and seeds, may be found in FNS guidance.
[4] Bread, pasta or noodle products, and cereal grains (such as rice, bulgur, or corn grits) must be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., must be made with whole grain or enriched meal or flour; cereal must be whole grain, enriched, or fortified.
[5] Information on food crediting, including serving sizes and equivalents, may be found in FNS guidance.
[6] Either volume (cup) or weight (ounces), whichever is less.
[7] Milk should be served as a beverage or on cereal, or used in part for each purpose.

(e) * * *

(2) Cooked dry beans, peas, and lentils may be used as a meat alternate or as a vegetable, but they may not be used to meet both component requirements in a meal.

* * * * *

(5) Nuts and seeds and their butters are allowed as meats/meat alternates. Acorns, chestnuts, and coconuts do not credit as meat alternates due to their low protein content. Nut and seed meals or flours may credit only if they meet the requirements for alternate protein products established in appendix A to this part.

(f) * * *

(3) *Bread and bread alternative substitutions.* In American Samoa, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands, and for sponsors in any State that serve primarily American Indian or Alaska Native children, any vegetable, including vegetables such as breadfruit, prairie turnips, plantains, sweet potatoes, and yams, may be served to meet the bread and bread alternatives requirement.

* * * * *

■ 33. In § 225.17, revise paragraph (e)(1) to read as follows:

§ 225.17 Procurement standards.

* * * * *

(e) * * *

(1) Sponsors participating in the Program may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products, including the use of ''locally grown'', ''locally raised'', or ''locally caught'' as procurement specifications or selection criteria for unprocessed or minimally processed food items. When utilizing the geographic preference to procure such products, the sponsor making the purchase has the discretion to determine the local area to which the geographic preference option will be applied, so long as there are an appropriate number of qualified firms able to compete;

* * * * *

PART 226—CHILD AND ADULT CARE FOOD PROGRAM

■ 34. The authority citation for part 226 continues to read as follows:

Authority: Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

■ 35. In § 226.2:
■ a. Revise the definition of ''Functionally impaired adult'';
■ b. Add in alphabetical order a definition for ''Meal component'';
■ c. Revise the definition of ''Persons with disabilities'';
■ d. Add in alphabetical order a definition for ''State licensed healthcare professional''; and
■ e. Add in alphabetical order a definition for ''Whole grain-rich''.

The revisions and additions read as follows:

§ 226.2 Definitions.

* * * * *

Functionally impaired adult means chronically impaired disabled persons 18 years of age or older, including persons with neurological and organic brain dysfunction, with physical or mental impairments to the extent that their capacity for independence and their ability to carry out activities of daily living is markedly limited. Activities of daily living include, but are not limited to, adaptive activities such as cleaning, shopping, cooking, taking public transportation, maintaining a residence, caring appropriately for one's grooming or hygiene, using a telephone, or using a post office. Marked limitations refer to the severity of impairment, and not the number of limited activities, and occur when the degree of limitation is such as to seriously interfere with the ability to function independently.

* * * * *

Meal component meals means one of the food groups which comprise reimbursable meals. The meal components are: fruits, vegetables, grains, meats/meat alternates, and fluid milk.

* * * * *

Persons with disabilities means persons of any age who have a physical or mental impairment that substantially limits one or more major life activities, have a record of such an impairment, or have been regarded as having such an impairment, and who are enrolled in an institution or child care facility serving a majority of persons who are age 18 and under.

* * * * *

State licensed healthcare professional means an individual who is authorized to write medical prescriptions under State law. This may include, but is not limited to, a licensed physician, nurse

practitioner, or physician's assistant, depending on State law.

* * * * *

Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched.

* * * * *

■ 36. Revise and republish § 226.20 to read as follows:

§ 226.20 Requirements for meals.

(a) *Meal components.* Except as otherwise provided in this section, each meal served in the Program must contain, at a minimum, the indicated components:

(1) *Fluid milk.* Fluid milk must be served as a beverage or on cereal, or a combination of both. Lactose-free and reduced-lactose milk that meet the fat content and flavor specifications for each age group may also be offered.

(i) *Children 1 year old.* Unflavored whole milk must be served.

(ii) *Children 2 through 5 years old.* Either unflavored low-fat (1 percent) or unflavored fat-free (skim) milk must be served.

(iii) *Children 6 years old and older.* Low-fat (1 percent fat or less) or fat-free (skim) milk must be served. Milk may be unflavored or flavored.

(iv) *Adults.* Low-fat (1 percent fat or less) or fat-free (skim) milk must be served. Milk may be unflavored or flavored. Six ounces (weight) or ¾ cup (volume) of yogurt may be used to fulfill the equivalent of 8 ounces of fluid milk once per day. Yogurt may be counted as either a fluid milk substitute or as a meat alternate, but not as both in the same meal.

(2) *Vegetables.* A serving may contain fresh, frozen, or canned vegetables, dry beans, peas, and lentils, or vegetable juice. All vegetables are credited based on their volume as served, except that 1 cup of leafy greens counts as ½ cup of vegetables.

(i) Pasteurized, full-strength vegetable juice may be used to fulfill the entire requirement. Vegetable juice or fruit juice may only be served at one meal, including snack, per day.

(ii) Cooked dry beans, peas, and lentils may be counted as either a vegetable or as a meat alternate, but not as both in the same dish.

(3) *Fruits.* A serving may contain fresh, frozen, canned, dried fruits, or fruit juice. All fruits are based on their volume as served, except that ¼ cup of dried fruit counts as ½ cup of fruit.

(i) Pasteurized, full-strength fruit juice may be used to fulfill the entire requirement. Fruit juice or vegetable juice may only be served at one meal, including snack, per day.

(ii) A vegetable may be used to meet the entire fruit requirement at lunch and supper. When two vegetables are served at lunch or supper, two different kinds of vegetables must be served.

(4) *Grains*—(i) *Enriched and whole grains.* All grains must be made with enriched or whole grain meal or flour.

(A) At least one serving per day, across all eating occasions of bread, cereals, and grains, must be whole grain-rich, as defined in § 226.2. Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched.

(B) A serving may contain whole grain-rich or enriched bread, cornbread, biscuits, rolls, muffins, and other bread products; or whole grain-rich, enriched, or fortified cereal grain, cooked pasta or noodle products, or breakfast cereal; or any combination of these foods.

(ii) *Breakfast cereals.* Breakfast cereals are those as defined by the Food and Drug Administration in 21 CFR 170.3(n)(4) for ready-to-eat and instant and regular hot cereals. Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce.

(iii) *Desserts.* Grain-based desserts do not count toward meeting the grains requirement.

(5) *Meats/meat alternates*—(i) *Serving meats/meat alternates.* Meats/meat alternates must be served in a main dish, or in a main dish and one other menu item. The creditable quantity of meats/meat alternates must be the edible portion as served of:

(A) Lean meat, poultry, or fish;

(B) Alternate protein products;

(C) Cheese, or an egg;

(D) Cooked dry beans, peas, and lentils;

(E) Peanut butter; or

(F) Any combination of these foods.

(ii) *Nuts and seeds.* Nuts and seeds and their butters are allowed as meat alternates. Information on crediting nuts and seeds may be found in FNS guidance.

(A) Nut and seed meals or flours may credit only if they meet the requirements for alternate protein products established in appendix A of this part.

(B) Acorns, chestnuts, and coconuts do not credit as meat alternates because of their low protein and iron content.

(iii) *Yogurt.* Four ounces (weight) or ½ cup (volume) of yogurt equals one ounce of the meats/meat alternates component. Yogurt may be used to meet all or part of the meats/meat alternates component as follows:

(A) Yogurt may be plain or flavored, unsweetened, or sweetened;

(B) Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce);

(C) Noncommercial or commercial standardized yogurt products, such as frozen yogurt, drinkable yogurt products, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruits or nuts, or similar products are not creditable; and

(D) For adults, yogurt may only be used as a meat alternate when it is not also being used as a fluid milk substitute in the same meal.

(iv) *Tofu and soy products.* Commercial tofu and soy products may be used to meet all or part of the meats/meat alternates component in accordance with FNS guidance and appendix A of this part. Non-commercial and non-standardized tofu and soy products cannot be used.

(v) *Beans, peas, and lentils.* Cooked dry beans, peas, and lentils may be used to meet all or part of the meats/meat alternates component. Beans, peas, and lentils include black beans, garbanzo beans, lentils, kidney beans, mature lima beans, navy beans, pinto beans, and split peas. Beans, peas, and lentils may be counted as either a meat/meat alternate or as a vegetable, but not as both in the same dish.

(vi) *Other meat alternates.* Other meat alternates, such as cheese, eggs, and nut butters may be used to meet all or part of the meats/meat alternates component.

(b) *Infant meals*—(1) *Feeding infants.* Foods in reimbursable meals served to infants ages birth through 11 months must be of a texture and a consistency that are appropriate for the age and development of the infant being fed. Foods must also be served during a span of time consistent with the infant's eating habits.

(2) *Breastmilk and iron-fortified formula.* Breastmilk or iron-fortified infant formula, or portions of both, must be served to infants birth through 11 months of age. An institution or facility must offer at least one type of iron-fortified infant formula. Meals containing breastmilk or iron-fortified infant formula supplied by the institution or facility, or by the parent or guardian, are eligible for reimbursement.

(i) *Parent or guardian provided breastmilk or iron-fortified formula.* A parent or guardian may choose to accept the offered formula, or decline the offered formula and supply expressed breastmilk or an iron-fortified infant formula instead. Meals in which a mother directly breastfeeds her child at the child care institution or facility are also eligible for reimbursement. When a parent or guardian chooses to provide breastmilk or iron-fortified infant formula and the infant is consuming solid foods, the institution or facility must supply all other required meal components in order for the meal to be reimbursable.

(ii) *Breastfed infants.* For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered at a later time if the infant will consume more.

(3) *Solid foods.* The gradual introduction of solid foods may begin at six months of age, or before or after six months of age if it is developmentally appropriate for the infant and in accordance with FNS guidance.

(4) *Infant meal pattern.* Infant meals must have, at a minimum, each of the food components indicated, in the amount that is appropriate for the infant's age.

(i) *Birth through 5 months*—(A) *Breakfast.* Four to 6 fluid ounces of breastmilk or iron-fortified infant formula, or portions of both.

(B) *Lunch or supper.* Four to 6 fluid ounces of breastmilk or iron-fortified infant formula, or portions of both.

(C) *Snack.* Four to 6 fluid ounces of breastmilk or iron-fortified infant formula, or portions of both.

(ii) *6 through 11 months.* Breastmilk or iron-fortified formula, or portions of both, is required. Meals are reimbursable when institutions and facilities provide all the components in the meal pattern that the infant is developmentally ready to accept.

(A) *Breakfast, lunch, or supper.* Six to 8 fluid ounces of breastmilk or iron-fortified infant formula, or portions of both; and 0 to ½ ounce equivalent of iron-fortified dry infant cereal; or 0–4 tablespoons meat, fish, poultry, whole egg, cooked dry beans, peas, and lentils; or 0 to 2 ounces (weight) of cheese; or 0 to 4 ounces (volume) of cottage cheese; or 0 to 4 ounces of yogurt; and 0 to 2 tablespoons of vegetable, fruit, or portions of both. Fruit juices and vegetable juices must not be served.

(B) *Snack.* Two to 4 fluid ounces of breastmilk or iron-fortified infant formula; and 0 to ½ ounce equivalent bread; or 0–¼ ounce equivalent crackers; or 0–½ ounce equivalent infant cereal or ready-to-eat cereals; and 0 to 2 tablespoons of vegetable or fruit, or portions of both. Fruit juices and vegetable juices must not be served. A serving of grains must be whole grain-rich, enriched meal, or enriched flour.

(5) *Infant meal pattern table.* The minimum amounts of meal components to serve to infants, as described in paragraph (b)(4) of this section, are:

TABLE 1 TO PARAGRAPH (b)(5)—INFANT MEAL PATTERNS

Infants	Birth through 5 months	6 through 11 months
Breakfast, Lunch, or Supper.	4–6 fluid ounces breast milk [1] or formula [2]	6–8 fluid ounces breast milk [1] or formula; [2] and 0–½ ounce equivalent infant cereal; [2 3] or 0–4 tablespoons meat, fish, poultry, whole egg, cooked dry beans, peas, and lentils; or 0–2 ounces of cheese; or 0–4 ounces (volume) of cottage cheese; or 0–4 ounces or ½ cup of yogurt; [4] or a combination of the above; [5] and 0–2 tablespoons vegetable or fruit, or a combination of both.[5 6]
Snack	4–6 fluid ounces breast milk [1] or formula [2]	2–4 fluid ounces breast milk [1] or formula; [2] and 0–½ ounce equivalent bread; [3 7] or 0–¼ ounce equivalent crackers; [3 7] or 0–½ ounce equivalent infant cereal; [2 3] or 0–¼ ounce equivalent ready-to-eat breakfast cereal; [3 5 7 8] and 0–2 tablespoons vegetable or fruit, or a combination of both.[5 6]

[1] Breast milk or formula, or portions of both, must be served; however, it is recommended that breast milk be served from birth through 11 months. For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered, with additional breast milk offered at a later time if the infant will consume more.

[2] Infant formula and dry infant cereal must be iron-fortified.

[3] Information on crediting grain items may be found in FNS guidance.

[4] Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce).

[5] A serving of this component is required when the infant is developmentally ready to accept it.

[6] Fruit and vegetable juices must not be served.

[7] A serving of grains must be whole grain-rich, enriched meal, enriched flour, bran, or germ.

[8] Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce.

(c) *Meal patterns for children age 1 through 18 and adult participants.* Institutions and facilities must serve the meal components and quantities specified in the following meal patterns for children and adult participants in order to qualify for reimbursement.

(1) *Breakfast.* Fluid milk, vegetables or fruit, or portions of both, and grains are required components of the breakfast meal. Meats/meat alternates may be offered to meet the entire grains requirement a maximum of three times per week. The minimum amounts of meal components to be served at breakfast are as follows:

TABLE 2 TO PARAGRAPH (c)(1)—CHILD AND ADULT CARE FOOD PROGRAM BREAKFAST

[Select the appropriate components for a reimbursable meal]

Meal components and food items [1]	Minimum quantities				
	Ages 1–2	Ages 3–5	Ages 6–12	Ages 13–18 [2]	Adult participants
Fluid Milk	4 fluid ounces [3]	6 fluid ounces [4]	8 fluid ounces [5]	8 fluid ounces [5]	8 fluid ounces.[6]
Vegetables, fruits, or portions of both [7]	¼ cup	½ cup	½ cup	½ cup	½ cup.
Grains [8]	½ ounce equivalent	½ ounce equivalent	1 ounce equivalent	1 ounce equivalent	2 ounce equivalents.

[1] Must serve all three components for a reimbursable meal. Offer versus serve is an option for at-risk afterschool care and adult day care centers.
[2] At-risk afterschool programs and emergency shelters may need to serve larger portions to children ages 13 through 18 to meet their nutritional needs.
[3] Must serve unflavored whole milk to children age 1.
[4] Must serve unflavored milk to children 2 through 5 years old. The milk must be fat-free, skim, low-fat, or 1 percent or less.
[5] May serve unflavored or flavored milk to children ages 6 and older. The milk must be fat-free, skim, low-fat, or 1 percent or less.
[6] May serve unflavored or flavored milk to adults. The milk must be fat-free, skim, low-fat, or 1 percent or less. Yogurt may be offered in the place of milk once per day for adults. Yogurt may count as either a fluid milk substitute or as a meat alternate, but not both, in the same meal. Six ounces (by weight) or ¾ cup (by volume) of yogurt is the equivalent of 8 ounces of fluid milk. Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce).
[7] Juice must be pasteurized. Full-strength juice may only be offered to meet the vegetable or fruit requirement at one meal or snack, per day.
[8] Must serve at least one whole grain-rich serving, across all eating occasions, per day. Grain-based desserts may not be used to meet the grains requirement. Meats/meat alternates may be offered in place of the entire grains requirement, up to 3 times per week at breakfast. One ounce equivalent of meats/meat alternates credits equal to one ounce equivalent of grains. Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce. Information on crediting grain items and meats/meat alternates may be found in FNS guidance.

(2) *Lunch and supper.* Fluid milk, meats/meat alternates, vegetables, fruits, and grains are required components in the lunch and supper meals. The minimum amounts of meal components to be served at lunch and supper are as follows:

TABLE 3 TO PARAGRAPH (c)(2)—CHILD AND ADULT CARE FOOD PROGRAM LUNCH AND SUPPER

[Select the appropriate components for a reimbursable meal]

Meal components and food items [1]	Minimum quantities				
	Ages 1–2	Ages 3–5	Ages 6–12	Ages 13–18 [2]	Adult participants
Fluid milk	4 fluid ounces [3]	6 fluid ounces [4]	8 fluid ounces [5]	8 fluid ounces [5]	8 fluid ounces.[6]
Meats/meat alternates [7]	1 ounce equivalent	1½ ounce equivalents	2 ounce equivalents	2 ounce equivalents	2 ounce equivalents.
Vegetables [8]	⅛ cup	¼ cup	½ cup	½ cup	½ cup.
Fruits [8]	⅛ cup	¼ cup	¼ cup	¼ cup	½ cup.
Grains [9]	½ ounce equivalent	½ ounce equivalent	1 ounce equivalent	1 ounce equivalent	2 ounce equivalents.

[1] Must serve all five components for a reimbursable meal. Offer versus serve is an option for at-risk afterschool care and adult day care centers.
[2] At-risk afterschool programs and emergency shelters may need to serve larger portions to children ages 13 through 18 to meet their nutritional needs.
[3] Must serve unflavored whole milk to children age 1.
[4] Must serve unflavored milk to children 2 through 5 years old. The milk must be fat-free, skim, low-fat, or 1 percent or less.
[5] May serve unflavored or flavored milk to children ages 6 and older. The milk must be fat-free, skim, low-fat, or 1 percent or less.
[6] May serve unflavored or flavored milk to adults. The milk must be fat-free, skim, low-fat, or 1 percent or less. Yogurt may be offered in place of milk once per day for adults. Yogurt may count as either a fluid milk substitute or as a meat alternate, but not both, in the same meal. Six ounces (by weight) or ¾ cup (by volume) of yogurt is the equivalent of 8 ounces of fluid milk. A serving of fluid milk is optional for suppers served to adult participants.
[7] Alternate protein products must meet the requirements in appendix A to this part. Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce). Information on crediting meats/meat alternates may be found in FNS guidance.
[8] Juice must be pasteurized. Full-strength juice may only be offered to meet the vegetable or fruit requirement at one meal or snack, per day. A vegetable may be offered to meet the entire fruit requirement. When two vegetables are served at lunch or supper, two different kinds of vegetables must be served.
[9] Must serve at least one whole grain-rich serving, across all eating occasions, per day. Grain-based desserts may not be used to meet the grains requirement. Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereal must contain no more than 6 grams of added sugars per dry ounce. Information on crediting grain items may be found in FNS guidance.

(3) *Snack.* Serve two of the following five components: Fluid milk, meats/meat alternates, vegetables, fruits, and grains. Fruit juice, vegetable juice, and milk may comprise only one component of the snack. The minimum amounts of meal components to be served at snacks are as follows:

TABLE 4 TO PARAGRAPH (c)(3)—CHILD AND ADULT CARE FOOD PROGRAM SNACK

[Select two of the five components for a reimbursable snack]

Meal components and food items [1]	Minimum quantities				
	Ages 1–2	Ages 3–5	Ages 6–12	Ages 13–18 [2]	Adult participants
Fluid milk	4 fluid ounces [3]	4 fluid ounces [4]	8 fluid ounces [5]	8 fluid ounces [5]	8 fluid ounces.[6]
Meats/meat alternates [7]	½ ounce equivalent	½ ounce equivalent	1 ounce equivalent	1 ounce equivalent	1 ounce equivalent.
Vegetables [8]	½ cup	½ cup	¾ cup	¾ cup	½ cup.
Fruits [8]	½ cup	½ cup	¾ cup	¾ cup	½ cup.
Grains [9]	½ ounce equivalent	½ ounce equivalent	1 ounce equivalent	1 ounce equivalent	1 ounce equivalent.

[1] Must serve two of the five components for a reimbursable snack. Milk and juice may not be served as the only two items in a reimbursable snack.
[2] At-risk afterschool programs and emergency shelters may need to serve larger portions to children ages 13 through 18 to meet their nutritional needs.
[3] Must serve unflavored whole milk to children age 1.
[4] Must serve unflavored milk to children 2 through 5 years old. The milk must be fat-free, skim, low-fat, or 1 percent or less.
[5] May serve unflavored or flavored milk to children ages 6 and older. The milk must be fat-free, skim, low-fat, or 1 percent or less.
[6] May serve unflavored or flavored milk to adults. The milk must be fat-free, skim, low-fat, or 1 percent or less. Yogurt may be offered in place of milk, once per day for adults. Yogurt may count as either a fluid milk substitute or as a meat alternate, but not both, in the same meal. Six ounces (by weight) or ¾ cup (by volume) of yogurt is the equivalent of 8 ounces of fluid milk.

[7] Alternate protein products must meet the requirements in appendix A to this part. Through September 30, 2025, yogurt must contain no more than 23 grams of total sugars per 6 ounces. By October 1, 2025, yogurt must contain no more than 12 grams of added sugars per 6 ounces (2 grams of added sugars per ounce). Information on crediting meats/meat alternates may be found in FNS guidance.
[8] Juice must be pasteurized. Full-strength juice may only be offered to meet the vegetable or fruit requirement at one meal or snack, per day.
[9] Must serve at least one whole grain-rich serving, across all eating occasions, per day. Grain-based desserts may not be used to meet the grains requirement. Through September 30, 2025, breakfast cereals must contain no more than 6 grams of total sugars per dry ounce. By October 1, 2025, breakfast cereal must contain no more than 6 grams of added sugar per dry ounce. Information on crediting grain items may be found in FNS guidance.

(d) *Food preparation.* Deep-fat fried foods that are prepared on-site cannot be part of the reimbursable meal. For this purpose, deep-fat frying means cooking by submerging food in hot oil or other fat. Foods that are pre-fried, flash-fried, or par-fried by a commercial manufacturer may be served, but must be reheated by a method other than frying.

(e) *Unavailability of fluid milk*—(1) *Temporary.* When emergency conditions prevent an institution or facility normally having a supply of milk from temporarily obtaining milk deliveries, the State agency may approve the service of breakfast, lunches, or suppers without milk during the emergency period.

(2) *Continuing.* When an institution or facility is unable to obtain a supply of milk on a continuing basis, the State agency may approve service of meals without milk, provided an equivalent amount of canned, whole dry or fat-free dry milk is used in the preparation of the components of the meal set forth in paragraph (a) of this section. (f) *Grain substitutions.* In American Samoa, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands, and in institutions or facilities in any State that serve primarily American Indian or Alaska Native participants, any vegetable, including vegetables such as breadfruit, prairie turnips, plantains, sweet potatoes, and yams, may be served to meet the grains requirement.

(g) *Modifications and variations in reimbursable meals and snacks as described in paragraphs (a) through (c) of this section*—(1) *Modifications for disability reasons.* Institutions and facilities must make meal modifications including substitutions in meals and snacks described in this section for participants with a disability and whose disability restricts their diet. The modification requested must be related to the disability and must be offered at no additional cost to the child or adult participant.

(i) In order to receive Federal reimbursement when a modified meal does not meet the meal pattern requirements specified in this section, the institution or facility must obtain from the household a written medical statement signed by a State licensed healthcare professional. By October 1, 2025, institutions and facilities must also accept a medical statement signed by a registered dietitian. The medical statement must provide sufficient information about the child or adult participant's dietary restrictions, such as foods to be omitted and recommended alternatives, if appropriate. Modified meals that meet the meal pattern requirements in this section are reimbursable with or without a medical statement.

(ii) Institutions and facilities must ensure that parents and guardians, and their children when age-appropriate at institution or facility discretion; adult participants; and persons on behalf of adult participants have notice of the procedure for requesting meal modifications for disabilities and the process for procedural safeguards related to meal modifications for disabilities. See §§ 15b.6(b) and 15b.25 of this title.

(iii) Expenses incurred when making meal modifications that exceed Program reimbursement rates must be paid by the institution or facility; costs may be paid from the institution or facility's nonprofit food service account.

(iv) A parent, guardian, adult participant, or a person on behalf of an adult participant may supply one or more components of the reimbursable meal as long as the institution or facility provides at least one required meal component.

(2) *Variations for non-disability reasons.* (i) Institutions and facilities should consider participants' dietary preferences when planning and preparing meals and snacks. Any variations must be consistent with the meal pattern requirements specified in this section.

(ii) Expenses incurred from variations that exceed program reimbursement rates must be paid by the institution or facility; costs may be paid from the institution or facility's nonprofit food service account.

(iii) A parent, guardian, adult participant, or a person on behalf of an adult participant may supply one component of the reimbursable meal as long as the component meets the requirements described in this section and the institution or facility provides the remaining components.

(3) *Fluid milk substitutes for non-disability reasons.* (i) An institution or facility may offer fluid milk substitutes based on a written request from a child's parent or guardian, an adult participant, a person on behalf of an adult participant, a State licensed healthcare professional, or registered dietitian for participants with dietary needs that are not disabilities that identifies the reason for the substitute. An institution or facility choosing to offer fluid milk substitutes for a non-disability reason is not required to offer the specific fluid milk substitutes requested but may offer the fluid milk substitutes of its choice, provided the fluid milk substitutes offered meet the requirements of paragraph (g)(3)(ii) of this section. For disability-related meal modifications, see paragraph (g)(1) of this section.

(ii) If an institution or facility chooses to offer one or more fluid milk substitutes for non-disability reasons, the fluid milk substitutes must provide, at a minimum, the nutrients listed in the following table. Fluid milk substitutes must be fortified in accordance with fortification guidelines issued by the Food and Drug Administration.

TABLE 5 TO PARAGRAPH (g)(3)(ii)—NUTRIENT REQUIREMENTS FOR FLUID MILK SUBSTITUTES

Nutrient	Per cup (8 fl. oz.)
Calcium	276 mg.
Protein	8 g.
Vitamin A	150 mcg. retinol activity equivalents (RAE).
Vitamin D	2.5 mcg.
Magnesium	24 mg.
Phosphorus	222 mg.
Potassium	349 mg.

TABLE 5 TO PARAGRAPH (g)(3)(ii)—NUTRIENT REQUIREMENTS FOR FLUID MILK SUBSTITUTES—Continued

Nutrient	Per cup (8 fl. oz.)
Riboflavin	0.44 mg.
Vitamin B–12	1.1 mcg.

(iii) Expenses incurred when providing fluid milk substitutes that exceed Program reimbursements must be paid by the participating institution or facility; costs may be paid from the institution or facility's nonprofit food service account.

(h) *Special variations.* FNS may approve variations in the meal components of the meals on an experimental or continuing basis in any institution or facility where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, economic, or physical needs.

(i) *Meals prepared in schools.* The State agency must allow institutions and facilities which serve meals to children 5 years old and older and are prepared in schools participating in the National School Lunch and School Breakfast Programs to substitute the meal pattern requirements of the regulations governing those Programs (parts 210 and 220 of this chapter, respectively) for the meal pattern requirements contained in this section.

(j) *Meal planning.* Institutions and facilities must plan for and order meals on the basis of current participant trends, with the objective of providing only one meal per participant at each meal service. Records of participation and of ordering or preparing meals must be maintained to demonstrate positive action toward this objective. In recognition of the fluctuation in participation levels which makes it difficult to estimate precisely the number of meals needed and to reduce the resultant waste, any excess meals that are ordered may be served to participants and may be claimed for reimbursement, unless the State agency determines that the institution or facility has failed to plan and prepare or order meals with the objective of providing only one meal per participant at each meal service.

(k) *Time of meal service.* State agencies may require any institution or facility to allow a specific amount of time to elapse between meal services or require that meal services not exceed a specified duration.

(l) *Sanitation.* Institutions and facilities must ensure that in storing, preparing, and serving food proper sanitation and health standards are met which conform with all applicable State and local laws and regulations. Institutions and facilities must ensure that adequate facilities are available to store food or hold meals.

(m) *Donated commodities.* Institutions and facilities must efficiently use in the Program any foods donated by the Department and accepted by the institution or facility.

(n) *Family style meal service.* Family style is a type of meal service which allows children and adults to serve themselves from common platters of food with the assistance of supervising adults. Institutions and facilities choosing to exercise this option must be in compliance with the following practices:

(1) A sufficient amount of prepared food must be placed on each table to provide the full required portions of each of the components, as outlined in paragraphs (c)(1) and (2) of this section, for all children or adults at the table and to accommodate supervising adults if they wish to eat with the children and adults.

(2) Children and adults must be allowed to serve the meal components themselves, with the exception of fluids (such as milk). During the course of the meal, it is the responsibility of the supervising adults to actively encourage each child and adult to serve themselves the full required portion of each meal component of the meal pattern. Supervising adults who choose to serve the fluids directly to the children or adults must serve the required minimum quantity to each child or adult.

(3) Institutions and facilities which use family style meal service may not claim second meals for reimbursement.

(o) *Offer versus Serve.* (1) Each adult day care center and at-risk afterschool program must offer its participants all of the required food servings as set forth in paragraphs (c)(1) and (2) of this section. However, at the discretion of the adult day care center or at-risk afterschool program, participants may be permitted to decline:

(i) *For adults*—(A) *One of the four food* items required at breakfast (one serving of fluid milk; one serving of vegetable or fruit, or a combination of both; and two servings of grains, or meat or meat alternates);

(B) *Two of the five* meal components required at lunch (fluid milk; vegetables; fruit; grain; and meat or meat alternate); and

(C) *One of the four* meal components required at supper (vegetables; fruit; grain; and meat or meat alternate).

(ii) *For children. Two of the five* meal components required at supper (fluid milk; vegetables; fruit; grain; and meat or meat alternate).

(2) In pricing programs, the price of the reimbursable meal must not be affected if a participant declines a food item.

(p) *Prohibition on using foods and beverages as punishments or rewards.* Meals served under this part must contribute to the development and socialization of children. Institutions and facilities must not use foods and beverages as punishments or rewards.

(q) *Severability.* If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstances, it shall be severable from this section and not affect the remainder thereof. In the event of such holding of invalidity or unenforceability of a provision, the meal pattern requirements covered by that provision reverts to the version that immediately preceded the invalidated provision.

■ 37. In § 226.22, revise paragraph (c)(1) to read as follows:

§ 226.22 Procurement standards.

* * * * *

(c) * * *

(1) Institutions participating in the Program may apply a geographic preference when procuring unprocessed locally grown or locally raised agricultural products, including the use of ''locally grown'', ''locally raised'', or ''locally caught'' as procurement specifications or selection criteria for unprocessed or minimally processed food items. When utilizing the geographic preference to procure such products, the institution making the purchase has the discretion to determine the local area to which the geographic preference option will be applied so long as there are an

appropriate number of qualified firms able to compete;

* * * * *

Cynthia Long,

Administrator, Food and Nutrition Service.

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

Appendix A—Regulatory Impact Analysis

I. Statement of Need

On February 7, 2023, USDA published a proposed rule, *Child Nutrition Programs: Revisions to Meal Patterns Consistent with the 2020 Dietary Guidelines for Americans,* to further align school meal nutrition requirements with the goals of the *Dietary Guidelines for Americans, 2020–2025 (Dietary Guidelines).*[1] USDA is now finalizing that proposed rule with the expectation that these changes will continue to improve the health of meals and snacks served in child nutrition programs in the coming years. To develop the rule, USDA considered broad stakeholder input, including written public comments received in response to the proposed rule, and a comprehensive review of the latest *Dietary Guidelines.* The rule represents the next stage of the rulemaking process to permanently update and improve school meal pattern requirements. This rule includes a focus on nutrition requirements for sodium, whole grains, and milk in school meals as well as new requirements to limit added sugars. Further, in addition to addressing these and other nutrition requirements, this rule finalizes a variety of changes to school meal requirements from the 2020 proposed rule, *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs.*[2] Updates for the Child and Adult Care Food Program (CACFP) and Summer Food Service Program (SFSP) are also included in certain provisions of this rule. Finally, USDA is issuing a final rule of the provisions of this rulemaking that strengthen the Buy American requirement.[3]

II. Background

The National School Lunch Program (NSLP) and School Breakfast Program (SBP) were established in 1946 and 1966, respectively. Both programs provide nutritionally balanced and low or no-cost meals to children in schools each day. In 2012, USDA issued a final rule that increased the availability of nutritious foods like fruits, vegetables, and whole grains and established limits for sodium in school meals, among other key changes. Since then, school nutrition professionals, industry partners, and other stakeholders have made tremendous strides in improving the nutritional quality of school meals, and recent research shows that school meals are the healthiest meals children eat during the day.[4] Many components of the 2012 nutrition requirements were successfully implemented, such as vegetable subgroups at lunch and calorie ranges for school meals. However, some requirements faced challenges, including Congressional intervention and administrative policies that delayed implementation or allowed less stringent requirements for milk, whole grains, and sodium. In addition, during the COVID–19 public health emergency, schools required meal pattern flexibilities to ensure that children had continued access to nutritious meals amid supply chain challenges. Program operators continue to face pandemic-related and supply chain challenges. To that end, this rule considers those challenges and uses a phased-in approach to implementation to strengthen the nutritional quality of school meals over time and provide ongoing support to school nutrition professionals. This rule builds on USDA's prior rulemakings, such as *Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans* proposed rule and *Child Nutrition Programs: Transitional Standards for Milk, Whole Grains, and Sodium* (87 FR 6984), from February 7, 2022, to further align school meal nutrition requirements with the goals of the *Dietary Guidelines, 2020–2025.*

III. Comments

USDA received 51 comments on the Regulatory Impact Analysis (RIA) in response to the 2023 proposed rule *Child Nutrition Programs: Revisions to Meal Patterns Consistent with the 2020 Dietary Guidelines for Americans.* The majority (45 respondents) commented on the costs, 2 respondents commented on long-term benefits, and 3 respondents commented on gaps in the RIA of the proposed rule.

There were 26 comments on the RIA for the 2020 proposed rule *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs.* This rule includes five provisions from the 2020 proposed rule:

- Meats/Meat Alternates at Breakfast
- Dry Beans, Peas, and Lentils at Lunch
- Meal Modifications
- Clarification on Potable Water Requirements
- Synthetic Trans Fats

The comments received on the regulatory impacts of the 2020 proposed rule did not include any comments related to expected impacts of the specific provisions included in this rule.

Comments on the 2023 Proposed Rule Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans

- Respondents expressed concern that implementation of the 2023 proposed rule would cause school districts to take on more debt or make budget cuts in other areas to fund school meals that meet the updated requirements. Respondents noted that though scratch cooking may be the most efficient way to reduce sodium levels in meals, it could be costly and should be accounted for in the cost-benefit-analysis. Other respondents pointed out that schools could face additional costs passed along from manufacturers having to reformulate their products and change their labels.

USDA Response

The decisions around the rule have taken into consideration the comments received on the 2023 proposed rule regarding costs to school districts. This rule maintains the current flavored milk requirements (Alternative B), which is the less restrictive and less costly option. This RIA also estimates $7 million in average annual cost savings associated with aligning afterschool snacks with CACFP snack requirements and $5 million in average annual cost savings from simplifying requirements for schools that choose to substitute vegetables for fruits at breakfast. This rule provides additional operational or administrative flexibilities for geographic preference, meats/meat alternates as breakfast, nuts and seeds, and beans, peas and lentils at lunch.

The sodium limits finalized in this rule are less restrictive and intended to be more attainable as compared to the proposed limits. Instead of three 10 percent reductions in NSLP and two 10 percent reductions in SBP over several years, this rule includes one reduction in each program to meet Target 2 levels from the 2012 rule, effective school year (SY) 2027–2028. USDA recognizes that in order to meet the sodium limits included in this rule, additional recipe and product reformulation may need to occur over time. To that end, to develop the sodium limits in this rulemaking, USDA considered the Food and Drug Administration's (FDA) voluntary sodium reduction goals, which aim to reduce sodium across the U.S. food supply. USDA expects that aligning school meal sodium limits with FDA's voluntary sodium reduction goals may help support children's acceptance of school lunches and breakfasts with less sodium, as the school meal reductions will occur alongside sodium reductions in the broader U.S. food supply. While USDA recognizes that schools may choose to introduce more scratch and quick-scratch cooking to meet the sodium limits, USDA lacks data to fully estimate those costs. However, potential equipment costs associated with increased scratch cooking are estimated in the ''Uncertainties/Limitations'' section and table 29 of this RIA. The ''Uncertainties/Limitations'' section also includes discussion of other uncertainties in

[1] U.S. Department of Agriculture and U.S. Department of Health and Human Services. Dietary Guidelines for Americans, 2020–2025. 9th Edition. December 2020. Available at *DietaryGuidelines.gov.*

[2] Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs (85 FR 4094, January 23, 2020). Available at: *https://www.federalregister.gov/documents/2020/01/23/2020-00926/simplifying-meal-service-and-monitoring-requirements-in-the-national-school-lunch-and-school.*

[3] Statutory language can be found in the Richard B. Russell National School Lunch Act (NSLA) section 12(n) on page 56: *https://www.fns.usda.gov/nsla.*

[4] Liu J, Micha R, Li Y, Mozaffarian D. Trends in Food Sources and Diet Quality Among US Children and Adults, 2003–2018. JAMA Netw Open. 2021;4(4):e215262. doi:10.1001/jamanetworkopen.2021.5262. This study found that foods consumed at schools provided the best mean diet quality of major US food sources.

this analysis and their potential impact on the costs and benefits of this rule.

The weekly average sodium limits are approximately a 15 percent reduction for lunch and 10 percent reduction for breakfast and will take effect in SY 2027–2028. Schools can maintain current sodium limits (Target 1A) prior to the SY 2027–2028 reduction. This will allow time and flexibility for a variety of sodium reduction practices that the RIA has estimated costs for, including product reformulation, scratch cooking, menu adjustments, reducing the frequency of offering higher sodium foods, and recipe alterations.

- Respondents mentioned areas of impact that were not considered in the proposed RIA. These respondents noted that CACFP and costs specific to its sponsors and providers were largely excluded from the RIA. One respondent suggested applying the methods used to estimate the reporting and record keeping costs for the Buy American provision to the other proposed provisions. Another respondent recommended that USDA conduct a marginal analysis on the cost of single-percent changes to the Buy American non-domestic ceiling and provide more information on the benefits of this provision on child nutrition.

USDA Response

The reporting and record keeping administrative burden hours estimated in this RIA are in accordance with the information collection request for these activities approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. USDA anticipates regulatory familiarization costs, including state administrative costs, local level training costs, and costs associated with adjusting purchasing patterns and menus at the local level. The administrative costs associated with this familiarization period were also expected for the 2012 final rule, which is used as a reference for the administrative costs for this rule; see Administrative Costs section.

Anticipated costs to CACFP sponsors and providers have been incorporated into the RIA in response to public comment. Costs include reporting and record keeping costs, administrative costs, familiarization costs, and local training costs, as well as costs associated with changes in purchasing patterns and menus. CACFP purchasing patterns and menu impacts are most likely to occur due to the added sugars provision, specifically the added sugars limit of 12 grams per 6 oz of yogurt. This replaces the existing limit of 23 grams of total sugars per 6 oz of yogurt for CACFP menus. The cost impact for CACFP is estimated to be about $2 million (table 6). Other provisions that apply to CACFP in this rule are not estimated to have a cost impact because they are technical corrections, clarifications, or add flexibility to menu planning.

The costs associated with the Buy American provision are based on increases in reporting and record keeping burden due to the final rule. Instead of a 5 percent ceiling as proposed, the final rule institutes a phased approach over seven school years to reach the 5 percent ceiling on the non-domestic commercial foods a school food authority may purchase per school year. The phased implementation will begin in SY 2025–2026 with a 10 percent non-domestic food cost cap, with an 8 percent cap beginning in SY 2028–2029, and finally a 5 percent cap in SY 2031–2032. We estimate a $3 million annual total food cost increase once the phased in non-domestic foods ceiling reaches 5 percent. Based on the average use of exceptions by school food authorities (8.5 percent), each single-percent reduction in the cap equals approximately $0.8 million in annual costs. These estimates are further detailed in the ''Buy American'' section (table 18). In response to public comments that suggested a 5 percent cap is too restrictive under current procurement conditions, USDA intends to help schools, State agencies, and other stakeholders adjust to the new requirement and achieve compliance with the Buy American provision through a phased in approach. The mission of Child Nutrition Programs is to serve children nutritious meals and support American agriculture.

IV. Summary of Impacts

The estimated impacts of this rule primarily reflect changes in the foods purchased for use in school meals, administrative familiarization, and labor costs incurred by schools for meal production. While this rule takes effect SY 2024–2025, the required changes will be gradually phased in over time. Program operators will not be required to make any changes to their menus as a result of this rule until SY 2025–2026 at the earliest. USDA estimates this rule will cost [5] schools between $0.02 and $0.04 per meal,[6] or an average of $206 million [7] annually including both the SBP and NSLP starting in SY 2024–2025, accounting for the fact that changes will be implemented gradually and adjusting for annual inflation.[8] Annual costs range from $53 million to $283 million over eight school years, adjusting for yearly inflation (table 20). While some changes—such as aligning the NSLP snack meal pattern with that of CACFP or simplifying requirements for schools that choose to substitute vegetables for fruits at breakfast—are estimated to reduce school food costs or have no cost impact, other changes, such as added sugars and sodium limits, are estimated to increase food costs. There are no estimated changes in Federal costs due to the changes in this final rule, as the rule does not impact the Federal reimbursement rate for school meals and is not expected to significantly impact baseline participation.

The changes in this rule are achievable and realistic for schools and address the need for strong nutrition requirements in school meals. This analysis provides nine-year cost streams to project potential impacts over each impacted fiscal year (FY), though FY 2024 and FY 2032 are shown as half year costs to account for the fact that implementation of this rule spans eight total school years (table 1). These same data are presented in table A in the ''Appendix'' section by school year.

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[5] Except where noted in the participation impacts, the terms ''costs'' and ''savings'' are used in this analysis to describe the school level shifts in food purchases and labor associated with school meal production.

[6] This is about 0.5% of the average cost to SFAs per breakfast and lunch, in 2024 dollars. Factoring 4% annual inflation, breakfast costs $4.03 and lunch costs $5.64 for SFAs to produce. Based on School Nutrition Meal Cost Study (SNMCS) Report—Volume 3, the average SFA had a reported cost of $3.81 per NSLP lunch and $2.72 per SBP breakfast in SY 2014–2015 (*https://fns-prod.azureedge.us/sites/default/files/resource-files/SNMCS-Volume3.pdf*).

[7] This annual average is based on this rulemaking finalizing Milk Alternative B in the proposed rule.

[8] Using 2023 dollars and not adjusting for annual inflation results in $1.256 billion dollars over eight school years (over nine fiscal years) or $52 to $227 million annually ($0.03 per meal), see appendix.

TABLE 1: STREAM OF QUANTIFIABLE COSTS TO SCHOOLS DURING THE 9 YEARS OF IMPLEMENTATION, IN 2023 DOLLARS[9,10]

	FISCAL YEAR ($ MILLIONS)									
	2024[11]	2025[12]	2026	2027	2028	2029	2030	2031	2032[13]	Total[14]
NOMINAL COST STREAM[15]										
ADMINISTRATIVE COSTS	$21	$41	$21	$21	$21	$0	$0	$0	$0	$124
ADDED SUGARS	$0	$52	$103	$103	$103	$103	$103	$103	$52	$722
MILK	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
SODIUM	$0	$0	$0	$45	$91	$91	$91	$91	$45	$454
AFTERSCHOOL SNACKS	$0	-$4	-$8	-$8	-$8	-$8	-$8	-$8	-$4	-$59
SUBSTITUTE VEGETABLES FOR FRUITS AT BREAKFAST	-$2	-$4	-$4	-$4	-$4	-$4	-$4	-$4	-$2	-$31
BUY AMERICAN	$7	$10	$4	$4	$4	$4	$4	$5	$3	$45
TOTAL	**$26**	**$94**	**$116**	**$161**	**$207**	**$186**	**$186**	**$186**	**$94**	**$1,256**
% COST OF BASELINE[16]	**0.2%**	**0.4%**	**0.4%**	**0.6%**	**0.7%**	**0.6%**	**1.1%**	**1.1%**	**0.5%**	**0.6%**
DISCOUNTED COST STREAM										
3 PERCENT	$26	$92	$109	$147	$184	$160	$155	$156	$78	$874
7 PERCENT	$26	$88	$101	$131	$158	$132	$124	$124	$62	$761

As required by OMB Circular A–4, in table 2 below, the Department has prepared an accounting statement showing the annualized estimates of benefits, costs, and transfers associated with the provisions of this rule. The next section provides an impact analysis for each change.

[9] No adjustment for inflation was done for this table aside for inflation from the time-period of data collection up to 2023.

[10] For data in 2023 dollars presented by school years (July–June) instead of fiscal years (October–September), see table A in the 'Appendix' section. Totals are the same as table 1 and the breakdown of costs is shown across the eight school years.

[11] First year of provision implementation presents half a year of costs from SY 2024–2025 (first half of the school year).

[12] Including costs from the second half of SY 2024–2025 and the first half of SY 2025–2026; this style is also true of FY 2026 through 2031.

[13] Presenting half a year of costs from SY 2030–2031 (second half of the school year).

[14] This is eight full fiscal years, including 7 full fiscal years and two half years.

[15] The nominal cost stream values are based upon 2023 participation levels and assumes participation holds steady through FY 2032.

[16] The percentage of baseline is calculated as total costs of the proposed changes divided by the total expected costs of the NSLP, SBP, and CACFP programs in each fiscal year. Expected costs for NSLP, SBP and CACFP are inflated from FY 2019 based on actual and forecasted food price inflation.

TABLE 2: ACCOUNTING STATEMENT

Benefits	Range	Estimate	Year Dollar	Discount Rate	Period Covered
Qualitative: Establishes achievable requirements that are expected to improve the nutritional content of meals served through USDA child nutrition programs and therefore diet quality and health of children who consume those meals. Additional provisions will also increase meal planning flexibility and improve program administration. Strengthens the Buy American provision to ensure that school meals use foods produced in the US to the extent feasible.					
	Annualized Monetized ($millions/year)	n.a.	n.a.	n.a.	n.a. FY 2024-2032
Costs Incurred by Schools	**Range**	**Estimate**	**Year Dollar**	**Discount Rate**	**Period Covered**
Quantitative: Costs result from changes in food purchase patterns to meet the new requirements, labor associated with changes in meal preparation, and administrative familiarization costs.					
Annualized Monetized ($millions/year)	Total	$140	2023	7 percent	FY 2024-2032
		$155	2023	3 percent	
Federal Costs	**Range**	**Estimate**	**Year Dollar**	**Discount Rate**	**Period Covered**
Qualitative and Quantitative: There are no estimated changes in Federal reimbursement levels associated with this rule. It is assumed participation will not measurably change from the baseline approximated by the status quo.					
Annualized Monetized ($millions/year)	n.a.	n.a.	n.a.	n.a.	FY 2024-2032

V. Section by Section Analysis

This rule finalizes the following provisions from the 2023 proposed rule:

- Added Sugars
- Milk
- Whole Grains
- Sodium
- Substituting Vegetables for Grains in Tribal Communities
- Traditional Indigenous Foods
- Afterschool Snacks
- Substituting Vegetables for Fruits at Breakfast
- Nuts and Seeds
- Competitive Foods: Bean Dip Exemption
- Professional Standards: Hiring Exemption for Medium and Large Local Educational
- Agencies
- Buy American
- Geographic Preference
- Miscellaneous Changes

This rule also finalizes the following provisions from the 2020 proposed rule:

- Meats/Meat Alternates at Breakfast
- Beans, Peas, and Lentils at Lunch
- Meal Modifications
- Clarification on Potable Water Requirements
- Synthetic Trans Fats

USDA worked closely with program stakeholders to gather input for the proposed rule. The public was also invited to submit comments on the transitional standards rule, the 2023 proposed rule, the 2020 proposed rule, and their accompanying Regulatory Impact Analyses. Analyses below detail the financial impacts of each provision of this rule.

A. Key Assumptions

Impacts in this analysis are based on data collected during SY 2014–2015 for the School Nutrition and Meal Cost Study (SNMCS).[17] Distribution of the types and quantities of foods school districts purchase may have changed since that time due to pandemic supply chain challenges, meal pattern flexibilities, implementation of the transitional standards, changing consumer preferences, and industry changes. Using a 10-year average of the Consumer Price Index (CPI) for all food (including food consumed away from home and at home) from 2015 to the 2024 and the predicted 2023 and 2024 years, cost data were inflated four percent annually for the analyses detailed below.[18] The analyses in this rule assume that the significant progress schools made toward serving healthier meals after 2012 rule was implemented will continue.

These analyses assume that school meal participation (average daily participation and meal counts) will normalize to be consistent with the service levels in FY 2023, as that is the most recent full year of typical program operations. USDA acknowledges that changes in the food served have the potential to impact participation. This impact could be either positive or negative, depending on how specific menu or product changes are implemented. Additional students may participate due to the availability of Healthy School Meals for All in several States in recent years, where all students receive breakfast and lunch at no cost to their families. Discussion of potential participation impacts are included in this Regulatory Impact Analysis under the ''Uncertainties/Limitations'' section as a sensitivity analysis. The analyses in this Regulatory Impact Analysis assume participation returns to more typical, pre-pandemic levels and projects participation will hold steady each school year during the time period between SY 2024–2025 and SY 2029–2030.

For discussion of health benefits of the rule, expected impacts of specific provisions on diet quality are estimated based on the SNMCS and prior data from School Nutrition Dietary Assessment Study (SNDA) IV.[19] Between SY 2009–2010 and SY 2014–2015, ''Healthy Eating Index–2010'' (HEI–2010) scores[20] of diet quality for NSLP and SBP meals increased significantly. The Healthy Eating Index is a tool to ''measure of diet quality that can be used to assess how well a set of foods aligns with key recommendations of the *Dietary Guidelines.*''[21] At the time of data collection in the SNMCS, the HEI–2010 score was used

[17] *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

[18] *https://www.ers.usda.gov/data-products/food-price-outlook/.*

[19] *https://www.fns.usda.gov/school-nutrition-dietary-assessment-study-iv.*

[20] The Healthy Eating Index is a measure of diet quality used to assess how well a set of foods aligns with key recommendations of the *Dietary Guidelines for Americans* that is periodically updated with each edition of the Guidelines. HEI–2010 and HEI–2015 scores are cited/calculated in this impact analysis. At this time, no HEI–2020 score version has been released.

[21] *https://www.fns.usda.gov/healthy-eating-index-hei.*

for evaluation so that there could be a direct comparison in diet quality between SY 2009–2010 and SY 2014–2015. Over this period, the overall mean HEI–2010 score for NSLP lunches served increased from 57.9 to 81.5 out of a possible 100 points, and the mean HEI–2010 score for SBP breakfasts increased from 49.6 to 71.3 out of a possible 100 points. USDA assumes these improvements were due to the 2012 rule. This impact analysis assumes that the dietary content of served school meals continued to improve until 2019 and potentially even during the pandemic for some schools because of the 2012 rule. However, USDA acknowledges that following implementation of the 2012 rule, there have been changes to the school meal pattern requirements because of USDA rulemakings related to the milk, whole grains, and sodium requirements, as well as COVID meal pattern waivers, which might have resulted in changes in the dietary content of meals served.

With regards to added sugars, USDA assumes that schools will use a variety of menu changes to reduce added sugars to 10 percent or less of the weekly calorie content at school lunch and breakfast. Because added sugars have not been part of school meal regulations in the past, there may be a learning curve for school food authorities to adjust as the product specific and weekly average limits are gradually implemented. Analyses of milk product data were conducted with the assumption that some products that meet the finalized flavored milk added sugars limit of 10 grams per 8 fluid ounces are available. At the time data were collected for SNMCS in SY 2014–2015, no products met a 10-gram added sugars limit; the mean added sugars content in flavored milk was 12.2 g. However, data collected by USDA in 2022 from a limited number of K–12 school and food service catalogs suggest that there has been a shift in the added sugars content of milk products available to schools in the last 7 years.[22] More information can be found in the ''Added Sugars'' subsection of the ''Impacts'' section below. Additionally, in April 2023, milk processors representing more than 90 percent of the school milk volume in the United States committed to provide school flavored milk options with no more than 10 grams of added sugar per 8 fluid ounce serving beginning in SY 25–26.[23]

Because flavored milk is the main source of added sugars in school meals, there is some overlap in the impact analyses of added sugars and milk changes in this rule. In this rule, USDA adopts the milk provision described as Alternative B in the proposed rule, which maintains the current requirement allowing all K–12 schools to offer flavored and unflavored milks. Because this rule maintains the current flavored milk requirements, child nutrition program operators will not need to make changes to their menus to comply with this provision, beyond those changes described in *Section 2: Added Sugars.*

For the analysis of the sodium provision of this rule, several assumptions were made. The sodium content of school meals has been trending downwards since implementation of the 2012 rule. From SY 2009–2010 to SY 2014–2015 HEI–2010 sodium component scores increase by almost 270 percent (from 10 to 27 percent of the maximum score). A sodium component score of 10 indicates a meal with sodium density content that is less than or equal to 1100 mg of sodium per 1000 calories. A higher score indicates lower meal sodium content. USDA assumes that the sodium content of school meals continued to decrease until the pandemic waivers allowed flexibility to the meal requirements, including sodium, beginning in 2020 due to the COVID–19 pandemic disruptions to school meal operations. Additionally, USDA assumes that sodium reductions in school meals will take place in a variety of ways and that there are a multitude of strategies schools can use to reduce the sodium content of meals served. As a result, this impact analysis analyzed a variety of meal pattern food and portion combinations to account for the various ways that sodium levels could be reduced.

Assumptions were also made in order to measure the impacts of sections of the rule that pertain to substituting vegetables for grains in Tribal communities, traditional Indigenous foods, afterschool snacks, substituting vegetables for fruits at breakfast, nuts and seeds, and the Buy American provision. As our baseline for current school meal program operations, it was assumed that the proportion of the relevant food items or food groups offered would be the same as, or similar to, foods offered in SY 2014–2015, which is the most recent school year data available. This assumption provided a baseline to simulate the impact of the updates to foods served at school that will occur as a result of this rule. For instance, since we do not have the data to know what combination of food and drink items schools currently serve to meet snack program requirements, USDA assumed the proportion of offered food components in afterschool snacks would be comparable to the proportion of food components offered in school meals in the current school year (SY 2023–2024). Similarly, the baseline assumes that the proportion of foods purchased under an exemption in the Buy American provision would be comparable to purchasing patterns from prior years.

For all analyses, the baseline for meals served was the number of breakfasts, lunches, and afterschool snacks served in fiscal year 2023 (table 3). There were approximately 4.1 billion lunches served in the NSLP, 2.1 billion breakfasts served in the SBP, and about 148 million snacks served through NSLP afterschool snacks. As noted, while this rulemaking takes effect in SY 2024–2025, USDA is gradually phasing in required changes over time. Program operators will not be required to make any changes to their menus as a result of this rulemaking until school year 2025–2026, at the earliest.

TABLE 3. TOTAL MEALS SERVED IN 2023 - VALUES USED FOR IMPACT CALCULATIONS

MEALS	N
BREAKFASTS	2,105,299,111
LUNCHES	4,118,346,313
SNACKS	148,028,994

B. Impacts

Baseline

The goal of this rule is to align school meal nutrition requirements more closely with recommendations in the *Dietary Guidelines for Americans, 2020–2025* and strengthen the existing Buy American requirement. It is assumed that the costs detailed in the Regulatory Impact Analysis for the transitional standards rule will carry forward from SY 2022–2023 through SY 2023–2024, accounting for inflation. For this RIA, SY 2022–2023—the year in which the transitional standards rule was implemented in the school meal programs—is used as the baseline for measuring changes schools would need to make in order to meet the new requirements included in this rule. Since USDA expects the rule to be gradually implemented beginning in SY 2024–2025, this is the starting point for estimating the annual costs of the new requirements.

Based on the total costs of the NSLP, SBP, and CACFP programs from FY 2023, the most recent full year of typical program operations, costs have been forecasted to the

[22] This was not an exhaustive data collection of milk products across the marketplace, simply a fact-finding search. See 'Added Sugars' subsection of the 'Impacts' section below.

[23] International Dairy Foods Association. IDFA Announces 'Healthy School Milk Commitment' to Provide Nutritious Milk with Less Added Sugar for Students in Public Schools, Surpassing USDA Standards. April 5, 2023. Available at: *https://www.idfa.org/news/idfa-announces-healthy-school-milk-commitment-to-provide-nutritious-milk-with-less-added-sugar-for-students-in-public-schools-surpassing-usda-standards.*

time-period between FY 2024 and FY 2032. Absent this rule, we expect the overall baseline program cost to be approximately $208 billion over the eight fiscal years, seven full fiscal years and two half fiscal years. The estimated cost to implement this rule of $1.2 billion (table 1) represents a 0.6 percent [24] increase over the baseline cost of the three largest child nutrition programs. Throughout the 'Impacts' section, annual cost estimates are presented for SY 2024–2025, meaning that they are based on data that has been inflated to SY 2024–2025 from the time of data collection.

Administrative Costs

In order to implement this rule between SY 2024–2025 and SY 2031–2032, it is expected that there will be some regulatory familiarization costs, including state administrative costs, local level training costs, and costs associated with adjusting purchasing patterns and menus at the local level. While USDA has not collected data on this element of rule implementation in the past, comparable measures were used in the 2012 final rule. For that rule, Congress provided $50 million per year for state administrative costs (for two years, FY 2013 and 2014), and raised Federal reimbursements for schools by 6 cents for all lunches in schools that serve both breakfasts and lunches that meet meal pattern regulations and nutrition requirements.[25] Since this rule includes more gradual and smaller changes than the 2012 rule, USDA expects state administrative costs to amount to $25 million annually during the three school years of gradual rule implementation, SY 2024–2025, SY 2025–2026, and SY 2027–2028,[26] for a total of $75 million. Congress has not provided additional funding for this rule change; school food authorities will need to account for them within their operations. The same is true of the local costs detailed in the next paragraph. State agencies may use State Administrative Expense funds (SAE) available in FY 2024 and FY 2025 towards administrative familiarization costs. Fiscal year 2024 SAE funds were substantially higher than in FY 2023 due to pandemic waivers allowing schools to serve meals at no cost to students reimbursed at SFSP rates.

For familiarization costs at the local level, USDA based the estimates on the additional reimbursement rate (from the 2012 final rule) of $0.06 per school lunch and about half of other non-production labor costs. The proportion of cost breakdown used in the transitional standards rule was 45 percent labor, 45 percent food, and 10 percent other. Labor costs include both production (meal-prep) and non-production labor costs; the latter represent 19.8 percent of total labor and would include familiarization costs as well as other costs like nutrition education.[27] We assume non-production costs are evenly split between these 2 activities, so overall, familiarization would represent about 10 percent of labor costs. Therefore, USDA assumes that 45 percent of the $0.06 addition reimbursement represents labor costs, and 10 percent of this amount, or $0.003 ($0.004 after adjusting for inflation up to 2024 per lunch), was the expected cost associated with becoming familiar with the rule and making necessary adjustments. This would then cost $17 million annually at the local level during the three school years of rule implementation during which new changes will be implemented, $51 million overall. In total with state and local costs, this would be $130 million dollars over the course of the rule that would be incurred by school food authorities during rule implementation, or $42 million annually (table 4).

TABLE 4: ESTIMATED ADMINISTRATIVE COSTS (MILLIONS), ADJUSTED FOR ESTIMATED INFLATION TO SY 2024-2025

CATEGORY	Estimated Annual Cost	Estimated 3 Year Cost[28]
STATE	$25	$75
LOCAL	$17	$51
TOTAL	**$42**	**$126**

Added Sugars

In this rule, USDA finalizes the proposed added sugars product-based and weekly limits to school lunch and breakfasts. The product-based limits will take effect in SY 2025–2026, allowing schools to make gradual changes to their menus. The weekly dietary limits will take effect two school years after the product-based limits are implemented. With added sugars now included on the food and beverage product Nutrition Facts label and the recommendation in the *Dietary Guidelines for Americans, 2020–2025* to limit intake of added sugars to less than 10 percent of calories per day, added sugars limits in school meals will help students to achieve a healthy dietary pattern without restricting naturally occurring sugars. Effective SY 2025–2026, for school lunch and breakfast, this rule establishes the following product-based added sugars limits in school meals:

- For school lunch and school breakfast, breakfast cereals are limited to no more than 6 grams of added sugars per dry ounce. This limit will also apply to CACFP starting October 1, 2025.
- For school lunch and school breakfast, yogurt is limited to no more than 12 grams of added sugars per 6 ounces. This limit will also apply to CACFP starting October 1, 2025.
- For school lunch and for school breakfast, flavored milk is limited to no more than 10 grams of added sugars per 8 fluid ounces. This limit does not extend to CACFP.

The weekly dietary limit, which will take effect in SY 2027–2028, limits added sugars to less than 10 percent of calories per week in the school lunch and breakfast programs. This weekly limit will be in addition to the product-based limits described above and aligns with the *Dietary Guidelines* recommendation to limit added sugars to less than 10 percent of calories. The weekly limit does not extend to CACFP.

While the NSLP and SBP have not had total sugar or added sugars limits in the past, product-based total sugar limits have been in place in CACFP since 2017. The current CACFP product-based limits apply to breakfast cereals (≤6 g total sugar/1 dry oz) and yogurt (≤23 g total sugar/6 oz). This final rule applies the product-based added sugars limits for breakfast cereals and yogurts to the CACFP, effective October 1, 2025; the added sugars limits will replace the current total sugar limits for breakfast cereals and yogurts. This aligns the yogurt and breakfast cereal added sugars limits between the two programs, simplifying program administration for schools that operate both programs and simplifying any necessary product reformulation.

The product-based limits for breakfast cereals and yogurts were supported by food label data collected by USDA in May 2022.[29] These data were used to estimate the proportion of recently available products that could meet the added sugars limits and demonstrated a shift in the proportion of products currently meeting existing CACFP total sugar limits. SNMCS data shows that in SY 2014–2015, only nine percent of served yogurt products met the existing CACFP total sugar yogurt limit and 35 percent of hot and cold cereal products met the CACFP total sugar cereal limit. Based on food label data, about 90 percent of yogurt products and 44 percent of hot and cold cereal products

[24] These costs are school food authority costs as a percentage of reimbursement baselines at this time (not Federal costs).

[25] *https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/healthyhungerfreekidsact0.pdf.*

[26] Refer to Preamble section 21B: Table of Changes by Program.

[27] SNMCS Study Report Volume 3: Table 2.6.

[28] Three school years when provisions of the rule take effect: SY 2024–2025, SY 2025–2026, and SY 2027–2028.

[29] USDA Food and Nutrition Service, Office of Policy Support data collection of nutrition label information from major cereal and yogurt manufacturer K–12 and food service catalogs.

available during SY 2021–2022 met the existing CACFP total sugar limits.[30] This indicates that in recent years manufacturers were able to make considerable changes in the sugar content of both yogurt and cereal products. The CACFP does not have any flavored milk total sugar limits. This analysis compares the cost of products that met the added sugars limits finalized in this rule to those that did not during SNMCS data collection. Since there is now wider market availability of products with a lower sugar content than there were during SY 2014–2015, it is possible that the actual cost of these changes may be lower than estimated due to a higher number of lower sugar product options.

Breakfast Cereals

The estimated cost of sweetened and unsweetened cold cereals was the same per dry ounce regardless of added sugars content. All hot cereal products met the added sugars limit in SY 2014–2015. While hot cereal is about half the price of cold cereal per dry ounce, it is not widely served; only five percent of menus included hot cereal and an even lower proportion of students consumed hot cereal. The cost of hot cereal per dry ounce also does not account for potentially costly toppings, such as nuts, seeds, or dried fruit. Toppings for hot cereal such as brown sugar or chocolate chips would also contain additional added sugars that are not accounted for in SNMCS data. Because it is unknown whether the proportion of schools serving hot cereal would increase under the final rule and because there is no cost difference among cold cereals based on added sugars content, we expect that this final rule will result in no change in annual cost for breakfast cereals despite the introduction of the added sugars limit. Of those hot and cold cereal products available during data collection in 2022,[31] 50 percent of products available met the added sugars limit of ≤ 6 g added sugars per ounce.

The added sugars limit for breakfast cereals extends to NSLP, SBP, and CACFP. The new 6 grams of added sugars limit for breakfast cereals is similar to the current CACFP limit of 6 grams of total sugars, but focuses on added sugars rather than total sugars, consistent with *Dietary Guidelines* recommendations. Therefore, USDA estimates it will not have a cost impact for CACFP as operators will continue to be able to serve breakfast cereals currently allowed in the program. Alignment of this limit across child nutrition programs may simplify program administration for State agencies and local program operators.

Yogurt

About 1.1 billion portions of yogurt are served annually at school breakfast and lunch combined. During SY 2014–2015, almost all yogurt products exceeded 12 grams of added sugars per 6 ounces. However, of the yogurt products available during SY 2021–2022, 57 percent of yogurt nutrition labels, or approximately 627 million portions, met the added sugars limit finalized in this rule.[32] The recent nutrition label data collection indicates that manufacturers have already made significant changes to yogurt products since the implementation of the CACFP total sugars limit in 2017, but also indicates that there is room for product reformulation in at least 43 percent of currently available products. For this analysis, to more accurately reflect currently available products, USDA used the SY 2021–2022 nutrition label data that indicated 57 percent of yogurt products meet the added sugars limit finalized in this rule.

When school meal cost data were last collected in SY 2014–2015, low-fat and fat-free yogurt products that met the added sugars limit cost $0.05 more than those products that did not meet the limit. On average, yogurt products with more than 12 grams of added sugars per 6-ounce container cost $0.42 and those with 12 grams or less of added sugars cost $0.47. This estimate assumes the cost of yogurt products is the same for CACFP providers, and that, based on program year 2016–2017, CACFP providers served yogurt at snacks and suppers.[33] If the added sugars limit is met in every meal and snack that includes yogurt, 43 percent of yogurt portions served would need to shift to products with fewer added sugars. This would cost an estimated $32 million total for NSLP, SBP, and CACFP, assuming the products that meet the added sugar limit cost $0.05 more per meal (about $0.07 after adjusting for inflation) (table 6).

TABLE 6. ANNUAL COST OF IMPLEMENTING YOGURT ADDED SUGARS LIMIT (MILLIONS), ADJUSTED FOR ESTIMATED INFLATION TO SY 2024-2025

	100% of yogurt products offered meeting limit			57% of yogurt products meeting limit (based on 2022 data)			Difference in Cost
	# of servings meeting limit (millions)	**# of servings not meeting limit**	**Cost**	**# of servings offered meeting limit (millions)**	**# of servings not meeting limit**	**Cost**	
SBP	526	NA	$366	300	226	$349	$17
NSLP	412	NA	$287	235	177	$273	$13
CACFP	57	NA	$39	32	24	$38	$2
TOTAL*	995	NA	$692	567	428	660	32

***DUE TO ROUNDING, SOME TOTALS MAY NOT CORRESPOND WITH THE SUM OF THE SEPARATE FIGURES**

Flavored Milk

This rule establishes a flavored milk added sugars limit of 10 grams of added sugars per 8 fluid ounces or, for flavored milk sold as a competitive food for middle and high schools, 15 grams of added sugars per 12 fluid ounces. As detailed in *Section 3A: Flavored Milk* of the rule preamble, schools may continue to offer fat-free and low-fat milk, flavored and unflavored, to all K–12 students. Effective SY 2025–2026, flavored milk must meet the product-based added sugars limit. In SY 2014–2015, there were no flavored milk products that met the new added sugars limit (≤10 g added sugars/8 fluid ounces); therefore, USDA could not compare the cost of flavored milk products that did and did not meet the added sugars limit. Instead, cost analyses are based on the difference in cost of unflavored and flavored milk, using unflavored milk as a proxy for milk that meets the added sugars limit.

The SY 2014–2015 data indicate that the cost of milk varied by fat content, but not

[30] USDA Food and Nutrition Service, Office of Policy Support internal analysis using collected nutrition label data during the development of the rule. Data were collected on 110 total yogurt products and 191 total cereal products.

[31] USDA Food and Nutrition Service, Office of Policy Support data collection of nutrition label information from major cereal and yogurt manufacturer K–12 and food service catalogs. Data were collected on 191 total cereal products.

[32] USDA Food and Nutrition Service, Office of Policy Support data collection of nutrition label information from major cereal and yogurt manufacturer K–12 and food service catalogs. Data were collected on 110 total yogurt products.

[33] *https://www.fns.usda.gov/cn/study-nutrition-activity-childcare-settings-usdas-cacfp.*

consistently. On average, low-fat, flavored milk cost $0.01 more than low-fat, unflavored milk per carton (8 fluid ounces). However, fat-free, flavored milk cost $0.01 less than fat-free, unflavored milk per carton. Low-fat, flavored milk was the least offered milk variety based on the SNMCS report (table 7). Low-fat, unflavored milk and fat-free, flavored milk were offered on a majority of menus at both breakfast and lunch, whereas fat-free, unflavored milk was offered on about half of menus for both breakfast and lunch.

TABLE 7. PERCENTAGE OF DAILY SBP AND NSLP MENUS THAT OFFERED MILK PRODUCTS IN SY 2014-2015[34]

	SBP	NSLP
LOW-FAT, FLAVORED	6%	7%
LOW-FAT, UNFLAVORED	91%	91%
FAT-FREE, FLAVORED	76%	91%
FAT-FREE, UNFLAVORED	51%	50%

To estimate the cost of serving milk that meets the added sugars limit, the cost of serving 100 percent unflavored milk (low-fat and fat-free), was compared to the estimated cost of all milk served during SY 2014–2015 (table 8). In lieu of data on milk served in school meals that meets the added sugars limit, the cost of unflavored milk is used as a proxy. The cost increase from serving milk with ≤10 grams added sugars per 8 fluid ounces is approximately $76 million annually, assuming the same proportion of servings as SY 2014–2015 menus. In addition to fat-free, unflavored milk costing $0.01 more than fat-free, flavored milk, this cost increase reflects that there was a much higher proportion of fat-free, flavored milk served compared to low-fat flavored milk during that school year.

TABLE 8. ANNUAL COST OF IMPLEMENTING FLAVORED MILK ADDED SUGARS LIMIT (MILLIONS), ADJUSTED FOR ESTIMATED INFLATION TO SY 2024-2025

	100% unflavored milk (proxy for milk with ≤10 grams added sugars per 8 fluid ounces)		Based on SY 2014-2015 menu proportions		Difference in cost
	# of servings of milk	Cost	# of servings of milk	Cost	
SBP					
LOW-FAT, FLAVORED	NA	NA	124	$46	-$46
LOW-FAT, UNFLAVORED	2,037	$737	1,913	$692	$45
FAT-FREE, FLAVORED	NA	NA	1,600	$568	-$568
FAT-FREE, UNFLAVORED	2,665	$986	1,065	$394	$592
NSLP					
LOW-FAT, FLAVORED	NA	NA	296	$110	-$110
LOW-FAT, UNFLAVORED	4,048	$1,464	3,751	$1,357	$107
FAT-FREE, FLAVORED	NA	NA	3,747	$1,331	-$1,331
FAT-FREE, UNFLAVORED	5,806	$2,149	2,059	$762	$1,387
TOTAL	14,558	$5,336	14.558	$5,261	$76

It is possible that prices of milk types have aligned since SY 2014–2015 and that the annual cost changes from reducing added sugars in flavored milks will be minimal. These estimates use the most recent school food authority-representative data available. During SY 2014–2015, flavored milk products had a mean added sugars content of 12.2 grams (minimum: 10.4 grams, maximum: 17.8 grams). Public comment on proposed rule that preceded the 2022 transitional standards rule[35] from the International Dairy Foods Association and National Milk Producers Federation indicated that the average added sugars content of flavored milk has declined from 16.7 to 7.1 grams in an eight-ounce serving of flavored school milk between SY 2006–2007 and SY 2019–2020. Despite the fact that no flavored milk products served in SY 2014–2015 met the added sugars limit, an internally conducted search of recent K–12 and food service product catalogs containing milk products indicated that there are some flavored milks now available to schools that meet the 10 grams of added sugar per eight fluid ounces limit.[36] At least four manufacturers had at least one flavored milk product with under 10 grams of added sugars per eight fluid ounce serving, and three manufacturers had products with 6 grams of added sugars per eight fluid ounce serving. A total of 10 flavored milk products from

[34] SNMCS Report—Volume 2.

[35] *https://www.regulations.gov/comment/FNS-2020-0038-4702.*

[36] This was not an exhaustive data collection of milk products across the marketplace, simply a fact-finding search.

four companies were below the 10 grams limit. The catalogs used for data collection generally showed that there were lower and higher sugar versions of flavored milk available. However, it is likely that additional product reformulation will be necessary for those manufacturers that have yet to reduce added sugars content of their flavored milk products. More recently, in April 2023, the International Dairy Foods Association announced a commitment to provide flavored milk with no more than 10 grams of added sugars per 8 fluid ounces, consistent with the limit established by this rule. This commitment was made by 37 school milk processors representing more than 90 percent of the school milk volume in the U.S.[37]

Product Limit Total Impact

In total, across all four product categories, we estimate the cost to meet the added sugars limits would be around $107 million per year. This total reflects the cost impacts of cereal, yogurt, and flavored milk products added sugars limits. These estimated annual costs, adjusted for inflation, are shown in table 9.

TABLE 9: ESTIMATED COST OF PRODUCT-SPECIFIC ADDED SUGAR LIMITS (MILLIONS), ADJUSTED FOR ESTIMATED INFLATION TO SY 2024-2025

PRODUCT TYPE	Estimated Annual Cost
BREAKFAST CEREALS (SBP+CACFP ONLY)	$0
YOGURT	$32
FLAVORED MILK (NSLP+SBP ONLY)	$76
TOTAL*	**$107**

***DUE TO ROUNDING, TOTALS MAY NOT CORRESPOND WITH THE SUM OF THE SEPARATE FIGURES**

Weekly Limit

This rule also finalizes a weekly limit of less than 10 percent of calories per week from added sugars in the school lunch and breakfast programs, effective SY 2027–2028. Considerable menu changes will be required to meet the weekly limit at breakfast. In SY 2014–2015 approximately 11 percent of calories offered at lunch and 17 percent at breakfast were from added sugars.[38] Since there are so many approaches to reduce added sugars across menus, there is not an accurate way to estimate the cost change of reducing all breakfast menus to containing less than 10 percent of calories per week from added sugars. In school breakfasts during SY 2014–2015, fat-free, flavored milk contributed 30 percent of added sugars content, with sweetened cold cereals contributing 13 percent, grain-based desserts contributing 12 percent, and condiments/toppings contributing 12 percent.[39] Schools may find that replacing flavored with unflavored milk is an effective way to begin to approach the weekly limits. Flavored milk in school meals has an average of 12 g of added sugar (minimum 10.4 g and maximum 17.8 g). If all flavored milk products were replaced with unflavored milk products, the percentage of calories from added sugars drops to six percent at lunch and to 13 percent at breakfast.[40] School food authorities could also use a more moderate approach of reducing, but not eliminating, flavored milk offerings at school breakfast; for example, offering unflavored milk varieties only certain days of the school week. Although this approach is not required in this final rule, it would be a simple and effective way to initiate a decrease in the added sugars content of weekly menus. School food authorities may also choose to reduce or eliminate grain-based desserts, sweetened cold cereals, and/or some condiments. This final rule allows schools to more easily offer meats/meat alternates at breakfast by removing the requirement for schools to meet a minimum grains requirement each day at breakfast. Under this provision (see: *Section 6: Meats/Meat Alternates at Breakfast*), schools may offer grains, meats/meat alternates, or a combination of both to meet the combined grains and meats/meat alternates component. Consequently, schools have more flexibility to replace grains that are high in added sugars with meats/meat alternates, such as scrambled eggs, which could help schools to meet the weekly added sugars limit at breakfast upon implementation. In making menu changes, school food authorities will likely choose to balance making the best economic decision for their operations with the need to minimize impacts on student participation and acceptance of new foods. The phased-in approach of this final rule, first with the product specific limits and then with a weekly average limit of added sugars, will help to temper any potential participation changes.

Health Benefits

A major source of added sugars, sugar-sweetened beverages (SSBs), has been studied widely as it relates to health outcomes. The World Health Organization defines SSBs as all beverages containing free sugars, including carbonated or non-carbonated soft drinks, liquid and power concentrates, flavored water, energy and sports drinks, ready-to-drink tea, ready-to-drink coffee, and flavored milk drinks.[41] Flavored milk is the top source of added sugar in school meals, and other SSBs may be sold as competitive foods to high school students under specific competitive food requirements.[42 43] Consumption of SSBs is related to risk of type 2 diabetes (T2D),[44] cardiovascular disease (CVD),[45 46] and chronic kidney disease.[47] Tooth decay and cavities are also associated with increased SSB consumption.[48] Other top sources of added sugars in school meals include sweetened cold cereal and grain-based desserts. If a third of school children met the *Dietary Guidelines* recommendation for

[37] International Dairy Foods Association. IDFA Announces 'Healthy School Milk Commitment' to Provide Nutritious Milk with Less Added Sugar for Students in Public Schools, Surpassing USDA Standards. April 5, 2023. Available at: *https://www.idfa.org/news/idfa-announces-healthy-school-milk-commitment-to-provide-nutritious-milk-with-less-added-sugar-for-students-in-public-schools-surpassing-usda-standards.*

[38] Added Sugars in School Meals and Competitive Foods.

[39] Fox MK, Gearan EC, Schwartz C. Added Sugars in School Meals and the Diets of School-Age Children. *Nutrients.* 2021;13(2):471. Published 2021 Jan 30. doi:10.3390/nu13020471.

[40] Based on an internal USDA analysis using SNMCS–II data.

[41] World Health Organization Taxes on Sugary Drinks: Why Do It? World Health Organization. 2017 Available online: *https://apps.who.int/iris/handle/10665/260253.*

[42] See 7 CFR 210.11(m)(3) *https://www.ecfr.gov/current/title-7/part-210#p-210.11(m)(3)* and *https://www.fns.usda.gov/cn/nutrition-standards-all-foods-sold-school-summary-chart.*

[43] Fox MK, Gearan EC, Schwartz C. Added Sugars in School Meals and the Diets of School-Age Children. *Nutrients.* 2021;13(2):471. Published 2021 Jan 30. doi:10.3390/nu13020471.

[44] Warshaw H, Edelman SV. Practical Strategies to Help Reduce Added Sugars Consumption to Support Glycemic and Weight Management Goals. *Clin Diabetes.* 2021;39(1):45–56. doi:10.2337/cd20–0034.

[45] Malik VS, Hu FB. Sugar-Sweetened Beverages and Cardiometabolic Health: An Update of the Evidence. *Nutrients.* 2019;11(8):1840. Published 2019 Aug 8. doi:10.3390/nu11081840.

[46] O'Connor L, Imamura F, Brage S, Griffin SJ, Wareham NJ, Forouhi NG. Intakes and sources of dietary sugars and their association with metabolic and inflammatory markers. *Clin Nutr.* 2018;37(4):1313–1322. doi:10.1016/j.clnu.2017.05.030.

[47] Bomback AS, Derebail VK, Shoham DA, et al. Sugar-sweetened soda consumption, hyperuricemia, and kidney disease. *Kidney Int.* 2010;77(7):609–616. doi:10.1038/ki.2009.500.

[48] Valenzuela MJ, Waterhouse B, Aggarwal VR, Bloor K, Doran T. Effect of sugar-sweetened beverages on oral health: a systematic review and meta-analysis. *Eur J Public Health.* 2021;31(1):122–129. doi:10.1093/eurpub/ckaa147.

added sugars consumption into adulthood, it could prevent an estimated 12,260 adult deaths related to CVD and cancer and save $6.01 billion in medical costs per year.[49] Gradual reduction in added sugars content to 10 percent of calories per week at school lunch and breakfast will align meals with the goals of the *Dietary Guidelines* and will promote improved lifestyle habits and health outcomes during childhood that can track into adulthood.[50]

Milk

This final rule codifies the proposal to maintain the current regulation allowing all schools the option to offer fat-free and low-fat milk, flavored and unflavored, to K–12 students, and to sell fat-free and low-fat milk, flavored and unflavored, à la carte. No annual change in the cost of milk is expected due to maintaining the transitional milk standards.

Several additional provisions would apply under this requirement. The added sugars requirement for flavored milk, which limits flavored milks to 10 grams of added sugars per 8 fluid ounces, effective SY 2025–2026, applies to milk served in reimbursable school lunches and breakfasts, and to milks sold as a competitive beverage.[51] Consistent with current requirements, this rule would require that unflavored milk be offered at each school meal service. This rule also continues to allow fat-free and low-fat milk, flavored and unflavored, to be offered to participants ages 6 and older in the SMP and CACFP.

Health Benefits

In the transitional standards rule, the decision to allow fat-free, flavored milk and low-fat, flavored milk reflected concerns about declining milk consumption and the importance of the key nutrients provided by milk for school-aged children.[52] However, USDA recognizes that flavored milk is the highest source of added sugars in school meals, which is why the product-specific added sugars limit has been finalized. Under this limit, flavored milk must contain no more than 10 grams of added sugars per 8 fluid ounces of milk. Both flavored milk and unflavored milk contain protein, calcium, potassium, vitamin A, vitamin D, and many more essential nutrients. About 90 percent of the U.S. population does not meet dairy recommendations. Most individuals would benefit by increasing intake of dairy in fat-free or low-fat forms of milk. Calcium, potassium, dietary fiber, and vitamin D are considered dietary components of public health concern for the general U.S. population because low intakes are associated with health concerns.[53] Low-fat dairy was also shown in some evidence to be part of a healthy dietary pattern in children that was associated with lower blood pressure and improved blood lipid levels later in life.[54] These potential health benefits combined with the fact that milk is a nutrient-dense beverage support the continued serving of both fat-free and low-fat flavored and unflavored milk. With flavored milk also meeting added sugar limits, all milk options schools offer will better align with the *Dietary Guidelines for Americans* regardless of student flavor preferences.

Whole Grains

This rule maintains the current requirement that at least 80 percent of the weekly grains offered are whole grain-rich, based on ounce equivalents of grains served in the school lunch and breakfast programs. The definition of whole grain-rich, which is codified in this final rule, reads as follows: *Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched.* This definition does not change the meaning of whole grain-rich, which has previously been communicated in USDA guidance, but is simply a clarification for school food authorities. The definition is included in NSLP, SBP, and CACFP regulations. There is no cost change expected as a result of these provisions because the requirement that at least 80 percent of weekly grains offered are whole grain-rich is carried forward from the 2022 transitional standards rule.

Health Benefits

The 2022 transitional standards rule required that at least 80 percent of grains offered be whole grain-rich. This was an increase from the 2018 rule which required that at least 50 percent of grains offered be whole grain-rich, in light of the challenges schools were facing in meeting the 2012 rule requirements. Despite these challenges, schools have made considerable progress offering whole grain-rich products. On average, in SY 2014–2015, 70 percent of the weekly menus offered at least 80 percent of the grain items as whole grain-rich for both breakfast and lunch.[55] This rule continues to emphasize the importance of consuming a dietary pattern with grains that are whole grain-rich, but also carries forward manageable, achievable goals.

Prepared NSLP lunches in SY 2014–2015 scored 95 percent of the maximum HEI–2010 whole grains component score, on average, and prepared breakfasts in the SBP scored 92 percent of the maximum.[56] NSLP participants scored the maximum HEI–2010 whole grains component score for lunches consumed on average in SY 2014–2015 and nonparticipants scored only 63 percent of the maximum score, a significant difference. SBP participants scored 98 percent of the maximum HEI–2010 whole grain component score on breakfasts consumed, whereas nonparticipants scored 68 percent of the maximum score.[57] A maximum whole grain component score in the HEI–2010 is achieved with at least 1.5 ounces equivalent of whole grains per 1000 kilocalories of intake, a measure of nutrient density. In SY 2014–2015, school meal programs were matching recommendations from the *Dietary Guidelines* at a high level with regards to whole grains.

Whole grains are considered to be a nutrient dense food, and the Dietary Guidelines recommend making half of your grains whole grains. However, almost all (98 percent) of Americans fall below recommendations for whole grains, while most (74 percent) exceed limits for refined grains, underscoring the importance of school meal requirements that encourage children's consumption of whole grain-rich foods. Throughout the lifespan, consumption of whole grains has also been shown to reduce the risk of type 2 diabetes.[58] Additionally, if children consume whole grains at the level recommended in the *Dietary Guidelines* through to adulthood, it could prevent an estimated 2,940 CVD- and cancer-related deaths and save $6.01 billion in medical costs per year.[59] Whole grains are shown in some evidence to be part of a healthy dietary pattern in children that was associated with lower blood pressure and improved blood lipid levels later in life.[60]

[49] Wang L, Cohen J, Maroney M, et al. Evaluation of health and economic effects of United States school meal standards consistent with the 2020–2025 dietary guidelines for Americans. The American Journal of Clinical Nutrition. 2023. DOI: *https://doi.org/10.1016/j.ajcnut.2023.05.031.*

[50] Lioret S, Campbell KJ, McNaughton SA, et al. Lifestyle Patterns Begin in Early Childhood, Persist and Are Socioeconomically Patterned, Confirming the Importance of Early Life Interventions. *Nutrients.* 2020;12(3):724. Published 2020 Mar 9. doi:10.3390/nu12030724.

[51] USDA is finalizing a higher added sugars limit for flavored milk sold as a competitive food in middle and high schools due to the larger serving size. The serving size for milk offered as part of a reimbursable meal is 8 fluid ounces. Milks sold to middle and high school students as a competitive food may be up to 12 fluid ounces.

[52] *https://www.gpo.gov/fdsys/pkg/FR-2017-11-30/pdf/2017-25799.pdf.*

[53] U.S. Department of Agriculture and U.S. Department of Health and Human Services. Dietary Guidelines for Americans, 2020–2025. 9th Edition. December 2020. Available at *DietaryGuidelines.gov.*

[54] Bouchey C, Ard J, Bazzano L, Heymsfield S, Mayer-Davis E, Sabaté J, Snetselaar L, Van Horn L, Schneeman B, English LK, Bates M, Callahan E, Butera G, Terry N, Obbagy J. Dietary Patterns and Risk of Cardiovascular Disease: A Systematic Review. July 2020. U.S. Department of Agriculture, Food and Nutrition Service, Center for Nutrition Policy and Promotion, Nutrition Evidence Systematic Review. Available at: *https://doi.org/10.52570/NESR.DGAC2020.SR0102.*

[55] Based on an internal USDA analysis using data from: U.S. Department of Agriculture, Food and Nutrition Service, School Nutrition and Meal Cost Study Final Report Volume 2: Nutritional Characteristics of School Meals, by Elizabeth Gearan et al. Project Officer, John Endahl, Alexandria, VA: April 2019. Available online at: *www.fns.usda.gov/research-and-analysis.*

[56] SNMCS Volume 2—Figures 5.2 and 5.5.

[57] SNMCS Volume 4—Figures 9.2 and 12.2.

[58] Chanson-Rollé A., Meynier A., Aubin F., Lappi J., Poutanen K., Vinoy S., Braesco V. Systematic Review and Meta-Analysis of Human Studies to Support a Quantitative Recommendation for Whole Grain Intake in Relation to Type 2 Diabetes. PLoS ONE. 2015;10:e0131377. doi: 10.1371/journal.pone.0131377.

[59] Wang L., Cohen J., Maroney M., et al. Evaluation of health and economic effects of United States school meal standards consistent with the 2020–2025 dietary guidelines for Americans. The American Journal of Clinical Nutrition. 2023. DOI: *https://doi.org/10.1016/j.ajcnut.2023.05.031.*

[60] Bouchey C., Ard J., Bazzano L., Heymsfield S., Mayer-Davis E., Sabaté J., Snetselaar L., Van Horn L., Schneeman B., English L.K., Bates M., Callahan E., Butera G., Terry N., Obbagy J., Dietary Patterns and Risk of Cardiovascular Disease: A Systematic Review. July 2020. U.S. Department of Agriculture, Food and Nutrition Service, Center for Nutrition

Factors that contribute to increased consumption of whole grains in children include providing a variety of whole grain options, serving whole grains in school programs, and improving appearance of package and product marketing.[61] The documented health benefits of the consumption of whole grain-rich products and strategies to increase whole grain intake in children both support a continued whole grain requirement in school meals.

Sodium

This rule updates the approach to sodium reduction in school meals. Lessons learned from the 2012 rule indicate that smaller, incremental reductions in sodium content may be more achievable given the need for industry to reformulate products and for schools to modify both the products they serve and their preparation methods. Based on these lessons learned and on comments received on the proposed rule, the current sodium limits (implemented in the 2022 transitional standards rule) will be maintained over the next three school years, and a single reduction will be implemented in SY 2027–2028. This final rule sets forth an approximate 15 percent reduction for school lunch and an approximate 10 percent reduction for school breakfast from the current sodium limits. The sodium limits in this rulemaking are informed by the *Dietary Guidelines* and FDA's voluntary sodium reduction goals, which aim to reduce sodium across the U.S. food supply.

To provide context, the previous three sodium targets from the 2012 rule and the targets from the 2022 transitional standards rule are presented below (table 10). The transitional standards rule required schools to meet Sodium Target 1 for school lunch and breakfast, effective SY 2022–2023. For school lunch only, schools were required to meet Sodium Target 1A beginning in SY 2023–2024. This final rule maintains the current limits under Target 1A for lunch and Target 1 for breakfast through the end of SY 2026–2027 and adds new limits that conform to the Target 2 limits from the 2012 rule, effective SY 2027–2028 (table 11).

TABLE 10: THREE 2012 SODIUM TARGETS AND TARGETS FROM THE TRANSITIONAL STANDARDS RULE (MG) FOR CURRENT SCHOOL LUNCH AND SCHOOL BREAKFAST

AGE/GRADE GROUP	NSLP				
	2012 TARGET 1	2012 TARGET 2	2012 TARGET 3	TARGET 1 SY 2022-2023	TARGET 1A SY 2023-2024
K-5	1,230	935	640	1,230	1,110
6-8	1,360	1,035	710	1,360	1,225
9-12	1,420	1,080	740	1,420	1,280
	SBP				
	2012 TARGET 1	2012 TARGET 2	2012 TARGET 3	TARGET 1 SY 2022-2023 AND SY 2023-2024	
K-5	540	485	430	540	
6-8	600	535	470	600	
9-12	640	570	500	640	

TABLE 11: FINAL RULE SODIUM LIMITS (MG) FOR SCHOOL LUNCH AND SCHOOL BREAKFAST

AGE/GRADE GROUP	NSLP	
	Current: In effect through June 30, 2027	Effective July 1, 2027
K-5	< 1,110	≤ 935
6-8	< 1,225	≤ 1,035
9-12	< 1,280	≤ 1,080
	SBP	
K-5	≤ 540	≤ 485
6-8	≤ 600	≤ 535
9-12	≤ 640	≤ 570

The school lunch baseline for this analysis is the menu-served sodium content from SY 2014–2015, in which elementary, middle, and high school lunch menus had sodium content, on average, of 1135 mg, 1235 mg, and 1330 mg, respectively. The school breakfast baseline for this analysis is the menu-served sodium content from SY 2014–2015, in which elementary, middle, and high school breakfast menus had sodium content, on average, of 510 mg, 570 mg, and 580 mg, respectively. This indicates that the majority of schools were already meeting Sodium Target 1 from the 2012 rule for both breakfast and lunch in SY 2014–2015, and almost meeting Sodium Target 1A from the 2022 transitional standards rule for school lunch. More specifically, 72 percent of weekly lunch menus and about 66 percent of weekly breakfast menus were meeting Sodium Target 1 in SY 2014–2015.[62]

Policy and Promotion, Nutrition Evidence Systematic Review. Available at: *https://doi.org/10.52570/NESR.DGAC2020.SR0102.*

[61] Meynier A., Chanson-Rollé A., Riou E., Main Factors Influencing Whole Grain Consumption in Children and Adults—A Narrative Review. Nutrients. 2020;12(8):2217. Published 2020 Jul 25. doi:10.3390/nu12082217.

[62] SNMCS Report Volume 2.

Because this final rule maintains the current sodium limits, no additional costs are expected through the end of SY 2026–2027. In order to simulate the potential increase in costs due to the final rule sodium limits effective SY 2027–2028, we determined whether products served in schools met the FDA short-term voluntary sodium targets.[63] For products that did not meet the FDA voluntary targets, we simulated the change in sodium by capping the sodium amount at the appropriate FDA category voluntary target. This simulation was originally used to estimate the cost of the proposed sodium limits, which was a series of 10 percent reductions over multiple school years. The analysis described in the subsection below ''Analyses Related to Gradual Sodium Reduction'' found that when foods served in school meals met the FDA voluntary sodium reduction targets the overall sodium content of menus decreased by approximately 10 percent. We assume this is true for estimating the cost impact of the final sodium limit. The cost difference was estimated by comparing the cost of a meal with foods that either already meet, or are not subject to, the FDA short-term voluntary targets to the cost of a meal with foods that do not meet, and are being subject to, the FDA short-term voluntary targets and represents the cost difference associated with a 10 percent sodium reduction. The average cost of multiple food group combinations in sample menus was used for both breakfast and lunch to simulate the cost of a variety of menus that might be created and used by school food authorities. This cost difference was used to estimate the total cost for the 10 percent sodium reduction applicable to breakfast in this final rule. For the 15 percent sodium reduction for lunch, the estimated cost difference for a 10 percent reduction was increased by 50 percent to reflect the additional costs associated with the larger sodium reduction.

When comparing higher sodium school meals (those containing more foods being targeted by FDA voluntary sodium guidance) to lower sodium school meals, higher sodium meals were found to be less expensive. Meals from SY 2014–2015 with higher sodium foods were $0.09 cheaper per SBP meal and $0.05 cheaper per NSLP meal than those meals that contained lower sodium products when only considering food costs. Adjusted for inflation, this was a $0.08 difference per meal, on average, for breakfast and lunch. We use those per meal food cost differences, adjusted for inflation, to estimate the food cost of the final rule sodium limits. We include in the total cost impact an added 25 percent labor costs associated with increased scratch cooking, totaling $2 million annually for labor from rule implementation. We assume scratch cooking will only increase about 25 percent since products should already be available that would allow schools to meet the final rule sodium limits (table 12). The approximate cost of implementing the sodium reduction is $118 million, with food costs totaling $94 million annually from rule implementation. The breakdown by meal type of annual total food costs are $27 million for breakfast and $68 million for lunch. Potential equipment costs are detailed in the ''Uncertainties/Limitations'' section below. The existing sodium limits will remain in effect through the end of SY 2026–2027, and there are no costs associated with current limits already in effect.

TABLE 12: ESTIMATED COST OF SODIUM REDUCTION (MILLIONS), ADJUSTED FOR ESTIMATED INFLATION TO SY 2024-2025

CATEGORY	Estimated Annual Cost Beginning SY 2027-2028
FOOD	$94
LABOR	$24
TOTAL	**$118**

Food and labor costs account for almost all of the costs to produce a meal in a school (about 45 percent for labor and 45 percent for food, on average). The impact analysis of the new sodium limits used the same method to estimate labor costs that was used in the 2022 transitional standards rule RIA. It also assumes a need for increased scratch cooking, staffing changes, and time needed for manufacturer product reformulation. The USDA study, ''Successful Approaches to Reduce Sodium in School Meals,'' found that school districts served more fresh fruits and vegetables to reduce sodium content. This may cause a reduction in food costs if items purchased to prep and serve fresh or to cook from scratch are less expensive; however, these costs may be offset by higher quantities needed or additional foods needed to prepare meals from scratch.

While meeting the 10 percent sodium reduction in breakfast is possible with products already available, the 15 percent reduction for lunch may require some product reformulation or new preparation methods such as scratch-cooking which, in turn, require changes in staffing and equipment. This is supported by the USDA study on ''Successful Approaches to Reduce Sodium in School Meals,''[64] in which schools, Food Service Management Companies, and manufacturers noted similar effects from the original sodium targets in the 2012 rule. Previous studies have shown that many schools have some capacity to conduct scratch-cooking, but that new equipment and more staff may be necessary to achieve recipe reformulation and cooking or baking from scratch.[65] Because data have not been collected since SY 2014–2015, it is possible that further product reformulation and recipe restructuring occurred prior to or during the COVID–19 pandemic. Likewise, it is unclear how much menus changed during the pandemic and what the baseline level of sodium in menus will be for SY 2022–2023 due to a lack of recent data. The USDA study, ''Successful Approaches to Reduce Sodium in School Meals,'' also noted that reducing sodium can be challenging, especially when using pre-packaged products. Schools may no longer purchase high-sodium items, and manufacturers may eliminate certain product lines.[66] However, the FDA's voluntary sodium goals may have already led to the reduced use of high-sodium pre-packaged foods and reformulation of some products, which may help to reduce the transition challenges.

Analyses Related to Gradual Sodium Reduction

A variety of factors may affect the reduction of sodium in school meals, including the short-term FDA sodium voluntary targets, improved sodium component Healthy Eating Index (HEI) scores, an adjustment for actual consumption of meals by students, and palatable reduction over time. Additionally, a comparison to sodium requirements in other organizations and a summary of health benefits of sodium reduction may inform further reduction of sodium content in school meals. These points may be considered alongside the expected additional cost of the final rule sodium limits.

[63] *https://www.fda.gov/food/cfsan-constituent-updates/fda-issues-sodium-reduction-final-guidance.*

[64] Gordon, E.L., Morrissey, N., Adams, E., Wieczorek, A. Glenn, M.E., Burke, S & Connor, P. (2019). Successful Approaches to Reduce Sodium in School Meals Final Report. Prepared by 2M Research under Contract No. AG–3198–P–15–0040. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service.

[65] Standing, Kim, Joe Gasper, Jamee Riley, Laurie May, Frank Bennici, Adam Chu, and Sujata Dixit-Joshi. Special Nutrition Program Operations Study: State and School Food Authority Policies and Practices for School Meals Programs School Year 2012–13. Project Officer: John R. Endahl. Prepared by Westat for the U.S. Department of Agriculture, Food and Nutrition Service, October 2016.

[66] Gordon, E.L., Morrissey, N., Adams, E., Wieczorek, A. Glenn, M.E., Burke, S & Connor, P. (2019). Successful Approaches to Reduce Sodium in School Meals Final Report. Prepared by 2M Research under Contract No. AG–3198–P–15–0040. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service.

The FDA sodium voluntary targets are designed to support a reduction in average daily sodium intake of 12 percent nationwide by targeting products across almost all available food categories containing commercially processed, packaged, and prepared foods.[67] An internal USDA analysis of school foods that met or did not meet the FDA voluntary food guidance used a matching process between categories of food products shown to have been on menus in the SNMCS and the FDA food categories. For products that did not meet the FDA voluntary sodium reduction guidance, the sodium content of these products was capped at the FDA short-term targets across all the potential food categories for the item to simulate reduction in those targeted food groups. This analysis found that when foods served in school meals met the FDA voluntary sodium reduction targets the overall sodium content of menus decreased by approximately 10 percent. Some foods served in school meals, including milk, fresh fruits and vegetables, and fresh cooked meats are not targeted for sodium reduction because most contain naturally occurring sodium. Condiments/accompaniments, breads/grains, combination entrees, some cheeses and a variety of other foods are targeted, leading to an estimated total reduction of 10 percent of menu sodium content. As detailed in the rule preamble, FDA's goals are not intended to focus on food or beverages that contain only naturally occurring sodium, but rather, to focus on items where actionable reductions in sodium are feasible. The sodium limits in this final rule account for naturally occurring sodium levels in foods and beverages in the current food supply. Therefore, foods and beverages containing naturally occurring sodium are not exempt from these sodium limits; rather, the sodium limits in this final rule account for naturally occurring sodium.

This analysis also showed that many products were available in SY 2014–2015 that would meet a 10 percent sodium reduction in breakfasts and lunches if menus are changed to include these products. At lunch, about 70 percent of accompaniments/condiments and combination entrees available already met the FDA voluntary sodium targets. At breakfast, 96 percent of accompaniments and 85 percent of combination entrees met the FDA sodium targets. Replacing condiments and combination entrees served at lunch would require the most effort with regards to sodium reduction through scratch cooking, menu changes, and product reformulation. However, minimal scratch cooking and reformulation is needed to reduce sodium by 10 percent. It is of note that current FDA voluntary targets are short-term and equal to a 10 percent reduction when applied to the NSLP and SBP menus,[68] and this rule finalizes a gradual 15 percent reduction for the NSLP and 10 percent reduction for the SBP.

The benefits of the new sodium limits are best measured with the HEI component scores. While the HEI is usually used to measure nutritional quality for daily dietary intake (ex. 24-hour recalls, food diaries), it can also be used to evaluate the alignment of single meals to the *Dietary Guidelines.* The maximum score for sodium is 10, indicating ≤1.1 grams of sodium per 1,000 calories, and the minimum score available is zero, indicating ≥2.0 grams of sodium per 1,000 calories.[69] A lower score indicates a higher sodium level in foods (higher sodium density), so a score of 10 is best and indicates lower levels of sodium in line with the *Dietary Guidelines.* This formula for scoring the sodium component is the same in the HEI–2010, HEI–2015, and HEI–2020[70] scoring versions.[71] The SNMCS reports[72] use the HEI–2010 version, but because the sodium component score did not change in 2015, HEI scores in tables 13 and 14 could be considered either HEI–2010 or HEI–2015. Intakes between the minimum and maximum levels of sodium are scored proportionately. Tables 13 and 14 show the HEI scores for menus that meet the sodium targets in the transitional standards rule and as finalized in this rule. The scores demonstrate improved consistency with the goals of the *Dietary Guidelines* through a decreased level of sodium density. For lunch, the sodium limit corresponds to an increase of 263 percent in HEI sodium component scores over the five years of implementation for elementary, middle, and high schools, respectively (table 14). Breakfast menu HEI scores were already 10 for the sodium component in SY 2014–2015 (table 13). However, further improvement is necessary to reach sodium intake levels recommended in the 2019 sodium dietary reference intakes (DRIs),[73] which have also been recommended in the *Dietary Guidelines for Americans, 2020–2025.* HEI sodium component scores are a good measure of sodium density, but Dietary Reference Intakes for sodium also provide recommendations for daily sodium intake by age group in the U.S. and Canada.[74] The latest edition of the sodium and potassium DRIs was released in 2019 and also included Chronic Disease Reduction Risk (CDRR) values that are a recommended maximum daily intake level to prevent chronic disease (table 15). Various organizations, including both the USDA through the *Dietary Guidelines* and non-Federal groups[75] [76] have indicated support for usage of these CDRR proportions as the goal for sodium consumption in school meals.

[67] *https://www.fda.gov/food/cfsan-constituent-updates/fda-issues-sodium-reduction-final-guidance.*

[68] Internal USDA analysis using FDA targets and SNMCS data.

[69] *https://www.fns.usda.gov/how-hei-scored.*

[70] HEI–2020 was published in September 2023, after this analysis was complete. For application to school age children in this RIA, using HEI–2010, HEI–2015 or HEI–2020 produces the same scores.

[71] *https://epi.grants.cancer.gov/hei/comparing.html.*

[72] *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

[73] *https://nap.nationalacademies.org/catalog/25353/dietary-reference-intakes-for-sodium-and-potassium.*

[74] National Academies of Sciences, Engineering, and Medicine; Health and Medicine Division; Food and Nutrition Board; Committee to Review the Dietary Reference Intakes for Sodium and Potassium; Oria M., Harrison M., Stallings V.A., editors. Dietary Reference Intakes for Sodium and Potassium. Washington (DC): National Academies Press (US); 2019 Mar 5. Available from: *https://www.ncbi.nlm.nih.gov/books/NBK538102/* doi: 10.17226/25353.

[75] *https://www.cspinet.org/sites/default/files/2022-03/CSPI%20Transition%20Final%20Rule%20Comment%202022.pdf.*

[76] *https://www.heart.org/-/media/Files/About-Us/Policy-Research/Fact-Sheets/Access-to-Healthy-Food/INFOGRAPHIC-Lowering-Sodium-in-School-Foods.pdf.*

TABLE 13: SODIUM LEVELS AND CORRESPONDING HEI SODIUM COMPONENT SCORES AT BREAKFAST BY MAXIMUM CALORIE LEVEL

SODIUM LEVELS BY SCHOOL AGE/GRADE GROUP	SY 2022-2023 and SY 2023-2024 (transitional standards rule)	SY 2014-2015 Menu Sodium Served	SY 2027-2028 Limit
ELEMENTARY (500 KCAL)	540	432	485
ELEMENTARY HEI SCORE	10	10	10
MIDDLE (550 KCAL)	600	447	535
MIDDLE HEI SCORE	10	10	10
HIGH (600 KCAL)	640	449	570
HIGH HEI SCORE	10	10	10

TABLE 14: SODIUM LEVELS AND CORRESPONDING HEI SODIUM COMPONENT SCORES AT LUNCH BY MAXIMUM CALORIE LEVEL

SODIUM LEVELS BY SCHOOL AGE/GRADE GROUP	SY 2023-2024 (transitional standards rule)	SY 2014-2015 Menu Sodium Served	SY 2027-2028 Limit
ELEMENTARY (650 KCAL)	1,110	1,057	935
ELEMENTARY HEI SCORE	3.2	4.2	6.2
MIDDLE (700 KCAL)	1,225	1,101	1,035
MIDDLE HEI SCORE	2.8	4.7	5.8
HIGH (850 KCAL)	1,280	1,236	1,080
HIGH HEI SCORE	5.5	6.1	8.1

TABLE 15. ESTIMATED SODIUM DIETARY REFERENCE INTAKES (CHRONIC DISEASE REDUCTION RISK VALUES) BY AGE/GRADE GROUP AND MEAL (MG)

	Elementary	Middle	High
BREAKFAST	340	390	500
LUNCH	510	580	740

School meal consumption data yields differing HEI scores from the menu data presented above. The sodium component HEI scores of consumed lunches in SY 2014–2015 were 4.2 on average for NSLP participants of all age/grade groups and a slightly better score than 4.0 on average for non-participants.[77] NSLP participants had a lunch sodium component score of 4.7, 4.6, and 3.0 for elementary, middle, and high schools, respectively. For breakfast, sodium component HEI scores in SY 2014–2015 were 8.7 on average for SBP participants and 7.9 on average for non-participants across age/grade groups. SBP participants had a breakfast sodium component score of 9.6, 9.0, and 6.7 for elementary, middle, and high schools, respectively.[66] Since both breakfast and lunch consumption data include competitive foods and foods brought from home, it is difficult to compare the menu sodium scores to the scores based on the consumed amount of sodium. Overall lunch HEI–2010 scores (scored out of 100), including all elements of the meal consumed, were 80.1 for NSLP participants and 65.1 for students that were not NSLP participants. Overall breakfast HEI–2010 scores were 66.1 for SBP participants and 58.9 for students that were not SBP participants.[78] While participants of school meal programs have higher meal HEI scores, indicating a higher adherence to the recommendations of the *Dietary Guidelines*,[79] there is room for improvement overall. For sodium, there is especially room for improvement in lunches at all ages and in high school breakfasts. The final rule sodium limits would improve these scores even when accounting for foods consumed that are not part of a reimbursable meal.

[77] SNMCS Report Volume 4 Appendices I to P—Tables J.1 to J.4 and Tables M.1 to M.4.

[78] SNMCS Report Volume 4.

[79] The HEI–2010 score corresponds to the *Dietary Guidelines for Americans, 2010–2015.*

Other reasons to finalize a single sodium reduction with a longer implementation timeline include palatability and the need for product reformulation. Manufacturers have found that a 10 percent reduction in sodium for individual products is manageable with regards to product reformulation and consumer approval in the past, as well as in internal discussions with USDA.[80] Various studies agree with gradual reduction being manageable for consumers both at an individual and population level.[81 82 83] Additionally, small reductions of sodium (2 to 5 percent) are generally not noticed by consumers.[84] The 15 percent and 10 percent reduction will not affect every single food product equally but will be spread across the lunch and breakfast menus, respectively, at varying levels. For instance, some products may easily be reduced in sodium content by 20 percent, whereas only a 5 percent change may be possible in others. Manufacturers also may have existing lower sodium product lines in their portfolio that they may be able to use without needing to reformulate existing products. Additionally, manufacturers may already be making strides in adjusting products as a result of the short-term FDA voluntary sodium guidance that was released in October 2021, especially with additional updated guidance expected to come out in 2024.

USDA completed a limited search of other food service operations in the U.S. in order to compare their sodium requirements to those finalized in this rule. The CDC Food Service Guidelines for Federal Facilities were designed to be used in Federal, State, and local government facilities, as well as hospitals, health care facilities, colleges and universities, private worksites, stadiums, and recreation centers.[85] This set of guidelines recommends that all meals, defined as an entrée and two sides, contain ≤800 milligrams of sodium. Entrees alone should contain ≤600 milligrams of sodium and all side items alone contain ≤230 milligrams of sodium. Though these guidelines are directed toward adults, it is helpful that beverages are included in these guidelines unlike other available measures since the NSLP and SBP require milk as part of the school food pattern. The U.S. Army Food Program Implementation Guide for Nutrition Standards[86] and the Healthier Campus Initiative Guidelines[87] also advise that lunch and dinner meals should contain ≤800 milligrams of sodium. The National Restaurant Association's Kids Live Well program[88] advises that at least two of the children's meal options served in restaurants should contain ≤700 milligrams of sodium, including at least two different food groups (fruit, vegetable, non/low-fat dairy, meat/meat alternative, and whole grains) and at least one of the two food groups must be a fruit or vegetable. No mention is made in the Kids Live Well program materials if a beverage is included as part of a meal when calculating the total sodium content. An 8-ounce carton of milk contains up to 130 milligrams of sodium, indicating that the lunch sodium limits of 935 milligrams, 1,035 milligrams, and 1,080 milligrams for elementary, middle, and high schools are achievable relative to organization limits when accounting for milk and the full meal pattern requirements.

Health Benefits

The most important reason for sodium reduction in school meals is the health benefits. Closer alignment of school meals with the goals of the *Dietary Guidelines for Americans, 2020–2025* is meant to promote a healthy lifestyle and prevent chronic disease by meeting dietary needs. During SY 2011–2012, U.S. elementary, middle, and high school age school children consumed about 3,050 mg, 3,115 mg, and 3,565 mg of sodium daily, respectively.[89] This exceeds the recommended daily sodium DRI values[90] for school age children; 1,500 mg for age 4 to 8 years, 1,800 mg for age 9 to 13 years, and 2,300 mg for age 14 to 18 years. Sodium DRI values are presented by age group so there is some overlap when comparing to school age groups.

Reducing sodium intake has been shown to reduce blood pressure in children, birth to age 18 years. This was shown in a systematic review conducted in 2015 by the Dietary Guidelines Advisory Committee (DGAC).[91] The 2015 DGAC also conducted an update on the 2013 Institute of Medicine (IOM) (now NASEM) and National Heart, Lung, and Blood Institute (NHLBI) systematic reviews that evaluated the relationship between sodium intake and the risk of cardiovascular disease (CVD). The DGAC found agreement with the NHLBI review, which concluded that ''a reduction in sodium intake by approximately 1,000 mg per day reduces CVD events by about 30 percent'' and that ''higher dietary sodium intake is associated with a greater risk for fatal and nonfatal stroke and CVD.'' The DGAC also found agreement with the IOM review that found that there is evidence to support a positive relationship between higher levels of sodium intake and risk of CVD and is consistent with blood pressure serving as a surrogate indicator of CVD risk.[80] Blood pressure tracks over the life course, meaning that reducing sodium intake and maintaining a healthy blood pressure level in childhood can benefit individuals into adulthood.[92] A recent study suggests that among the three major dietary groups addressed in this rule (sodium, added sugars, and whole grains), children's consumption of sodium at the D*ietary Guidelines, 2020–2025* recommendations into adulthood has the largest potential health and economic impacts. The maintenance of this dietary pattern from school age was associated with 5,580 fewer adult deaths from CVD and cancer and $8.26 billion in reduced healthcare-related costs per year.[93] Evidence is strong to support the conclusion that reduction in sodium intake reduces blood pressure and in turn reduces CVD risk and CVD events. A gradual reduction in sodium content of school meals will likely contribute to an improvement of dietary habits, blood pressure, and CVD risk factors in NSLP and SBP participants that could track into adulthood.

Meats/Meat Alternates at Breakfast

This rule codifies the combined grains and meats/meat alternates meal component at breakfast and removes the requirement for schools to offer 1.0 ounce equivalent of grains each day at breakfast, included from the 2020 proposed rule *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs.* Schools may offer grains, meats/meat alternates, or a combination of both to meet this combined component requirement. The minimum daily requirement (1 ounce equivalent) and minimum weekly requirement (7–9 ounce equivalents, depending on the age/grade group) for this component remain the same. This rule allows for these daily and weekly requirements to be met with grains and/or meat/meat alternates. This provision does not require school food authorities to change their breakfast meal service. Schools should balance this

[80] Cobb L.K., Appel L.J., Anderson C.A., Strategies to reduce dietary sodium intake. *Curr Treat Options Cardiovasc Med.* 2012;14(4):425–434. doi:10.1007/s11936–012–0182–9.

[81] Liem D.G., Miremadi F., Keast R.S., Reducing sodium in foods: the effect on flavor. *Nutrients.* 2011;3(6):694–711. doi:10.3390/nu3060694.

[82] Levings J.L., Cogswell M.E., Gunn J.P., Are reductions in population sodium intake achievable? *Nutrients.* 2014;6(10):4354–4361. Published 2014 Oct 16. doi:10.3390/nu6104354.

[83] Dehmer S.P., Cogswell M.E., Ritchey M.D., et al. Health and Budgetary Impact of Achieving 10-Year U.S. Sodium Reduction Targets. *Am J Prev Med.* 2020;59(2):211–218. doi:10.1016/j.amepre.2020.03.010.

[84] Drake S.L., Lopetcharat K., Drake M.A., Salty taste in dairy foods: can we reduce the salt? [published correction appears in *J Dairy Sci.* 2012 Dec;95(12):7429]. *J Dairy Sci.* 2011;94(2):636–645. doi:10.3168/jds.2010–3509.

[85] *https://www.cdc.gov/obesity/downloads/guidelines_for_federal_concessions_and_vending_operations.pdf.*

[86] *https://quartermaster.army.mil/jccoe/Operations_Directorate/QUAD/nutrition/Implementation-Guide-for-Go-for-Green-Army.pdf.*

[87] *https://www.ahealthieramerica.org/healthier-campus-initiative-20#resource_grid-292.*

[88] *https://restaurant.org/getmedia/f829f35b-917a-432d-8192-9b1c79864d0d/kids-livewell-getting-started.pdf.*

[89] Quader ZS, Gillespie C, Sliwa SA, et al. Sodium Intake among US School-Aged Children: National Health and Nutrition Examination Survey, 2011–2012. *J Acad Nutr Diet.* 2017;117(1):39–47.e5. doi:10.1016/j.jand.2016.09.010.

[90] 2019 Sodium Chronic Disease Reduction Risk (Dietary Reference Intake) values.

[91] 2015 *Dietary Guidelines* Advisory Committee and Nutrition Evidence Library. Systematic Reviews of the Cross-Cutting Topics of Public Health Importance Subcommittee. 2015 *Dietary Guidelines* Advisory Committee Project. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Center for Nutrition Policy and Promotion, March 2017. Available at: *https://nesr.usda.gov/2015-dietary-guidelines-advisory-committee-systematic-reviews.*

[92] Cheng S, Xanthakis V, Sullivan LM, Vasan RS. Blood pressure tracking over the adult life course: patterns and correlates in the Framingham heart study. *Hypertension.* 2012;60(6):1393–1399. doi:10.1161/HYPERTENSIONAHA.112.201780.

[93] Wang L, Cohen J, Maroney M, et al. Evaluation of health and economic effects of United States school meal standards consistent with the 2020–2025 dietary guidelines for Americans. The American Journal of Clinical Nutrition. 2023. DOI: *https://doi.org/10.1016/j.ajcnut.2023.05.031.*

flexibility while still offering grains to ensure adequate nutrition of school breakfasts. In SY 2014–2015, whole grain-rich offerings in the SBP helped school breakfasts meet the *Dietary Guidelines* recommendations for grains.[94] This change allows school food authorities the flexibility to develop SBP menus that include meats/meat alternates without a requirement to serve a minimum amount of grains. This change is not anticipated to impact program costs, but rather, to provide flexibility for school food authorities to balance resources and meal pattern requirements with student preferences when planning SBP menus.

Substituting Vegetables for Grains in Tribal Communities

Current regulations allow program operators in American Samoa, Puerto Rico, and the U.S. Virgin Islands to serve vegetables such as yams, plantains, or sweet potatoes to meet the grains or breads component. This rule allows school food authorities and schools that are tribally operated, operated by the Bureau of Indian Education, and that serve primarily American Indian or Alaska Native children to serve vegetables to meet the grains requirement in NSLP and SBP. For SFSP and CACFP, this final rule allows sponsors, institutions, and facilities, as applicable, that serve primarily American Indian or Alaska Native children to substitute vegetables for grains or breads. This rule also allows all program operators in Guam and Hawaii to substitute vegetables for grains or breads in NSLP, SBP, SFSP, and CACFP. This final rule clarifies that under this provision, any vegetable may substitute for the grains or bread component. However, USDA emphasizes the importance of traditional and culturally relevant vegetables, including traditional vegetables such as breadfruit and prairie turnips, for grains.

USDA has limited data regarding consumption of these foods in the SBP and NSLP and the cost of these specific foods to schools serving American Indian and/or Alaska Native children specifically. However, SNMCS data from SY 2014–2015 indicate that starchy vegetables, including potatoes, and red/orange vegetables such as sweet potatoes, cost $0.18 per portion on average and bread/grain items also cost $0.18 per portion on average. Based on this data we expect this provision will lead to minimal, if any, cost change per meal. Further, program operators would not be required to make any changes to their menus under this rule and may continue to serve grain items to meet the grains component requirement if that is most cost-effective.

Traditional Indigenous Foods

This rule states in regulation that traditional Indigenous foods may be served in reimbursable school meals. USDA acknowledges that many traditional Indigenous foods may already be served in school meal programs; the goal of this provision is to draw attention to this option and support efforts to incorporate these foods into school meals. By ''traditional food,'' USDA means the definition included in the Agriculture Improvement Act of 2014[95] which defines traditional food as ''food that has traditionally been prepared and consumed by an American Indian tribe,'' which includes wild game meat, fish, seafood, marine mammals, plants, and berries.

Due to limited data regarding the consumption and cost of traditional Indigenous foods in the SBP and NSLP, no cost analysis can be done to predict how this provision would affect child nutrition programs. Traditional Indigenous foods may be served in school meals under existing guidance, and this provision encourages rather than requires schools to serve traditional Indigenous foods, so it is expected to result in a negligible annual cost change for food service operations.

Afterschool Snacks

USDA aligns NSLP snack requirements for school-aged children with the CACFP snack requirements in this final rule, effective SY 2025–2026. NSLP requirements for snacks served to infants and preschool-aged children remain in effect. For school-aged children, under this final rule, reimbursable snacks include two of the following five components: milk, vegetables, fruits, grains, and meats/meat alternates. USDA also requires that NSLP snacks adapt these existing CACFP snack requirements: (1) only one of the two components served at snack may be a beverage; (2) milk served to children age 6 and older must be fat-free or low-fat and may be flavored or unflavored; (3) grain-based desserts do not count toward meeting the grains requirement, and (4) foods that are deep-fat fried on-site are not reimbursable NSLP snacks. Additionally, the added sugars product limits for breakfast cereals and yogurt finalized in this rule apply to NSLP snacks, effective SY 2025–2026. The component options for afterschool snacks are the same categories as previously, aside from fruits and vegetables now being separate components.

The number of afterschool snacks served represents four percent of the number of lunches served, based on 2023 data.[96] Of those snacks served, over 80 percent were breads/grains, fruits, and milk. SNMCS data from SY 2014–2015 indicate that under half of snack items served were beverages. Milk served was already meeting the final rule requirement to be fat-free or low-fat, flavored or unflavored. Combination entrees were not considered in this analysis because they are very rarely served as snacks.

This provision will require schools to replace grain-based desserts with other grains and to limit breakfast cereals and yogurts to those that meet the product-based added sugars limits, upon implementation. Cereal costs the same per dry ounce regardless of added sugars content, so there would be no cost change. In SY 2014–2015, grain-based desserts made up 14 percent of items served at snacks, and about half of the grain items in snacks were grain-based desserts. On average, grain-based desserts cost $0.35 per ounce equivalent and other grain items cost $0.19 per ounce equivalent, about a $0.22 difference after adjusting for inflation. Switching those to grains/breads that are not grain-based desserts would save approximately $9.4 million. Since yogurt was not as widely served as a snack item, the cost of switching to yogurt products with no more than 12 grams of added sugars per 6 ounces—an increase of $0.05 per portion—is under half a million dollars. In total, the final rule that aligns NSLP snack requirements with CACFP snack requirements is estimated to save around $9 million on average (table 16).

TABLE 16: ESTIMATED COST OF AFTERSCHOOL SNACKS RULE BY EACH AFFECTED PRODUCT (MILLIONS), ADJUSTED FOR ESTIMATED INFLATION TO SY 2024-2025

PRODUCT TYPE	Estimated Annual Cost
GRAIN-BASED DESSERTS	-$9.4
BREAKFAST CEREALS	$0
YOGURT	$0.3
TOTAL	**-$9.1**

[94] U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, *School Nutrition and Meal Cost Study, Final Report Volume 2: Nutritional Characteristics of School Meals* Project Officer: John Endahl. Alexandria, VA: April 2019. Available at: *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

[95] Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)).

[96] USDA—Food and Nutrition Service National Database Publicly Available Data.

Substituting Vegetables for Fruits at Breakfast

This rule establishes that schools can continue to substitute vegetables for fruits at breakfasts but simplifies the vegetable variety requirement. Under this final rule, schools that substitute vegetables more than one day per school week will be required to offer vegetables from at least two subgroups. The vegetable subgroups include starchy; red and orange; dark green; beans, peas, and lentils; and ''other'' vegetables. Starchy vegetables are consumed at a higher rate in children and adolescents compared to the other vegetable subgroups, so this provision continues to encourage consumption of a variety of vegetables at breakfast, in cases where schools opt to substitute vegetables for fruit.

SNMCS data from SY 2014–2015 showed that only about three percent of fruits were substituted for vegetables at breakfast. Of the servings of vegetables substituted for fruits in SY 2014–2015, half were starchy, and the other half were primarily red and orange vegetables. USDA expects more vegetables to be offered in breakfast meals in order to meet the required reduction in added sugars. This may lead to vegetables being offered alongside servings of eggs or in breakfast burritos, for example. However, it is also expected that fruits will be served in most breakfasts since fruits are easy to incorporate in meals and menus, and fresh fruits contain no added sugars, only naturally occurring sugars. Depending on the local prices, school food authorities will decide the most cost-effective menus for their operations, but this provision continues to promote vegetable variety at breakfast.

TABLE 17: ESTIMATED ANNUAL COST OF SUBSTITUTING VEGETABLES FOR FRUITS AT BREAKFAST (MILLIONS), ADJUSTED FOR ESTIMATED INFLATION TO SY 2024-2025

PRODUCT TYPE	10% OF FRUIT SERVINGS SWITCHED TO VEGETABLES	25% OF FRUIT SERVINGS SWITCHED TO VEGETABLES
# OF TOTAL FRUIT SERVINGS	1,705	1,705
# OF FRUIT SERVINGS TO SWITCH	170	426
COST	-$4	-$10

An internal USDA analysis simulated switching between 10 and 25 percent of fruit servings at breakfast to vegetables. This simulation assumed that half of the vegetables would be starchy vegetables and the other half would be non-starchy vegetable subgroups (red and orange; dark green; beans, peas, and lentils, and ''other'' vegetables), following the pattern of substitution shown in SNMCS. In SY 2014–2015, starchy vegetables served at breakfast and lunch cost approximately $0.18 per portion, and all other vegetables served cost approximately $0.20 per portion, on average. Fruits served at breakfast were $0.21 per portion, on average. Using these prices per portion and the number of breakfasts served in 2023, there would be a savings ranging from $4 million to $10 million resulting from a substitution of 10 to 25 percent of fruit servings with vegetable servings (table 17).

Nuts and Seeds

This rule allows nuts and seeds to credit for the full meats/meat alternates component in all child nutrition programs and meals. It removes the 50 percent crediting limit for nuts and seeds at breakfast, lunch, and supper. USDA expects that nuts and seeds will most often continue to be offered in snacks or in small amounts at breakfast, lunch, or supper alongside other meats/meat alternates. Nuts and seeds are most often offered in school meals in the form of a nut butter (or nut butter alternative, such as soy or sunflower seed butter) in a sandwich.

About 17 percent of daily lunch menus in SY 2014–2015 offered ''other protein items'' in the form of eggs, seeds, nuts, beans, and peas.[97] Of combination entrees served in the NSLP, about six percent were peanut butter and jelly sandwiches,[98] including variations with sunflower seed butter and almond butter.[99] Nuts, seeds, or nut/seed butters represented less than one percent of meat and meat alternate food items offered on NSLP menus [100] Very few instances of serving whole nuts and seeds were found in this analysis at either breakfast or lunch. Because USDA expects that nuts and seeds will be minimally offered as the sole meat/meat alternate at a meal and because this change may take shape in a variety of combinations across menus, this element of the rule is not expected to result in a measurable per-meal cost change. The saturated fat content of school meals must be less than ten percent of total calories per week and replacing some lean sources of meat with nuts or seeds may result in higher saturated fat content of meals. When creating menus, operators must be aware of the saturated fat content of meals if offering more nuts and seeds. Operators who serve combination entrees using nut butters (*e.g.,* peanut butter and jelly sandwich) will also need to consider requirements related to whole grains, although SY 2014–2015 data indicate that over 85 percent of peanut butter and jelly served were prepared using whole grain-rich bread.

Beans, Peas, and Lentils at Lunch

This final rule codifies the flexibility to allow school food authorities to count beans, peas, and lentils offered as a meat alternate at lunch toward the weekly beans, peas, and lentils vegetable subgroup requirement, included from the 2020 proposed rule *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs.* Under this option, as with the current requirement, schools would determine which overall meal component the beans, peas, and lentils would count toward: the vegetable meal component, or the meats/meat alternates meal component. This change aims to facilitate service of the legumes subgroup; compared to other vegetable subgroups, the legumes subgroup requirement has proven to be more difficult for some school food authorities to meet.

Legumes are often an ingredient in combination entrées. Such entrées are common in lunch menus, especially in high schools where about 25 percent of daily menus include burritos, tacos, nachos, quesadillas, fajitas, or enchiladas.[101] Children benefit from the array of essential nutrients legumes offer, including protein and fiber, regardless of whether legumes are labeled as a vegetable or meat alternate for menu planning purposes. The daily and weekly menus must still meet minimum quantity requirements for vegetables, which are unchanged. This flexibility will not result in a reduction in total calories or vegetables served, but rather allows school food authorities the ability to develop menus that better reflect student preferences. The daily and weekly meat/meat alternate quantities are also unchanged. There are negligible impacts to program costs associated with this flexibility.

[97] SNMCS Report Volume 2.

[98] Of these peanut butter and jelly sandwiches, over 85 percent were made with whole grain-rich bread.

[99] SNMCS Study Data, USDA internal analysis.

[100] SNMCS Study Data, USDA internal analysis.

[101] U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, School Nutrition and Meal Cost Study, Final Report Volume 2: Nutritional Characteristics of School Meals. Project Officer: John Endahl. Alexandria, VA: April 2019. Available at: *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

Competitive Foods—Bean Dip Exemption

In this final rule, USDA is revising the terminology for this provision based on public comment. Instead of referring to ''hummus'' in regulation, this final rule will refer to ''bean dip,'' which includes hummus. This change reflects input received through a public comment, which noted that the word ''hummus'' already has a culturally significant meaning and is traditionally made from chickpeas (rather than any variety of beans, peas, or lentils). This rule adds bean dip to the list of foods exempt from the total fat standard in the competitive food, or Smart Snack, regulations. Smart Snacks are foods that are sold to students outside of the school meal programs, such as foods sold a la carte, in school stores, in vending machines, or in any other venues where food is served to students during school hours. Bean dip is already permitted as a part of a reimbursable school meal but with this change could also be sold as a Smart Snack. A specific definition of bean dip is also given as part of this provision. Bean dip will still be subject to the saturated fat standard, which limits competitive foods to less than 10 percent of calories from saturated fat per item as packaged or served and the sodium standard in which snacks must be 200 mg of sodium or less and entrees must be 480 mg of sodium or less.[102]

USDA does not collect or track competitive food sales, so it is unclear the exact cost change to school food authorities that will result from this provision. A served portion of bean dip was comparable in price to a served portion of regular or reduced-fat peanut butter according to SNMCS data. Peanut butter and bean dip are comparable in that they are served as part of a snack alongside another food (*i.e.* pretzels, bread, vegetables, apple slices, etc.). As a result, USDA expects a minimal cost change for school food authorities that choose to sell bean dip as a competitive food due to this provision. Individual schools often sell competitive foods to complement reimbursable foods and maintain a revenue-neutral operation; therefore, USDA assumes that schools will opt to sell bean dip as a competitive food if they determine it is financially beneficial. When data were collected in SY 2014–2015, bean dip was served minimally in the NSLP, but it is likely the popularity of bean dip among students has increased since that time, so allowing an additional option for schools could be beneficial to schools.

Meal Modifications

This rule updates the regulatory text for meal modifications, removes the term ''medical or other special dietary needs'' from the regulations, authorizes State licensed healthcare professionals and dietitians to write a medical statement in support of a meal modification for a disability, and defines the term ''State licensed healthcare professional'' in regulation. These changes are not expected to impact program costs, but rather, clarify procedures for State agencies, schools, institutions, and facilities working to meet the needs of participants with disabilities that restrict their diets. This provision was included in the 2020 proposed rule *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs.*

Clarification of Requirements for Potable Water

This final rule maintains the requirement that schools make potable water available and accessible without restriction to children at no charge during the meal service, and clarifies in regulation that the potable water must be ''plain.'' This is a change from the 2020 proposed rule, where this provision was introduced, *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs,* which would have allowed schools to offer calorie-free, naturally flavored, noncarbonated water to meet the potable water requirement, without requiring that plain potable water be offered. This change from the proposed rule was made in response to public comments that emphasized the importance of ensuring children have access to plain potable water. This change is not expected to increase costs, as schools will be in compliance with the potable water requirement by continuing to offer plain potable water.

Synthetic Trans Fat

This final rule change eliminates the requirement for SBP, NSLP, and competitive foods to have zero synthetic trans fat.[103] FDA regulations removed synthetic trans fat from the United States food supply, with a final compliance date of January 1, 2020, and thus, the requirement to monitor synthetic trans fat in the school meal programs is unnecessary. This final rule eliminates regulations that are not necessary since synthetic trans fat is no longer in the food supply. This change will align Program regulations with the food supply standards. There are no impacts to program costs associated with this change. This provision was included in the 2020 proposed rule *Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs*.

Professional Standards: Hiring Exemption for Medium and Large Local Educational Agencies

USDA codifies allowing State agency discretion in the hiring of a school nutrition program director in a medium or large local educational agency for individuals who have 10 years or more of school nutrition program experience but who lack a bachelor's or associate's degree. In other words, this provision allows for a substitution of experience for education to widen the potential applicant pool for school nutrition program director positions. A high school diploma or GED is still required, but this shift may help with hiring challenges experienced in recent years. Instead of education being the only path to promotion, substantial experience can be an alternative path. Directors hired under this provision are encouraged to work toward a degree related to nutrition and/or business, but this is not required. This rule also clarifies in regulation that State agencies may determine what counts as ''additional educational experience'' for the hiring standards.

This provision is estimated to have no cost impact. Codifying this standard allows State agencies more discretion in hiring selection, but States are not required to change current practices. It is unclear exactly how many school food authorities this will affect and how many individuals have 10 years or more of experience and could be promoted to director positions. However, USDA has recently received requests from State agencies to substitute school nutrition program experience for a higher degree in order to fill existing vacancies. Also, in response to USDA's 2018 professional standards proposed rule,[104] USDA received 13 comments (out of 76 total comments) that mentioned alternatives to the education requirement. Of those, 9 specifically recommended experience as a substitute for a degree, with 10 years of experience being the most common suggestion. Data will be collected by USDA between SY 2024–2025 and SY 2029–2030 to support ongoing assessment of the effects of this rule change. In 2017, around 8.3 million U.S. workers (5.4 percent) were employed in food preparation and serving-related occupations.[105] Employment in this category is beginning to recover from COVID-era challenges that began in 2020. Of the food service managers across the U.S. in 2019 and 2021, 9.6 percent had less than a high school diploma, 28.6 percent had a high school diploma or equivalent, and 25.7 percent had some college but no degree.[106] Thirty-six percent of food service managers had an associate's degree or higher level of education. For school food authority directors specifically, a recent USDA study indicated that 12 percent of school food authority directors had advanced degrees, 29 percent had bachelor's degrees, 13 percent had associate's degrees, 20 percent had some college but no degree, and 26 percent had high school diplomas.[107] The study also found that directors at larger school food authorities had higher levels of educational attainment. Comparing school food authority directors to food service managers across the U.S., school food authority directors have a higher level of education on average than food service

[102] *https://fns-prod.azureedge.us/sites/default/files/resource-files/smartsnacks.pdf.*

[103] This restriction does not apply to naturally occurring trans fats, which are present in meat and dairy products.

[104] *https://www.federalregister.gov/documents/2018/03/06/2018-04233/hiring-flexibility-under-professional-standards.*

[105] *https://www.census.gov/library/stories/2022/07/how-food-service-transportation-workers-fared-before-pandemic.html.*

[106] *https://www.bls.gov/emp/tables/educational-attainment.htm.*

[107] Urban location and low poverty level of the SFA were also correlated with higher educational attainment among SFA directors. USDA, FNS, Office of Policy Support, School Nutrition and Meal Cost Study, Final Report Volume 1: School Meal Program Operations and School Nutrition Environments, prepared by Mathematica Policy Research and Abt Associates, April 2019, pp. 34–35, *https://fns-prod.azureedge.net/sites/default/files/resource-files/SNMCSVolume1.pdf.*

managers, yet about 46 percent of school food authority directors have no degree. As a result, it is likely that a substantial percentage of operations could benefit from the ability to promote based on experience rather than education level.

Buy American

This final rule seeks to strengthen the Buy American requirement but also acknowledges that purchasing domestic food products is not always feasible for schools. USDA maintains the current two limited exceptions to the Buy American provision and will also phase in a new threshold limit for school food authorities using these exceptions. The two exceptions apply when: (1) the product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or (2) competitive bids reveal that the costs of a U.S. product are significantly higher than the non-domestic product. Consistent with current USDA guidance, this final rule clarifies in regulation that it is the responsibility of the school food authority to determine whether an exception applies.

With this final rule, USDA institutes a phased approach over seven school years to reach a 5 percent ceiling on the non-domestic commercial foods a school food authority may purchase per school year. The phased approach would be the following:

- Beginning in SY 2025–2026, the non-domestic food cost cap will be 10 percent.
- Beginning in SY 2028–2029, the non-domestic food cost cap will be 8 percent.
- Beginning in SY 2031–2032, the non-domestic food cost cap will be 5 percent.

School food authorities will be required to maintain documentation regarding use of an exception as well as to demonstrate that the percent non-domestic food costs of total commercial foods purchased per year are not more than the cap for that school year. Beginning in SY 2031–2032, the documentation must demonstrate that exceptions were used for no more than 5 percent of total commercial foods purchased per year. In addition, in response to public comment, USDA is including that when a school food authority purchases a food item found on the Federal Acquisition Regulations (FAR) 25.104 Nonavailable articles list, no further documentation is required, upon implementation of this final rule. There still may be individual school food authorities that cannot meet the threshold. USDA will work in concert with State agencies during implementation to provide needed technical assistance and guidance, and if, appropriate, an accommodation for temporary relief from the requirement as the State agency works with the school food authority on increasing their domestic purchases.

This rule will codify the requirement to maintain documentation for an exception, while decreasing the amount of required documentation compared to current practices. To supplement this documentation, USDA will continue to collect information and data on the Buy American provision and school food authority procurement. This final rule will require all school food authorities to include the Buy American provision in documented procurement procedures, solicitations, contracts for foods and food products procured using informal and formal procurement methods, and in awarded contracts. State agencies will verify the inclusion of this language when conducting reviews. Additionally, this final rule codifies a definition of ''substantially,'' as well as a clarification of requirements for harvested, farmed, and wild caught fish.

The Food and Nutrition Service Child Nutrition Program Operations Study [108] collected data on Buy American exceptions during SY 2017–2018. This study found that an average of 8.5 percent of total food expenditures were purchased under exceptions among school food authorities that used an exception to the Buy American provision. During SY 2017–2018, 25.7 percent of school food authorities used an exception to the Buy American provision. Based on this data, it is likely that the majority of school food authorities already meet the final rule ceiling on the non-domestic commercial foods a school food authority may purchase per school year. Around a quarter of school food authorities may need to decrease their purchase of non-domestic commercial foods to reach the 5 percent limit starting in SY 2031–2032. Among the school food authorities using an exception to the provision, the reasons cited included: limited supply of the commodity or product (88 percent), increased costs of domestic commodities or products (43 percent), and quality issues with available domestic commodities or products (21 percent). The exceptions to the Buy American provision will help school food authorities control costs of purchasing domestic food products despite the eventual 5 percent ceiling.

TABLE 18: USE OF EXCEPTIONS BY SCHOOL FOOD AUTHORITY CHARACTERISTICS

SCHOOL FOOD AUTHORITY CHARACTERISTIC	Foods purchased with Buy American exceptions (%)
SMALL (1-999 STUDENTS)	9.5
MEDIUM (1,000-4999 STUDENTS)	8.1
LARGE (5,000-24,999 STUDENTS)	7.5
VERY LARGE (>25,000 STUDENTS)	7.5
IN TOWNS	12.7
RURAL	8.0
URBAN AREA/CITY	7.9
IN SUBURBS	6.5
HIGH F/RP PARTICIPATION (0-29%)	10.9
LOW F/RP PARTICIPATION (≥60%)	10.4
MEDIUM F/RP PARTICIPATION (30-59%)	5.9

Some school food authorities will be more affected by the final rule Buy American provision than others (table 18). School food authorities that are small, located in towns, and that had either a low or high percentage of students approved for free and reduced-price meals used exceptions for more than the 8.5 percent average of food expenditures. School food authorities falling in these groups may have the most difficulty meeting the Buy American provision finalized in this final rule. Larger school food authorities

[108] Child Nutrition Program Operations Study (CN–OPS–II) Report: School Year 2017–2018. *https://fns-prod.azureedge.us/sites/default/files/resource-files/CNOPS-II-SY2017-18.pdf.*

(>999 students), those in suburban, city or rural environments, and those that have 30 to 59 percent of students approved for free and reduced-price meals are already closer to the final rule limit of 5 percent and may have less difficulty complying with the change.

For the 26 percent of school food authorities that used an exception to the Buy American provision during SY 2017–2018, USDA expects they will incur some costs associated with the need to update menus and/or update purchasing practices to meet the five percent ceiling. These costs are included in the regulatory familiarization cost totals that are detailed in the ''Administrative Costs'' section above. Using SY 2009–2010 total food expenditure data from the School Food Purchase Study, we estimated the difference in food costs needed to reach the 5 percent threshold for the 26 percent of school food authorities that used exceptions in SY 2017–2018. Of those school food authorities that used an exception, 43 percent sought exemptions based on cost. The majority of those school food authorities (70 percent) used a cost threshold of 30 percent or less when determining whether a cost is significantly higher for a domestic commodity or product, warranting a use of exception. Therefore, we assume that, on average, the cost of purchasing domestic products will be 15 percent higher for those affected purchases.

Based on the assumption that domestic products cost 15 percent more on average, food cost impacts vary by each phase over seven school years (table 19). Beginning in SY 2025–2026, school food authorities may use exceptions to purchase non-domestic foods for 10 percent of total food cost expenditures. This is estimated to have negligible annual cost impact due to a 10 percent ceiling being higher than the 8.5 percent average among school food authorities using exceptions. However, some school food authorities such as those in towns (table 18) may need to make an incremental shift in food purchasing to meet the 10 percent limit, or the State agency may seek an accommodation for temporary relief from the requirement if the school food authority needs additional support. In SY 2028–2029, the next phase of the Buy American provision is an 8 percent ceiling that is estimated to have a food cost impact of $0.40 million annually. We estimate a nearly $3 million annual total food cost increase once the phased in non-domestic foods ceiling reaches 5 percent in SY 2031–2032. Based on the data mentioned in the previous paragraph, the proposed rule estimated that 43 percent of the cost difference of using exemptions for 5 percent of food purchases instead of the 8.5 percent average is approximately $20 million. A 15 percent increase in that cost equals approximately $3 million. Proportionately, the cost of moving from the 8.5 percent average to 8 percent in SY 2028–2029 would have a food cost of approximately $0.40 million annually. In SY 2031–2032 and beyond when the ceiling reaches 5 percent we estimate a $3 million annual total food cost increase.

Additionally, USDA estimates that the final rule record keeping requirement to include that school food authorities maintain documentation when using an exception and that school food authorities include language requiring Buy American in all procurement procedures, solicitations, and contracts and maintain such documentation. While the PRA section of this rule includes burden estimates associated with including and maintaining language requiring Buy American in all contracting documents and procurement procedures, USDA has promoted this as a best practice for years. Based on this longstanding guidance and public comments to the proposed rule that this is already in practice to some extent, USDA estimates half of school food authorities will develop and maintain changes to contracting documentation record each year, and that it takes approximately 20 hours NSLP and 10 hours for SBP [109] to complete the record keeping requirement for each set of contracting and procurement documents. This results in a total of 270,535 burden hours. When using the latest hourly compensation of public administration in state and local government from 2022 of $54.05,[110] the cost of this requirement is $15 million in SY 2024–2025. For those school food authorities that are not already including this information in their procurement documents, we expect this is a one-time change that will be in place by SY 2025–2026 and annual maintenance will happen as part of their normal administrative processes.

For documenting exceptions to the non-domestic food purchase cap, USDA estimates all school food authorities (18,495 total) will develop and maintain 10 records each year per NSLP and SBP, and that it takes approximately 15 minutes [111] to complete the record keeping requirement for each record documenting an exception. This results in a total of 89,030 annual burden hours. The additional cost of this reporting requirement is nearly $5 million annually. In total, USDA estimates that the final rule Buy American provision will cost $15 million leading up to SY 2025–2026 and approximately $5 million to $8 million annually starting in SY 2025–2026 with both food costs and record keeping included (table 19). USDA acknowledges that the estimated cost of this provision will add to school food authority costs, potentially reducing funds for other areas of spending. However, it will be at school food authority discretion how funds are shifted to meet the threshold for non-domestic foods. USDA does not anticipate that this provision will have any effect on the ability of school food authorities to meet school meal nutrition requirements.

Table 19: Estimated Annual Cost (millions) of Buy American Provision Phases by Implementation Year, Adjusted for Estimated inflation to SY 2024-2025

% CAP	NA	10%	8%	5%
CATEGORY	**SY 2024-2025**	**SY 2025-2026**	**SY 2028-2029**	**SY 2031-2032**
Food Costs	$0	$0	$0.40	$2.8
Record keeping[112]	$15	$4.8	$4.8	$4.8
Total	**$15**	**$4.8**	**$5.2**	$7.6

Geographic Preference

In this rulemaking USDA is expanding geographic preference options by allowing locally grown, raised, or caught as procurement specifications (a written description of the product, or service that the vendor must meet to be considered responsive and responsible) for unprocessed or minimally processed food items in the child nutrition programs. This is intended to increase the procurement of local foods and ease procurement challenges for operators interested in sourcing food from local producers. USDA requested public input on whether respondents agree that this provision would ease procurement challenges for child nutrition program operators or if it would encourage smaller-scale producers to submit bids to sell foods to child nutrition programs. No specific cost impact is being estimated for this provision

[109] As explained in the PRA (Paperwork Reduction Act program).

[110] Using the U.S. Bureau of Labor Statistics series ID of CMU3019200000000D of total compensation cost per hour worked for state and local government workers in public administration industries (*https://data.bls.gov/cgi-bin/dsrv*).

[111] See final rule Paperwork Reduction Act (PRA) burden charts.

[112] Record keeping costs are total annual estimates for the final Buy American provision, not estimates per phase of implemented cap. No inflation adjustment was completed for record keeping costs since they are not food costs or based on a factor of food costs.

since USDA does not have any applicable data, but USDA assumes that this option will be used at school food authority discretion depending on individual school budgets, the availability of local products, and other school and region-specific factors. USDA research found that among school food authorities participating in Farm to School, 85 percent served at least some local foods, and about 20 percent of participating school food authorities' total food spending was on local foods in School Year 2018–2019. In this same period, one-fifth of participating school food authorities used geographic preference in its current form to prioritize local foods in the bid or proposal evaluation process.[113] Therefore, the expansion of geographic preference options may facilitate increased local food purchases by school food authorities at their discretion.

Miscellaneous Changes

This section establishes a variety of miscellaneous changes and updates to child nutrition program regulations, including terminology changes, from the 2023 proposed rule. For the ''legumes (beans and peas)'' vegetable subgroup, this rule changes the name to ''beans, peas, and lentils'' to reflect the *Dietary Guidelines, 2020–2025.* As noted in the rule preamble, the rule also finalizes a variety of technical corrections, including correcting cross-references, updating definitions, removing outdated requirements, and revisions to the meal pattern tables to make them more user-friendly.

Summary

As noted above, this rule was developed in order to align school nutrition requirements more closely with the goals of the *Dietary Guidelines for Americans, 2020–2025* and to support the continued transition to long-term requirements after the pandemic and implementation of the transitional standards rule. Most of the impacts associated with this rule are in the form of shifts in purchasing patterns and increased labor costs. Costs in this section are uncertain (and thus estimates should be considered as somewhat imprecise) but reflect the potential value of the changes in this rule that States and local entities may need to account for. There are no estimated changes in Federal costs due to the changes in this final rule.

TABLE 20: ESTIMATED ANNUAL COSTS IN MOVING FROM TRANSITIONAL STANDARDS RULE TO THIS RULE BEGINNING BY SCHOOL YEAR (MILLIONS), ADJUSTED FOR ANNUAL INFLATION[114,115]

YEAR OF IMPLEMENTATION	SY 2024-2025	SY 2025-2026	SY 2026-2027	SY 2027-2028	SY 2028-2029	SY 2029-2030	SY 2030-2031	SY 2031-2032	Total	Annual Average[116]
ADMINISTRATIVE COSTS[117]	$42	$43	$0	$44	$0	$0	$0	$0	$129	$16
ADDED SUGARS	$0	$112	$116	$121	$125	$131	$136	$141	$881	$110
MILK	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
SODIUM	$0	$0	$0	$128	$133	$138	$144	$149	$691	$86
AFTERSCHOOL SNACKS	$0	-$9	-$9	-$10	-$10	-$11	-$11	-$12	-$72	-$9
SUBSTITUTING VEGETABLES FOR FRUITS AT BREAKFAST	-$4	-$4	-$4	-$5	-$5	-$5	-$5	-$5	-$37	-$5
BUY AMERICAN[118]	$15	$5	$5	$5	$5	$5	$5	$8	$52	$7
TOTAL	$53	$146	$107	$283	$248	$258	$268	$281	**$1,645**	**$206**
TOTAL PER MEAL	**$0.008**	**$0.023**	**$0.017**	**$0.045**	**$0.040**	**$0.041**	**$0.043**	**$0.045**	**NA**	**$0.033**

The estimated cost to schools averages $206 million annually over eight school years, or $0.03 per lunch and breakfast in food and labor costs (table 20). The majority of costs associated with this rule are a result of purchasing different products with less sodium and the additional labor needed to increase scratch cooking, update menus, and introduce new recipes to reduce sodium. The estimated cost of shifting to the product specific added sugars limits and substituting vegetables for fruits is based on switching to products already available on the market; costs to schools may vary if manufacturers alter products or create new products to meet the added sugars regulations. However, we estimate cost savings to update the requirements for afterschool snacks related to food prices to meet the breakfast cereal and yogurt product-based added sugars limits. The costs associated with Buy American are due to additional food costs and additional burden hours for documentation. All estimates from this rule, intending to implement achievable requirements in alignment with the goals of the *Dietary Guidelines,* are supported by a variety of analyses of the most recently available data.

VI. Uncertainties/Limitations

Many assumptions were made in this analysis of this rule's impacts, and the resulting uncertainties and limitations must be acknowledged. Some general limitations are noted first, followed by limitations specific to sections and then a discussion of the uncertainty of school meal program participation levels going forward. Some of these uncertainties and limitations result from this rule being written directly after extended use of COVID–19 meal pattern waivers, in which assumptions must be made about future participation in school meal programs, and others result from unknown future food and labor price trajectories.

General

Due to the pandemic, the next edition of the School Nutrition Meal Cost Study (II) was delayed, thus leaving the SY 2014–2015 data from the first version of that study as the most recent data that could be used for this analysis. Product availability and costs have likely changed from SY 2014–2015 and will continue to change through the implementation date of this rule (SY 2024–2025, although required changes will be phased in over time). Because the transitional standards rule went into effect recently, it is unclear how well schools will adapt to the updated requirements in this rule. A lack of recent data on school staffing levels and impacts of the pandemic in all aspects of school foodservice make it challenging to estimate changes in staffing cost, especially as it affects changes in the need for scratch cooking and professional standards final regulations.

USDA acknowledges that the data used to evaluate cost, although the most recent available data, is relatively old. One remedy has been to adjust for inflation from SY 2014–2015 to the years of implementation prescribed in this rule. However, as noted throughout the analysis, it is possible that

[113] Bobronnikov, E. et al. (2021). Farm to School Grantee Report. Prepared by Abt Associates, Contract No. AG–3198–B–16–0015. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Ashley Chaifetz.

[114] Values reflect annual costs from sections above with added three percent annual inflation. Costs are also shown by school year in this table. This varies from table 1 which shows fiscal years and does not include expected annual inflation through the duration of the final rule.

[115] Due to rounding, numbers may not add up to rounded sum in 'total' column exactly.

[116] Annual average over 8 school years of rule implementation.

[117] Only local costs (not State costs) are adjusted for inflation because they are based on a factor of food-costs.

[118] Only food costs (not record keeping) are adjusted for inflation.

changes in product formulation, availability, and cost have occurred in the years since these data were collected. Among the more significant changes in this rule are the requirements to reduce levels of sodium and added sugars in school meals. USDA conducted additional analysis of these two changes in order to more fully account for possible cost impacts. A sensitivity analysis shows a range of possible cost impacts from half the estimated cost impact to double the cost impact of the added sugars and sodium provisions (table 21). It is possible that the impacts could be higher or lower in the future, but this sensitivity analysis shows a range in costs to illustrate the potential magnitude of change. If the costs of food with lower sodium and lower added sugars has doubled since SY 2014–2015, then the costs of implementing this rule would be considerably higher. However, if the market has changed already due to the CACFP total sugar limits, public desire for healthier packaged food options, and the FDA voluntary sodium reduction goals, then it is possible that the cost differential has already decreased.

TABLE 21: SENSITIVITY ANALYSIS - ESTIMATED 7-YEAR COST DIFFERENTIALS OF REDUCING SODIUM AND ADDED SUGARS IN SCHOOL MEALS (MILLIONS), ADJUSTED FOR ANNUAL INFLATION[119]

SODIUM LIMIT EFFECTIVE SCHOOL YEAR	SY 2025 - 2026	SY 2026-2027	SY 2027-2028	SY 2028-2029	SY 2029-2030	SY 2030-2031	SY 2031-2032	7-YEAR TOTAL	ANNUAL AVERAGE
ADDED SUGARS									
SY 2014-2015 ESTIMATES	$112	$116	$121	$125	$131	$136	$141	$881	$110
HALF COST DIFFERENTIAL	$56	$58	$60	$63	$65	$68	$71	$441	$63
DOUBLE COST DIFFERENTIAL	$223	$232	$241	$251	$261	$271	$282	$1,762	$252
SODIUM									
SY 2014-2015 ESTIMATES	$0	$0	$128	$133	$138	$144	$149	$691	$86
HALF COST DIFFERENTIAL	$0	$0	$64	$66	$69	$72	$75	$346	$69
DOUBLE COST DIFFERENTIAL	$0	$0	$255	$265	$276	$287	$299	$1,383	$277
TOTAL									
SY 2014-2015 ESTIMATES	$112	$116	$248	$258	$269	$279	$290	$1,573	$197
HALF COST DIFFERENTIAL	$56	$58	$124	$129	$134	$140	$145	$786	$132
DOUBLE COST DIFFERENTIAL	$223	$232	$497	$516	$537	$559	$581	$3,145	$528

Another area of uncertainty is about the types of products available from manufacturers, especially those products that are created for school foodservice. Certain products will be eliminated, others will be reformulated, and the dimensions of such product changes are difficult to predict. Product lines that have been created specifically for schools may become more common with this rulemaking. School food authorities have also faced supply chain delays in recent years that may continue. About 92 percent of school food authorities reported experiencing challenges due to supply chain disruptions in SY 2021–2022, including product availability, orders arriving with missing or substituted items, and labor shortages.[120] In addition, it may take longer to reformulate certain product lines than anticipated. Food manufacturers play an integral role in school food service operations and in the ability for school food authority menus to meet regulations, especially when it comes to added sugars, milk, whole grains, and sodium.

For this analysis, HEI scores were used to measure the alignment of school menus with recommendations from the *Dietary Guidelines.* The HEI measure has a few limitations as used for this analysis. HEI component scores for added sugars and sodium only reflect one aspect of the diet, not a complete diet. HEI scores were originally designed to measure a full day of intake, not necessarily to evaluate one or two meals a day. Another limitation regarding HEI scores is that the calculation does not exactly align with the recommendations in the *Dietary Guidelines* but is a tool to evaluate nutrient density of foods consumed throughout an entire day. For instance, a maximum score for the sodium component is achieved if sodium content is ≤1.1 grams of sodium per 1,000 kilocalories (HEI–2010 and HEI–2015) and a maximum score for the added sugars component is achieved if added sugars are at ≤6.5 percent of total energy (HEI–2015).[121] The *Dietary Guidelines for Americans, 2020–2025* sodium recommendations are based on the sodium DRIs and the added sugar recommendations are more liberal at 10 percent when considering the entire population, including adults. While these are limitations of using the HEI score and component scores, HEI is still a valuable tool to evaluate meals in a standardized way that allows for comparison and measuring improvement over time.

Decreasing sodium and added sugars menu content may inadvertently increase other nutrients such as fat and protein. It is uncertain what the effect of these changes across this final rule will have on average across school food authorities since there are so many combinations of food groups and permutations of menu changes. For example, a decrease in added sugars content alone could inadvertently increase sodium content through usage of more meat/meat alternate products on menus. School nutrition program directors will have to be aware of possible tradeoffs when making menu changes.

The adaptability of children's taste preferences is at the root of the way the final rule impacts for sodium have been measured. Typical benefit-cost analysis of a policy intervention of the type in this rulemaking often uses a willingness-to-pay (WTP) measure.[122] WTP reflects underlying preferences—in this case, preferences for

[119] Product-specific added sugars limits and weekly added sugars and sodium limits included in this final rule will not take effect until SY 2025–2026 and SY 2027–2028, respectively.

[120] Results of USDA's FNS-Administered SFA Survey II on Supply Chain Disruption and Student Participation | Food and Nutrition Service.

[121] *https://epi.grants.cancer.gov/hei/comparing.html.*

[122] Either a direct WTP estimate could be developed or a multistep estimation could quantify health and longevity effects with lost eating-experience utility subsequently being subtracted. For example, in the context of sugar-sweetened beverages (SSB), Kalamov and Runkel (2021), citing Allcott et al.'s (2019) estimates, suggest that internalities (representing the harm consumers of relatively unhealthy foods suboptimally impose on their future selves) could be 30- to 50-percent of gross health impacts; it is the 30- to 50-percent that would appropriately be retained in an analysis of the intrapersonal benefits of a policy that reduces consumption of SSB or foods with similar characteristics. Kalamov, Z. Y. and M. Runkel, *Taxation of unhealthy food consumption and the intensive versus extensive margin of obesity.* International Tax and Public Finance, 2021: p. 1–27. Allcott, H., B. B. Lockwood, and D. Taubinsky, *Regressive sin taxes, with an application to the optimal soda tax.* The Quarterly Journal of Economics, 2019. 134(3): p. 1557–1626.

food characteristics, including both health consequences and short-term eating experience—and if preferences are unstable, then key inputs to the analysis are not well-defined. Indeed, shifting taste preferences (when they are malleable during childhood) away from foods with high levels of sodium is a key expected outcome of this final rule.

Health Benefits

The financial impacts of changes that affect our health can be challenging to quantify, especially for a younger, student population. A 2023 study used NHANES data to evaluate the health and economic effects of school meal requirements consistent with the *Dietary Guidelines for Americans, 2020–2025*—namely added sugars, sodium, and whole grains. The study estimated that, if only 25 percent of school children's dietary changes were maintained into adulthood, that would prevent 7,760 adult deaths and save $14 billion in medical costs annually.[123] Such estimates are model projections and do not prove the extent of health-related benefits over time. While a variety of studies have shown that habits developed in childhood can track into adulthood,[124 125] it is unclear what proportion of individuals hold to this trend and the related level of reduced chronic health conditions in adults consuming healthier meals during childhood and adolescence.

As detailed above in the 'Impacts' section, reducing intake of added sugars can result in reductions in T2D, CVD, and chronic kidney disease. Consumption of meals with low-fat dairy (including low-fat milk) and whole grains was associated with lower blood pressure and improved blood lipid levels. Throughout the lifespan, consumption of whole grains has been shown to reduce the risk of CVD, T2D, and some types of cancer. Reducing sodium intake has been shown to reduce blood pressure in children of all ages, and in turn to reduce CVD incidence.[126]

Despite the challenges of quantifying the costs or savings resulting from improved health outcomes in children, there are some available studies that quantify these findings in adults for major health outcomes. For instance, annual medical costs for individuals with high blood pressure are up to $2,500 higher than costs for people without high blood pressure,[127 128] resulting in a $79 billion total annual medical cost associated with high blood pressure in the U.S.[129] From 1996 to 2016, there was an increase of over $100 billion in spending on adult CVD, to a total of $320 billion spent in 2016 in the U.S., reported in 2016 dollars.[130] This indicates that a reduction in CVD overall could result in significant savings. One model from 2017 showed ''clear and significant benefits for interventions that reduce consumption of added sugars.'' The study found that reducing added sugar consumption by 20 percent would mean lower annual direct medical costs for U.S. adults by more than $10 billion. While the study only modelled the population with an age over 20, it noted that including interventions for children, especially with T2D, would lead to additional benefits.[131] A scientific statement from the American Heart Association noted that CVD ''is the leading cause of death in North Americans and generates tremendous personal and economic burden globally.'' [132] The most expensive chronic condition in the U.S. is diabetes, with a $327 billion annual cost ($237 billion of which are medical costs).[133] The cost and benefit estimates from these studies may be subject to a variety of limitations depending on study design and available data; however, these estimates help to provide insight into potential savings associated with consuming a healthy diet over the lifespan. While there is some cost associated with improving the dietary intake of school-aged-children through school meals and other child nutrition programs, the potential savings in adulthood through reduced medical costs and increased productivity could be substantial, especially when considering blood pressure, CVD, and diabetes.

Added Sugars

For milk products, the market availability of flavored milks that meet the added sugars limit of ≤10 mg of added sugars per 8 fluid ounces is uncertain. While a limited search completed in 2022 by USDA showed that some manufacturers are already producing flavored milks that meet the added sugars limit, the full availability across the nation is unclear, as is whether it will be a slow transition for manufacturers.[134] It is possible that some school food authorities will need to serve unflavored milk varieties only, temporarily, if the availability of flavored milks with a lower level of added sugars is limited. However, a recent commitment from the milk industry states that, beginning in SY 2025–2026, 37 school milk processors representing more than 90 percent of the school milk volume in the United States commit to provide school milk options with no more than 10 grams of added sugar per 8 fluid ounce serving. This would improve the market availability of flavored milks that meet the added sugars limit finalized in this rule in time for implementation in SY 2025–2026.[135]

Milk

With regards to milk, there is some uncertainty about the differences in price by milk type. When comparing the average price per eight fluid ounces of milk in SY 2009–2010 data to the average price in SY 2014–2015 data, both show small differences in prices by milk type, although those differences are not consistent between the two time periods. For instance, in the SY 2009–2010 data, flavored, low-fat milk cost $0.02 more per carton than other milk types (flavored, fat-free milk, unflavored, low-fat milk, and unflavored, fat-free milk). In the SY 2014–2015 data, however, flavored, low-fat milk cost $0.01 more than flavored, fat-free milk, and flavored, fat-free milk cost $0.01 more than unflavored, fat-free milk. More data regarding these cost differences are in table 22.

USDA acknowledges the possibility that this rule and the transitional standards rule may cause, or have already caused, milk product prices to change and that school milk prices have been similar by fat content and flavor status in the past. A comparison of the potential impacts of the added sugars limits for milk using milk prices in the two different data collection time points (SY 2009–2010 and SY 2014–2015) is included below.

[123] Wang L, Cohen J, Maroney M, et al. Evaluation of health and economic effects of United States school meal standards consistent with the 2020–2025 dietary guidelines for Americans. The American Journal of Clinical Nutrition. 2023. DOI: *https://doi.org/10.1016/j.ajcnut.2023.05.031*.

[124] Lioret S, Campbell KJ, McNaughton SA, et al. Lifestyle Patterns Begin in Early Childhood, Persist and Are Socioeconomically Patterned, Confirming the Importance of Early Life Interventions. Nutrients. 2020;12(3):724. Published 2020 Mar 9. doi:10.3390/nu12030724.

[125] Movassagh EZ, Baxter-Jones ADG, Kontulainen S, Whiting SJ, Vatanparast H. Tracking Dietary Patterns over 20 Years from Childhood through Adolescence into Young Adulthood: The Saskatchewan Pediatric Bone Mineral Accrual Study. Nutrients. 2017;9(9):990. Published 2017 Sep 8. doi:10.3390/nu9090990.

[126] More detailed explanations of health effects of the most impactful provisions are in the 'Impacts' section above.

[127] Wang G, Zhou X, Zhuo X, Zhang P. Annual total medical expenditures associated with hypertension by diabetes status in US adults. Am J Prev Med. 2017;53(6 suppl 2):S182–S189.

[128] Kirkland EB, Heincelman M, Bishu KG, et al. Trends in healthcare expenditures among US adults with hypertension: national estimates, 2003–2014. J Am Heart Assoc. 2018;7(11).pii: e008731.

[129] Dieleman JL, Cao J, Chapin A, et al. US Health Care Spending by Payer and Health Condition, 1996–2016. 2020;323(9):863–884. doi:10.1001/jama.2020.0734.

[130] Birger M, Kaldjian AS, Roth GA, Moran AE, Dieleman JL, Bellows BK. Spending on Cardiovascular Disease and Cardiovascular Risk Factors in the United States: 1996 to 2016. Circulation. 2021;144(4):271–282. doi:10.1161/CIRCULATIONAHA.120.053216.

[131] Vreman RA, Goodell AJ, Rodriguez LA, et al. Health and economic benefits of reducing sugar intake in the USA, including effects via non-alcoholic fatty liver disease: a microsimulation model. BMJ Open. 2017 Aug 3;7(8):e013543. doi: 10.1136/bmjopen-2016–013543. PMID: 28775179; PMCID: PMC5577881.

[132] Vos MB, Kaar JL, Welsh JA, American Heart Association, et al. Added Sugars and Cardiovascular Disease Risk in Children: A Scientific Statement From the American Heart Association. Circulation. 2017 May 9;135(19):e1017-e1034. doi: 10.1161/CIR.0000000000000439. Epub 2016 Aug 22. PMID: 27550974; PMCID: PMC5365373.

[133] American Diabetes Association. Economic costs of diabetes in the US in 2017. Diabetes Care. 2018;41:917–928.

[134] The search was conducted in 2022, however some product catalogs were older. It was found that at least four manufacturers had at least one flavored milk product with under 10 grams of added sugars per serving and in fact, three of them had products with six grams of added sugars per serving. A total of 10 flavored milk products from four companies were below the 10-gram added sugars limit. The catalogs used for data collection generally showed that there were lower sugar and higher sugar versions of flavored milk available.

[135] The Healthy School Milk Commitment—IDFA.

TABLE 22. COMPARISON OF COST OF MILK PER EIGHT FLUID OUNCES BY MILK TYPE DURING TWO DATA COLLECTIONS

	SY 2009-2010 Data	SY 2014-2015 Data
LOW-FAT, FLAVORED	$0.21	$0.25
LOW-FAT, UNFLAVORED	$0.19	$0.24
FAT-FREE, FLAVORED	$0.19	$0.24
FAT FREE, UNFLAVORED	$0.19	$0.25

As noted above, on average, low-fat, flavored milk cost $0.01 more than low-fat, unflavored milk per carton (8 fluid ounces) in the SY 2014–2015 data, and fat-free, flavored milk cost $0.01 less than fat-free, unflavored milk per carton. If across all NSLP and SBP menus, all fat-free, flavored milk was replaced with low-fat, flavored milk, it would cost about $85 million more a year (using updated data from SY 2014–2015). Any change to low-fat, flavored milk from fat-free, flavored milk must be made within available resources and calorie and fat limits, and upon implementation, added sugars limits, so it is unlikely that all school food authorities will make this change for all flavored milk offerings. USDA estimates this to be about $9 million more a year in the value spent on milk (table 23). By using the updated milk cost data, the annual cost of purchasing low fat flavored milk is about 30 percent less than the cost using the SY 2009–2010 data, adjusted for inflation (table 23).

TABLE 23: ESTIMATED IMPACT OF PURCHASING LOW-FAT, FLAVORED MILK (MILLIONS) WITH UPDATED DATA

SUBSTITUTION LEVEL	Estimated Annual Cost with SY 2009-2010 Data	Estimated Annual Cost with SY 2014-2015 Data
MAXIMUM – REPLACE ALL FAT-FREE, FLAVORED WITH LOW FAT FLAVORED	$126	$85
MINIMUM - 9 PERCENT OF DAILY MENUS REPLACED FAT-FREE, FLAVORED WITH LOW-FAT, FLAVORED (BASED ON EXEMPTION DATA)[125]	$13	$9

Whole Grains

Due to the age of the available data, it is unknown if schools made substantial changes in the proportion of whole grain-rich items served during the time from SY 2014–2015 to SY 2019–2020. In order to update the RIA with SY 2014–2015 data, the analysis also incorporated whole grain-rich based combination entrées because they contribute importantly to daily intake in school meals, according to the SNMCS report.[136] However, the cost of combination entrees also includes the cost of other food groups, so the cost comparison was based on a cost per grain portion of the combination entrées. The values are still comparable because the same methodology was used for whole grain-rich items and the non-whole grain-rich items overall, but it is not possible to compare to the transitional standards rule RIA methodology which included bulk cost data from another source.[137]

Sodium

A limitation in the cost analysis of sodium is that the sodium limit is meant to be met by product reformulation, changing food menu items, and scratch cooking, so the assumptions about the cost distribution, 45 percent food, 45 percent labor, and 10 percent other, might not be accurate or complete. As a result, the costs of the sodium limits were not adjusted to account for additional costs of equipment as part of an estimate for this 'Uncertainties/Limitations' section. This is a limitation because the exact needs of each school food authority to equip kitchens for scratch cooking and menu changes are not known.

This additional analysis provides a high and low estimate of the costs to schools for equipment that would allow them to reach the sodium limits established in this rule. About half of schools make under 50 percent of their recipes from scratch according to the Farm to School Census data.[138] In the 2012 rule, estimates based on public comments regarding the sodium targets were included in the Uncertainties discussion to calculate potential equipment costs; around $5,000 per school for approximately half of schools.[139]

Adjusting for inflation, this would be equivalent to $7,700 beginning in SY 2025–2026 for about 50,000 schools, which was the basis of the equipment cost estimate used for the proposed sodium limits of several 10 percent reductions for breakfast and lunch. However, since the final sodium limit implements only one 10–15 percent sodium reduction, we assume fewer equipment costs than the proposed rule. On the low end, we estimate a quarter of all schools will spend an average of $3,850 on equipment costs, for a total of about $100 million. As an upper bound, we assume schools may need more equipment to adapt to the reduced sodium limits, spending an average of $7,700 spread over the two school years prior to the SY 2027–2028 implementation year. This would be equivalent to about $200 million across two school years (SY 2025–2026 and SY 2026–2027). These estimates, adjusted for inflation, are shown below in table 24 with the low end estimate accounting for $30 million in equipment grants that are available annually. The actual costs for equipment may be higher as the exact needs of schools for equipment and remodeling to increase scratch cooking are unknown. Examples of equipment needed by schools to improve the appearance, safety, and healthfulness of food include ovens, skillets, broilers, refrigerators or freezers, serving equipment, steam equipment, and food preparation equipment.[140] It is also possible that schools may sustain higher costs as a result of purchasing more pre-made meals and foods through food service companies if they do not have the necessary equipment to lower sodium content through scratch cooking or menu reformulation.

[136] *https://fns-prod.azureedge.us/sites/default/files/resource-files/SNMCS-Volume2.pdf.*

[137] School Food Purchase Study III.

[138] Bobronnikov, E. et al. (2021). Farm to School Grantee Report. Prepared by Abt Associates, Contract No. AG–3198–B–16–0015. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Project Officer: Ashley Chaifetz.

[139] **Federal Register**: Final Rule: Nutrition Standards in the National School Lunch and School Breakfast Programs.

[140] U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Child Nutrition Program Operations Study (CN–OPS–II): SY 2015–16 by Jim Murdoch and Charlotte Cabili. Project Officer: Holly Figueroa. Alexandria, VA: December 2019.

TABLE 24: ESTIMATED COSTS OF EQUIPMENT FOR IMPLEMENTING NEW SODIUM REDUCTION PLAN (MILLIONS) [141]

SODIUM LIMIT EFFECTIVE SCHOOL YEAR	SY 2025 - 2026	SY 2026-2027	TOTAL
LOW END ESTIMATES[142]	$0	$70	$70
HIGH END ESTIMATES	$48	$152	$200

Participation Impacts

As noted earlier, in the Key Assumptions section, participation costs associated with this rule are based on a level of service in school lunch and breakfast programs that mirrors the 2023 level of service. There are multiple contributing factors that may lead to an increased or decreased level of school meal participation in these years after the pandemic. Due to the uncertainty of the direction of student participation, a variety of possibilities are detailed here and the change in cost is simulated below (table 25). Nearly three-quarters of school food service directors reported that gaining student acceptance of the meal pattern standards, particularly whole grains, was moderately to extremely challenging with respect to maintaining student participation.[143] If there is a similar downward trend in student participation as a result of sodium and added sugar standards, there would be a corresponding reduction in food costs and potentially a reduction in labor hours. USDA is not aware of any evidence to support that there is a correlation between updates to school meal patterns and student participation, however. If student participation increases, there would be an expected increase in food and labor costs, but potentially a reduction of cost due to economies of scale as the operation scale increases. Relatedly, more states and schools are offering Healthy School Meals for All due to the realized benefits of free school meals during the COVID pandemic. [This could be through State initiatives [144] or increased use of Community Eligibility Provision (CEP).] Research has shown that schools offering all meals at no charge through CEP experience higher student participation levels and increases in Federal revenues.[145] These revenue increases may offset (from the local perspective, though not from the nationwide perspective) some of the estimated costs associated with this rule.

TABLE 25: PROJECTED COSTS BY STUDENT PARTICIPATION CHANGE (MILLIONS)

	ONE-YEAR	8-YEAR TOTAL
FULL PARTICIPATION	$206	$1,645
ESTIMATED COSTS IF SCHOOL MEAL PARTICIPATION INCREASES		
2.5 PERCENT PARTICIPATION INCREASE	$211	$1,686
5 PERCENT PARTICIPATION INCREASE	$216	$1,727
10 PERCENT PARTICIPATION INCREASE	$226	$1,809
ESTIMATED COSTS IF SCHOOL MEAL PARTICIPATION DECREASES		
2.5 PERCENT PARTICIPATION DECREASE	$200	$1,604
5 PERCENT PARTICIPATION DECREASE	$195	$1,563
10 PERCENT PARTICIPATION DECREASE	$185	$1,480

Improving meal pattern requirements may have corresponding impacts on student participation. After publication of the updated meal patterns in the 2012 final rule, which were implemented in SY 2012–2013 and beyond, there were variable changes to school meal program participation. Total breakfasts served increased steadily between fiscal year 2012 and fiscal year 2016. School lunches served decreased by approximately three percent between fiscal year 2012 and fiscal year 2016. However, similar breakfast and lunch trends existed prior to fiscal year 2012 [146] and the exact relationship between the new meal patterns and participation changes is unclear based on these data.

Other factors unrelated to meal pattern requirements may also impact student participation. In 2014, a sample of principals and foodservice managers in elementary schools indicated that 70 percent of students ''generally seem to like the new school lunch'' and 78 percent said participation in school lunch was the same or more than the previous year.[147] However, about 25 percent of those surveyed still disagreed that students seemed to like lunches offered under the new requirements. CEP became available to all school districts nationwide in SY 2014–2015, and rates of SBP and NSLP participation increased in SY 2016–2017 in school districts that had implemented CEP.[148] As participation in CEP continues to expand it is possible there may be some offset of any downward trend in school lunch participation though USDA has no evidence to support that this is likely to occur. While student participation may be variable following implementation of this rule, it is known that students who participate in the school meal programs consume more whole grains, fruits, vegetables, and milk than non-participants, leading to a better quality of daily diet overall.[149]

It is assumed that levels of SBP and NSLP participation will continue to increase to pre-pandemic rates, but it is difficult to know how long the supply chain disruptions and

[141] Changes to sodium limits as a result of this final rule will not take effect until SY 2027–2028.

[142] Includes the $30 million offset of annually available equipment grants.

[143] U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, Child Nutrition Program Operations Study (CN–OPS–II): SY 2017–18. Beyler, Nick, Jim Murdoch, and Charlotte Cabili. Project Officer: Holly Figueroa. Alexandria, VA: November 2022. *https://fns-prod.azureedge.us/sites/default/files/resource-files/CNOPS-II-SY2017-18.pdf.*

[144] *https://www.cde.ca.gov/ls/nu/sn/cauniversalmeals.asp.*

[145] *https://fns-prod.azureedge.us/sites/default/files/resource-files/CEPSY2016-2017.pdf.*

[146] USDA—Food and Nutrition Service, National Data Bank—Publicly available data.

[147] Turner, Lindsey, and Frank Chaloupka (2014). ''Perceived Reactions of Elementary School Students to Changes in School Lunches after Implementation of the United States Department of Agriculture's New Meals Standards: Minimal Backlash, but Rural and Socioeconomic Disparities Exist,'' Childhood Obesity 10(4):1–8.

[148] *https://fns-prod.azureedge.us/sites/default/files/resource-files/CEPSY2016-2017.pdf.*

[149] ox MK, Gearan E, Cabili C, et al. School Nutrition and Meal Cost Study, Final Report Volume 4: Student Participation, Satisfaction, Plate Waste, and Dietary Intakes. U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support; 2019. *https://www.fns.usda.gov/school-nutrition-and-meal-cost-study.*

staffing challenges will continue. A variety of Executive orders and plans within the Federal Government have been employed to track and address supply chain disruptions, as well as a task force with a focus on supply chain issues.[150] The U.S. Department of Transportation reported improvements in supply chain disruption in early 2022, but there are still existing stressors in the U.S. supply chain.[151 152] Unemployment levels have returned to pre-pandemic rates as of mid-2022, and gains are continuing in the hospitality sector, so it is likely staffing challenges in school food service will continue to improve.[153] These disruptions in service have created additional burden for school food authorities and it is possible this burden may hold on for a few years, potentially affecting student participation in school meal programs. USDA recognizes that schools may have been offering meals that were higher in sodium under the COVID–19 meal pattern waivers. The sodium limits finalized in this rule, which align with Sodium Target 2 from the 2012 final rule, will be gradually implemented. This gradual approach, which requires implementation in SY 2027–2028, is expected to ease implementation for schools as they adjust to the new limits. There is potential for a decrease in participation if students find meals less desirable because of lower added sugars and sodium levels, though USDA has no evidence to support that this has occurred during prior meal pattern updates. However, research indicates that a 10 percent sodium reduction in individual food products does not substantially impact consumer approval.[154] If there is a five percent decrease in participation of school meal programs, then the readily quantifiable annual cost of this rule would be $195 million, or $1.6 billion over the eight years (table 25).[155] Other possible levels of decrease in participation are also provided.

Many students who had never participated in the NSLP and SBP prior to the pandemic but who did participate under USDA's COVID–19 nationwide waivers may have found a level of convenience associated with participating in the school meals programs instead of eating breakfast at home or bringing a lunch from home. Parents and guardians may also find that school meals with reduced sodium and added sugars are a healthier option than meals that were available at school previously. If there is a five percent increase in participation of school meal programs, then the quantified annual cost of this rule would be $216 million, or $1.7 billion over the eight years (table 25).[156] Costs associated with other possible levels of potential increase in participation are provided. It is possible that an increase in revenue resulting from greater participation in school meal programs would offset some of the costs that occur from implementation of this rule.

VII. Benefits of the Rule and Other Discussion

Health Benefits

The goal of this rule is to more closely align school meals with the goals of the *Dietary Guidelines for Americans, 2020–2025.* The *Dietary Guidelines* are meant to promote health, prevent and reduce risk of chronic disease, and meet nutrient needs.[157] School meals are an important source of nutrition for school age children. Pandemic disruption to school operations demonstrated the continued importance of child nutrition programs including the NSLP and SBP.

Making the changes outlined in this rule can lead to improved health outcomes in the long-term. Lifestyle habits including dietary habits are established in childhood and research has shown that they may carry through into adulthood.[158 159] The two most impactful changes in this rule are reductions in added sugars and sodium content of school meals. Reducing sodium and added sugars intake is associated with a variety of potential health benefits that are detailed above in the sodium and added sugars 'Impacts' sections. Reduction in sodium intake reduces blood pressure which in turn can reduce CVD risk and CVD events. Added sugars consumption is associated with a variety of potential chronic health conditions, including CVD and T2D, and risk factors for these chronic diseases. While this rule maintains the existing whole grain-rich requirements for school meals, it is of note that increased whole grain consumption is associated with an improved overall dietary pattern.[160] On average, in SY 2014–2015, 70 percent of the weekly menus offered at least 80 percent of the grain items as whole grain-rich for both breakfast and lunch.[161] Recent research evaluating the health benefits of aligning the school meal nutrition requirements with the *Dietary Guidelines for Americans, 2020–2025* found an association of 7,760 fewer annual deaths due to CVD and cancer and save $13.8 billion in healthcare-related costs annually if 25 percent of school children's dietary changes were sustained into adulthood.[162] Systematic review evidence also exists that shows intake in children of healthier dietary patterns including ''higher intakes of vegetables, fruits, whole grains, fish, low-fat dairy, legumes, and lower intake of sugar-sweetened beverages, other sweets, and processed meat,'' are associated with lower blood pressure and improved blood lipid levels later in life.[163 164] These dietary patterns associated with improved health outcomes have higher intake of whole grains and lower intake of both foods high in sodium and high in added sugars. Improvements in school meals finalized in this rule, with a focus on sodium and added sugars reduction, will lead to healthier dietary intake and improved health outcomes over time.

This rule also includes sections on traditional Indigenous foods that may have

[150] *https://crsreports.congress.gov/product/pdf/IN/IN11927.*

[151] *https://www.transportation.gov/briefing-room/usdot-supply-chain-tracker-shows-progress-supply-chains-remain-stressed.*

[152] Results of USDA's Food and Nutrition Service-Administered School Food Authority Survey II on Supply Chain Disruption and Student Participation (*azureedge.us*).

[153] *https://www.bls.gov/news.release/pdf/empsit.pdf.*

[154] Cobb LK, Appel LJ, Anderson CA. Strategies to reduce dietary sodium intake. *Curr Treat Options Cardiovasc Med.* 2012;14(4):425–434. doi:10.1007/s11936–012–0182–9.

[155] If the decrease in participation is caused by provisions of this final rulemaking, then there would be other effects—for example, incremental health consequences of revised eating patterns, or the transition cost to parents and guardians as they make other eating arrangements for their children—that would also be attributable to the rule. By contrast, if participation decreases due to unrelated trends, then the quantified cost estimates would be as reported here but the (unquantified) accompanying effects would not be attributable to this final rule.

[156] If the increase in participation is caused by provisions of the final rule, then there would be other effects—for example, incremental health consequences of revised eating patterns—that would also be attributable to the provision. By contrast, if participation increases due to unrelated trends, then the quantified cost estimates would be as reported here but the unquantified accompanying effects would not be attributable to the final rule.

[157] U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines* for Americans, 2020–2025. 9th Edition. December 2020. Available at *DietaryGuidelines.gov.*

[158] Grummer-Strawn LM, Li R, Perrine CG, Scanlon KS, Fein SB. Infant feeding and long-term outcomes: results from the year 6 follow-up of children in the Infant Feeding Practices Study II. *Pediatrics.* 2014;134 Suppl 1(Suppl 1):S1–S3. doi:10.1542/peds.2014–0646B.

[159] Lioret S, Campbell KJ, McNaughton SA, et al. Lifestyle Patterns Begin in Early Childhood, Persist and Are Socioeconomically Patterned, Confirming the Importance of Early Life Interventions. *Nutrients.* 2020;12(3):724. Published 2020 Mar 9. doi:10.3390/nu12030724.

[160] Albertson AM, Reicks M, Joshi N, Gugger CK. Whole grain consumption trends and associations with body weight measures in the United States: results from the cross sectional National Health and Nutrition Examination Survey 2001–2012. Nutr J. 2016;15:8. Published 2016 Jan 22. doi:10.1186/s12937–016–0126–4.

[161] Based on an internal USDA analysis using data from: U.S. Department of Agriculture, Food and Nutrition Service, School Nutrition and Meal Cost Study Final Report Volume 2: Nutritional Characteristics of School Meals, by Elizabeth Gearan et.al. Project Officer, John Endahl, Alexandria, VA: April 2019. Available online at: *www.fns.usda.gov/research-and-analysis.*

[162] Wang L, Cohen J, Maroney M, et al. Evaluation of health and economic effects of United States school meal standards consistent with the 2020–2025 dietary guidelines for Americans. The American Journal of Clinical Nutrition. 2023. DOI: *https://doi.org/10.1016/j.ajcnut.2023.05.031.*

[163] 2020 *Dietary Guidelines* Advisory Committee and Nutrition Evidence Systematic Review Team. Dietary Patterns and Risk of Cardiovascular Disease: A Systematic Review. 2020 *Dietary Guidelines* Advisory Committee Project. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Center for Nutrition Policy and Promotion, July 2020. Available at: *https://nesr.usda.gov/2020-dietary-guidelines-advisory-committee-systematic-reviews.*

[164] 2020 *Dietary Guidelines* Advisory Committee and Nutrition Evidence Systematic Review Team. Dietary Patterns and Growth, Size, Body Composition, and/or Risk of Overweight or Obesity: A Systematic Review. 2020 *Dietary Guidelines* Advisory Committee Project. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service, Center for Nutrition Policy and Promotion, July 2020. Available at: *https://nesr.usda.gov/2020-dietary-guidelines-advisory-committee-systematic-reviews.*

some potential health benefits for American Indian and Alaska Native children. USDA acknowledges that for decades, the United States government actively sought to eliminate traditional American Indian and Alaska Native ways of life—for example, by forcing Indigenous families to send their children to boarding schools. This separated Indigenous children from their families and heritage, and disrupted access to traditional foods, altering Indigenous children's relationship to food. This disruption effected food access, food choice, and overall health. The Traditional Foods Project (TFP) and associated research have shown that there may be benefits to integrating culture and history through locally designed interventions framed by food sovereignty among American Indian and Alaska Native communities to help prevent chronic disease, especially type 2 diabetes.[165] [166]

Food and Nutrition Security

Prior to and during the pandemic, school meals played an important role in serving healthy meals to millions of children and increasing food security by serving free or reduced price meals to eligible students. Food and nutrition security is defined as ''consistent and equitable access to healthy, safe, affordable foods essential to optimal health and well-being'' by the USDA.[167] In 2020, about fifteen percent of households with children were food insecure compared to about fourteen percent in 2019.[168] This means that millions of children are affected by food insecurity in the U.S. Free and reduced-price meals in the SBP and NSLP are served to students from households with lower income levels. In 2023, about 80 percent of meals served in the SBP and about 71 percent of meals served in the NSLP were free or reduced-price meals.[169] This rule targets the diet quality of meals served through child nutrition programs, and we estimate this rule to benefit the health of program participants. Providing nutrient-dense meals and snacks is especially valuable for children that may not always have access to nutritious foods at home. In 2021, USDA found that around 55 percent of food-insecure households participated in one or more of three Federal food and nutrition assistance programs (SNAP, WIC, NSLP).[170] This same report indicated that in households with income below 185 percent of the poverty line, those that received free or reduced-price school lunch in the previous 30 days (in 2021) were less likely to be food insecure compared to those that did not receive free or reduced-price lunch, indicating that school meals are an important source of food for families facing hardships. Student participation in the NSLP has been found in other research to be associated with a reduction in food insecurity.[171] Households with incomes near or below the Federal poverty line, all households with children and particularly households with children headed by single women or single men, and Black- and Hispanic-headed households have higher rates of food insecurity than the national average.[159] Efforts to increase participation in child nutrition programs should focus on expanding and encouraging participation among children in households under these circumstances to promote equity in daily nutrient intake nationwide.[172] School meal programs reach children across the U.S. from households of all income levels and of various backgrounds and race/ethnicities with nutritious meals. As noted previously, the incremental effect of the rule on program participation is uncertain as regards both magnitude and direction; the impact on food security is likewise uncertain.

Achievable Limits

While some elements of the 2012 rule were challenging to meet over a long period of time, this rule prescribes smaller gradual shifts and targeted changes to improve the overall nutrient content of meals. This rule will require changes over time, at achievable levels for schools and manufacturers. For instance, reduction in sodium finalized in this rule is about 15 percent at lunch and about 10 percent at breakfast, which is more manageable than the previous final targets in the 2012 rule. The FDA's voluntary sodium reduction goals were introduced in October 2021, so manufacturers may already be making changes to their products. Additional reduction goals are expected in the coming years. School food authorities and manufacturers have indicated in the past that the sodium targets from the 2012 rule (especially Target 3) were challenging to achieve due to several contributing factors. These challenges included high labor and equipment costs needed to support food preparation, lack of lower sodium products associated with school food authority urbanicity and size, and low levels of student acceptance varying by cultural and regional taste preferences.[173] This rule addresses these concerns by implementing a single sodium reduction that is supported by FDA voluntary sodium goals for industry and the 2019 dietary reference intakes [174] that call for continued reduction in sodium intake to promote health.

USDA data collection in 2022 [175] showed that reductions in total and added sugars content of certain food types (yogurt, milk, cereal) have already been observed, on average, since the last data collection during SY 2014–2015. This indicates that manufacturers are willing to make shifts in their product formulations and that regulations for programs such as CACFP do help to jumpstart product shifts. Another aspect of this rule is that USDA finalizing added sugar limits, rather than total sugars limits. Limiting added sugars will not limit naturally occurring sugars from fruit or milk, which will allow many yogurt products containing fruit and cereals containing dried fruit to remain a part of school meals. This less restrictive group of limits for added sugars is more achievable for school food authorities compared to total sugar limits and reflects *Dietary Guidelines* recommendations.

The changes from this rule will occur gradually over time. The sodium reduction included in this final rule will not occur until SY 2027–2028—over three years after this rule is published. Schools will maintain current sodium limits prior to the SY 2027–2028 reduction. This gradual approach will provide adequate lead in time, allowing school food authorities and manufacturers time to make changes to menus and available food products. Reduction of added sugars in school meals will also occur gradually, beginning with product specific limits, followed by an overall weekly limit. This approach will also allow time for adjustment both by food service operators and food/beverage manufacturers. Gradual formulation changes are also recommended for consumer satisfaction and product desirability.[176] [177] Taste preference may be established early in life and early food preference can influence

[165] DeBruyn L, Fullerton L, Satterfield D, Frank M. Integrating Culture and History to Promote Health and Help Prevent Type 2 Diabetes in American Indian/Alaska Native Communities: Traditional Foods Have Become a Way to Talk About Health. Prev Chronic Dis 2020;17:190213. DOI: *http://dx.doi.org/10.5888/pcd17.190213external* icon.

[166] Satterfield D, DeBruyn L, Santos M, Alonso L, Frank M. Health promotion and diabetes prevention in American Indian and Alaska Native communities—Traditional Foods Project, 2008–2014. CDC Morbidity Mortality Weekly Report. 2016;65(S1):4–10. *https://www.cdc.gov/mmwr/volumes/65/su/su6501a3.htm*.

[167] *https://www.usda.gov/nutrition-security#:~:text=At%20a%20minimum%2C%20food%20security,%2C%20or%20other%20coping%20strategies*).

[168] *https://www.ers.usda.gov/amber-waves/2022/february/food-insecurity-for-households-with-children-rose-in-2020-disrupting-decade-long-decline/*.

[169] USDA—Food and Nutrition Service, National Data Bank—Publicly available data.

[170] Matthew P. Rabbitt, Laura J. Hales, Michael P. Burke, and Alisha Coleman-Jensen, October 2023. Household Food Security in the United States in 2022, ERR–325, U.S. Department of Agriculture, Economic Research Service.

[171] Ralston, K.; Treen, K.; Coleman-Jensen, A.; Guthrie, J. Children's Food Security and USDA Child Nutrition Programs; U.S. Department of Agriculture, Economic Research Service: Washington, DC, USA, 2017.

[172] Gearan EC, Monzella K, Jennings L, Fox MK. Differences in Diet Quality between School Lunch Participants and Nonparticipants in the United States by Income and Race. Nutrients. 2021;12(12):3891. *https://www.mdpi.com/2072-6643/12/12/3891*.

[173] Gordon, E.L., Morrissey, N., Adams, E., Wieczorek, A. Glenn, M.E., Burke, S & Connor, P. (2019). Successful Approaches to Reduce Sodium in School Meals Final Report. Prepared by 2M Research under Contract No. AG–3198–P–15–0040. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service.

[174] *https://nap.nationalacademies.org/catalog/25353/dietary-reference-intakes-for-sodium-and-potassium*.

[175] USDA Food and Nutrition Service, Office of Policy Support data collection of nutrition label information from major cereal and yogurt manufacturer K–12 and food service catalogs.

[176] Hoppu U, Hopia A, Pohjanheimo T, et al. Effect of Salt Reduction on Consumer Acceptance and Sensory Quality of Food. Foods. 2017;6(12):103. Published 2017 Nov 27. doi:10.3390/foods6120103.

[177] Institute of Medicine (US) Committee on Strategies to Reduce Sodium Intake; Henney JE, Taylor CL, Boon CS, editors. Strategies to Reduce Sodium Intake in the United States. Washington (DC): National Academies Press (US); 2010. Available from: *https://www.ncbi.nlm.nih.gov/books/NBK50956/* doi: 10.17226/12818.

later food choices, so a gradual change may influence school age children for years to come. Along with gradual change, the added sugars weekly limit and the sodium reduction will be introduced the same year, allowing for menus to be changed simultaneously, avoiding the inconvenience of making substantial changes multiple times. This rule ensures that there will be a high nutrition quality of school meals with continued improvements over time.

VIII. Alternative(s)

Sodium

As a result of comments and feedback from stakeholders on the proposed sodium limits, this final rule implements more gradual and attainable sodium reduction compared to the proposed rule. USDA proposed to phase in three 10 percent sodium reductions at lunch and two 10 percent sodium reductions at breakfast beginning in SY 2025–2026. The estimated annual costs of the proposed sodium limits assumed a higher increase in labor and scratch cooking compared to the final rule due to the proposed multiple reductions. The estimated annual food and labor costs of the proposed changes averaged $102 million annually, compared to $68 million annual average for the final rule sodium provisions. The equipment costs associated with an increase in scratch cooking assumed at least half, or 50,000, of schools would spend between $7,350 to $14,700 each leading up to the proposed implementation years. The range of equipment costs for the proposed rule was $324 million to $792 million total, compared to the final rule equipment costs of $70 million to $200 million total.

Added Sugars: Grain-Based Desserts

The final rule does not adopt the proposal to limit grain-based desserts to 2 ounce equivalents per week in school breakfasts. The change from the proposed rule is to avoid potential negative impacts on breakfast programs, especially grab-and-go breakfasts. The proposed grain-based dessert limit for school breakfast had an estimated cost savings of $23 million annually, because the average cost of grains other than grain-based desserts is estimated to be $0.22 less than the average cost of grain-based desserts. The final added sugar product limits annual cost is $107 million annually, an increase from $84 million, after removing cost estimates associated with the proposed limit for grain-based desserts at school breakfast.

Buy American

The final rule maintains reaching a 5 percent cap on total costs per school year on non-domestic food purchases, consistent with the proposed rule. However, the proposed rule would have implemented a 5 percent cap as soon as the provision was effective. The final rule takes an incremental approach and considers procurement for SBP in addition to NSLP. USDA made this change in the rule in response to public comments that suggested a 5 percent cap is too restrictive under current procurement conditions. The cost analysis assumptions were the same in the proposed rule, but the estimated costs were due to a shorter implementation period and the associated burden hours with meeting the cap in the next school year for NSLP. While the final rule incorporates a more gradual timeline, burden estimates were calculated for both SBP and NSLP ($7 million annually for both the proposed rule and the final rule).

Whole Grains

The final rule maintains the current whole grain-rich requirements, however, the proposed rule requested comments on an alternative proposal for the whole grain-rich requirement for final rule consideration. Under the proposed alternative, all grains offered in the school lunch and breakfast programs would be required to be whole grain-rich, except that one day each school week, schools may offer grains that are not whole grain-rich. On average, a similar number of servings of whole grains would be provided in the alternative proposal, just on different days than before, leading to no additional expected costs. In response to comments, the final rule maintains the existing whole grain-rich requirement.

Other Considered Alternatives

In the process of creating this rule, there were a few other potential alternatives considered for added sugars and whole grains. Initially, product-specific total sugar limits were considered to align with the current CACFP total sugar limits for breakfast cereals and yogurts. However, this meant restricting naturally occurring sugars and did not align with the *Dietary Guidelines for Americans* [178] which recommend limiting added sugars to 10 percent of calories per day. The product-specific added sugars limits for yogurt, breakfast cereal, and flavored milk are expected to help introduce the concept of limiting added sugars, specifically as part of the gradual goal of reaching the final 10 percent weekly limit. For whole grains, other percentages were considered for the proportions of grains to be served that must be whole grain-rich (*i.e.,* 50 or 100 percent). However, 80 percent was decided on as a measure that allows for flexibility, but also still requiring that the majority of grains offered in school meals are whole grain-rich.

IX. Appendix

TABLE A: ESTIMATED ANNUAL COSTS IN MOVING FROM TRANSITIONAL STANDARDS RULE TO THIS RULE BEGINNING BY SCHOOL YEAR (MILLIONS), IN 2023 DOLLARS[179, 180]

IMPLEMENTATION YEAR	SY 2024-2025	SY 2025-2026	SY 2026-2027	SY 2027-2028	SY 2028-2029	SY 2029-2030	SY 2030-2031	SY 2031-2032	Total	Annual Average [181]
ADMINISTRATIVE COSTS	$41	$41	$0	$41	$0	$0	$0	$0	$124	$16
ADDED SUGARS	$0	$103	$103	$103	$103	$103	$103	$103	$722	$90
MILK	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
SODIUM	$0	$0	$0	$91	$91	$91	$91	$91	$454	$57
AFTERSCHOOL SNACKS	$0	-$8	-$8	-$8	-$8	-$8	-$8	-$8	-$59	-$7
SUBSTITUTING VEGETABLES FOR FRUITS AT BREAKFAST	-$4	-$4	-$4	-$4	-$4	-$4	-$4	-$4	-$31	-$4
BUY AMERICAN	$15	$4	$4	$4	$4	$4	$4	$6	$45	$6
TOTAL	**$52**	**$137**	**$95**	**$227**	**$186**	**$186**	**$186**	**$187**	**$1,256**	**$157**
TOTAL PER MEAL	0.008	0.022	0.015	0.037	0.030	0.030	0.030	0.030	NA	0.025

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BILLING CODE 3410–30–P

[178] U.S. Department of Agriculture and U.S. Department of Health and Human Services. Dietary Guidelines for Americans, 2020–2025. 9th Edition. December 2020. Available at *DietaryGuidelines.gov.*

[179] Due to rounding, numbers may not add up to rounded sum in 'total' column exactly.

[180] This data is the same as in table 1, but broken down by school years instead of fiscal years.

[181] Annual average over 8 school years of rule implementation.

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Part IV

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2510

Retirement Security Rule: Definition of an Investment Advice Fiduciary; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AC02

Retirement Security Rule: Definition of an Investment Advice Fiduciary

AGENCY: Employee Benefits Security Administration, Department of Labor

ACTION: Final rule

SUMMARY: The Department of Labor (Department) is adopting a final rule defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a ''fiduciary'' in the Employee Retirement Income Security Act of 1974 (Title I of ERISA or the Act). The final rule also applies for purposes of Title II of ERISA to the definition of a fiduciary of a plan defined in Internal Revenue Code (Code), including an individual retirement account or other plan identified in the Code. The Department also is publishing elsewhere in this issue of the **Federal Register** amendments to Prohibited Transaction Exemption 2020–02 (Improving Investment Advice for Workers & Retirees) and to several other existing administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA.

DATES: This regulation is effective September 23, 2024.

FOR FURTHER INFORMATION CONTACT:

- *For questions regarding the rule:* contact Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), 202–693–8510. (Not a toll-free number).
- *For questions regarding the prohibited transaction exemptions:* contact Susan Wilker, Office of Exemption Determinations, EBSA, 202–693–8540. (Not a toll-free number).
- *For questions regarding the Regulatory Impact Analysis:* contact James Butikofer, Office of Research and Analysis, EBSA, 202–693–8434. (Not a toll-free number).

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning Title I of ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department of Labor's website (*https://www.dol.gov/agencies/ebsa*).

SUPPLEMENTARY INFORMATION:

A. Executive Summary

The Department is issuing a final rule defining an investment advice fiduciary for purposes of Title I and Title II of ERISA. The final rule defines when a person is a fiduciary in connection with providing advice to an investor saving for retirement through a workplace retirement plan or other type of retirement plan such as an IRA. Such retirement investors include participants and beneficiaries in workplace retirement plans, IRA owners and beneficiaries, as well as plan and IRA fiduciaries with authority or control with respect to the plan or IRA.

Under the final rule, a person is an investment advice fiduciary if they provide a recommendation in one of the following contexts:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:
  - is based on review of the retirement investor's particular needs or individual circumstances,
  - reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
  - may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
- The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

The recommendation also must be provided ''for a fee or other compensation, direct or indirect'' as defined in the final rule.

As compared to the previous regulatory definition, which was finalized in 1975, the final rule better reflects the text and the purposes of ERISA and better protects the interests of retirement investors, consistent with the Department's mission to ensure the security of the retirement, health, and other workplace-related benefits of America's workers and their families.

The final rule is designed to ensure that retirement investors' reasonable expectations are honored when they receive advice from financial professionals who hold themselves out as trusted advice providers. The Department's regulation fills an important gap in those advice relationships where advice is not currently treated as fiduciary advice under the 1975 regulation's approach to ERISA's functional fiduciary definition. This may be the case even though the financial professional holds themselves out as providing recommendations that are based on review of the retirement investor's needs or circumstances and the application of professional or expert judgment to the retirement investor's needs or circumstances, and that can be relied upon to advance the retirement investor's best interest.

Together with amendments to administrative exemptions (PTEs) from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA published elsewhere in this issue of the **Federal Register**, the final rule is intended to protect the interests of retirement investors by requiring persons who are defined in the final rule as investment advice fiduciaries to adhere to stringent conduct standards and mitigate their conflicts of interest. The amended PTEs' compliance obligations are generally consistent with the best interest obligations set forth in the Securities and Exchange Commission's (SEC) Regulation Best Interest and its Commission Interpretation Regarding Standard of Conduct for Investment Advisers (SEC Investment Adviser Interpretation), each released in 2019.

The Department anticipates that the most significant benefits of the final rule and amended PTEs will stem from the application of ERISA's fiduciary protections under Title I and Title II and PTE conditions to all covered investment advice provided to retirement investors. Under the final rule and amended PTEs, advice providers that satisfy the definition of an investment advice fiduciary will be required to adhere to the prudence standard of care, reduce retirement investor exposure to conflicted advice that may erode investment returns, and adopt protective conflict-mitigation requirements.[1]

Requiring advice providers to operate in compliance with ERISA fiduciary protections will be especially beneficial with respect to those transactions that currently are not uniformly covered by fiduciary protections consistent with ERISA's high standards. Those transactions include recommendations to roll over assets from a workplace

[1] The references in this document to a ''fiduciary'' are intended to mean an ERISA Title I and Title II fiduciary unless otherwise stated.

retirement plan to an IRA in those cases in which the advice provider is not subject to Federal securities law standards and, as is often the case, has not previously advised the customer about plan or IRA assets on a regular basis. Other examples include investment recommendations with respect to many commonly purchased retirement annuities, such as fixed indexed annuities; recommendations of other investments that may not be subject to the SEC's Regulation Best Interest, such as real estate, certain certificates of deposit, and other bank products; and investment recommendations to plan fiduciaries with authority or control with respect to the plan.

A proposed rule and proposed amendments to the PTEs were released by the Department on October 31, 2023 for notice and public comment, and public hearings on the proposals were held on December 12 and 13, 2023. The Department has made certain changes and clarifications in the final rule in response to public comments on the proposal and the testimony presented at the public hearings. The final rule narrows the contexts in which a covered recommendation will constitute ERISA fiduciary investment advice and makes clear that the test for fiduciary status is objective. Similarly, a new paragraph in the regulatory text confirms that sales recommendations that do not satisfy the objective test will not be treated as fiduciary advice, and that the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of the rule. Additionally, the final rule makes clear that the rule is focused on communications with persons with authority over plan investment decisions (including selecting investment options for participant-directed plans), rather than communications with financial services providers who do not have such authority. Accordingly, the rule excludes plan and IRA investment advice fiduciaries from the definition of a retirement investor. As a result, an asset manager does not render fiduciary advice simply by making recommendations to a financial professional or firm that, in turn, will render advice to retirement investors in a fiduciary capacity. The Department believes the final rule, with these revisions, appropriately defines an investment advice fiduciary to comport with reasonable investor expectations of trust and confidence.

B. Background

1. Title I and Title II of ERISA and the 1975 Rule

Title I of ERISA imposes duties and restrictions on persons who are ''fiduciaries'' with respect to employee benefit plans. In particular, fiduciaries to Title I plans must adhere to duties of prudence and loyalty. ERISA section 404 provides that Title I plan fiduciaries must act with the ''care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,'' and that they also must discharge their duties with respect to a plan ''solely in the interest of the participants and beneficiaries.'' [2]

These fiduciary duties, which are rooted in the common law of trusts, are reinforced by prohibitions against transactions involving conflicts of interest because of the dangers such transactions pose to plans and their participants. The prohibited transaction provisions of ERISA, including Title II of ERISA which is codified in the Internal Revenue Code (Code), ''categorically bar[ ]'' plan fiduciaries from engaging in transactions deemed ''likely to injure the pension plan'' [3] absent compliance with a prohibited transaction exemption. The provisions include prohibitions on a fiduciary's ''deal[ing] with the assets of the plan in his own interest or for his own account,'' and ''receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.'' [4] Thus, ERISA requires fiduciaries who have conflicts of interest, including from financial incentives, to comply with protective conditions in a prohibited transaction exemption. Congress included some statutory prohibited transaction exemptions in ERISA and also authorized the Department to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[5]

Title II of ERISA, codified in the Code,[6] governs the conduct of fiduciaries to plans defined in Code section 4975(e)(1), which includes IRAs.[7] Some plans defined in Code section 4975(e)(1) are also covered by Title I of ERISA, but the definitions of such plans are not identical. Although Title II, as codified in the Code, does not directly impose specific duties of prudence and loyalty on fiduciaries as in ERISA section 404(a), it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.[8] Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984,[9] Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975.[10]

Many of the protections, duties, and liabilities in both Title I and Title II of ERISA hinge on fiduciary status. ERISA includes a statutory definition of a

[2] ERISA section 404, 29 U.S.C. 1104.

[3] *Harris Trust Sav. Bank* v. *Salomon Smith Barney Inc.,* 530 U.S. 238, 241–42 (2000) (citation and quotation marks omitted).

[4] ERISA section 406(b)(1), (3), 29 U.S.C. 1106(b)(1), (3).

[5] ERISA section 408(a), 29 U.S.C. 1108(a).

[6] This preamble discussion includes some references to the Code in the context of discussions of Title II of ERISA involving specific provisions codified in the Code. The Department understands that references to the Code are useful but emphasizes that both Title I and Title II are covered by the same general definition of fiduciary and the same general framework of prohibited transactions, and that, under both Title I and Title II, fiduciaries must comply with the conditions of an available prohibited transaction exemption in order to engage in an otherwise prohibited transaction.

[7] For purposes of the final rule, the term ''IRA'' is defined as any account or annuity described in Code section 4975(e)(1)(B)–(F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans. However, for purposes of any rollover of assets between a Title I plan and an IRA described in this preamble, the term ''IRA'' includes only an account or annuity described in Code section 4975(e)(1)(B) or (C). Additionally, while the Department uses the term ''*retirement* investor'' throughout this document to describe advice recipients, that is not intended to suggest that the fiduciary definition applies only with respect to employee pension benefit plans and IRAs that are retirement savings vehicles. As discussed herein, the final rule applies with respect to plans as defined in Title I and Title II of ERISA that make investments. In this regard, see also paragraph (f)(12) that provides that the term ''investment property'' ''does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.''

[8] 26 U.S.C. 4975(c)(1); *cf. id.* at 4975(f)(5), which defines ''correction'' with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted ''under the highest fiduciary standards.''

[9] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

[10] 5 U.S.C. App. 752 (2018).

fiduciary at section 3(21)(A), which provides that a person is a fiduciary with respect to a plan to the extent the person (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.[11] The same definition of a fiduciary is in Code section 4975(e)(3).[12]

These statutory definitions broadly assign fiduciary status for purposes of Title I and Title II of ERISA. Thus, ''any authority or control'' over plan assets is sufficient to confer fiduciary status, and any person who renders ''investment advice for a fee or other compensation, direct or indirect'' is an investment advice fiduciary, regardless of whether they have direct control over the plan's assets, and regardless of their status under another statutory or regulatory regime. In the absence of fiduciary status, persons who provide investment advice to retirement investors would neither be subject to Title I of ERISA's fundamental fiduciary standards, nor responsible under Title I and Title II of ERISA for avoiding prohibited transactions. The broad statutory definition, the prohibitions on conflicts of interest, and the core fiduciary obligations of prudence and loyalty (as applicable) all reflect Congress' recognition in 1974, when it passed ERISA, of the fundamental importance of investment advice to protect the interests of retirement investors.

In 1975, shortly after ERISA was enacted, the Department issued a regulation at 29 CFR 2510.3–21(c)(1) (the 1975 regulation) that defined the circumstances under which a person renders ''investment advice'' to an employee benefit plan within the meaning of ERISA section 3(21)(A)(ii), such that the person would be a fiduciary under ERISA.[13] The 1975 regulation significantly narrowed the plain and expansive language of ERISA section 3(21)(A)(ii), creating a five-part test that must be satisfied in order for a person to be treated as a fiduciary by reason of rendering investment advice. Under the five-part test, a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. At the time the 1975 regulation was issued, the Department of the Treasury had sole regulatory authority over Code section 4975(e)(3), and issued a virtually identical regulation, 26 CFR 54.4975–9(c)(1), which applies to plans defined in Code section 4975.[14]

Since 1975, the retirement plan landscape has changed significantly, with a shift from defined benefit plans (in which decisions regarding investment of plan assets are primarily made by professional asset managers) to defined contribution/individual account plans, such as 401(k) plans (in which decisions regarding investment of plan assets are often made by plan participants who lack professional investment expertise). In 1975, individual retirement accounts had only recently been created (by ERISA itself), and 401(k) plans did not yet exist.[15] Retirement assets were principally held in pension funds controlled by large employers or other large plan sponsors and professional money managers. Now, IRAs and plans providing for participant-directed investments, such as 401(k) plans, have become more common retirement vehicles as opposed to traditional pension plans, and rollovers of workplace retirement plan assets to IRAs are commonplace. Individuals, regardless of their financial literacy, have thus become increasingly responsible for their own retirement savings, and have increasingly become direct recipients of investment advice with respect to those savings.

The shift toward individual control over retirement investing (and the associated shift of risk to individuals) has been accompanied by a dramatic increase in the variety and complexity of financial products and services, which has widened the information gap between investment advice providers and their clients. Plan participants and other retirement investors may be unable to assess the quality of the advice they receive and may not be in a position to learn of and guard against the investment advice provider's conflicts of interest.[16] However, as a result of the five-part test in the 1975 regulation, and its limiting interpretation of ERISA's statutory, functional fiduciary definition, many financial professionals, consultants, and financial advisers have no legal obligation to adhere to the fiduciary standards in Title I of ERISA or to the prohibited transaction rules in Title I and Title II of ERISA, despite the critical role these professionals, consultants and advisors play in guiding plan and IRA investments. In many situations, this disconnect undermines the reasonable expectations of retirement investors in today's marketplace; a retirement investor may reasonably expect that the advice they are receiving from a trusted adviser is fiduciary advice even when, under the 1975 regulation's interpretation, it is not. If these investment advice providers are not fiduciaries under Title I or Title II of ERISA, they do not have obligations under Federal pension law to either avoid prohibited transactions or comply with the protective conditions in a PTE.

Recently, other regulators have recognized the need for change in the regulation of investment recommendations and have imposed enhanced conduct standards on financial professionals who make investment recommendations, including broker-dealers and insurance agents. As a result, the regulatory landscape today is very different than it was even five years ago. In 2019, the SEC adopted Regulation Best Interest, which established an enhanced best interest standard of conduct applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers.[17] The SEC also issued its SEC Investment Adviser Interpretation

[11] ERISA section 3(21)(A), 29 U.S.C. 1002(21)(A).

[12] 26 U.S.C. 4975(e)(3).

[13] 40 FR 50842 (Oct. 31, 1975).

[14] 40 FR 50840 (Oct. 31, 1975). The issuance of this 1975 regulation pre-dated The Reorganization Plan No. 4 of 1978, and thus authority to issue this regulatory definition under Title II of ERISA was still with the Department of the Treasury.

[15] Section 2002(b) of Title II of ERISA established individual retirement accounts with the addition of 408(a) to the Code. *See* Public Law 93–406.

[16] In the securities law context, both SEC Regulation Best Interest and the Advisers Act fiduciary duty have specific obligations related to disclosure and/or mitigation of conflicts of interest. The SEC also adopted the Form CRS, which is a brief relationship summary required to be provided by broker-dealers and investment advisers to retail investors. The SEC stated that the Form CRS ''is intended to inform retail investors about: [t]he types of client and customer relationships and services the firm offers; the fees, costs, conflicts of interest, and required standard of conduct associated with those relationships and services; whether the firm and its financial professionals currently have reportable legal or disciplinary history; and how to obtain additional information about the firm.'' 84 FR 33492 (July 12, 2019).

[17] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318 (July 12, 2019) (Regulation Best Interest release).

in 2019, which addressed the conduct standards applicable to investment advisers under the Investment Advisers Act of 1940 (Advisers Act).[18] Describing these actions, the SEC has said, ''key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act.'' [19] In this connection, the SEC has also stressed that Regulation Best Interest ''aligns the standard of conduct with retail customers' reasonable expectations.'' [20]

In 2020, the National Association of Insurance Commissioners (NAIC) also revised its Suitability In Annuity Transactions Model Regulation to provide that insurance agents must act in the consumer's best interest, as defined by the Model Regulation, when making a recommendation of an annuity. Under the NAIC Model Regulation, insurers would also be expected to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.[21] The stated goal of the NAIC working group related to the NAIC Model Regulation was ''to seek clear, enhanced standards for annuity sales so consumers understand the products they purchase, are made aware of any material conflicts of interest, and are assured those selling the products do not place their financial interests above consumers' interests.'' [22] According to the NAIC, as of March 11, 2024, 45 jurisdictions have implemented the revisions to the NAIC Model Regulation.[23]

These regulatory efforts reflect the widespread understanding that broker-dealers and insurance agents commonly make recommendations to their customers for which they are compensated as a regular part of their business; that investors rely upon these recommendations; and that regulatory protections are important to ensure that the recommendations are in the best interest of the retail customer (in the case of broker-dealers) or consumers (in the case of insurance agents).[24] After careful review of the existing regulatory landscape, the Department has concluded that the 1975 regulation should also be revised to reflect current realities in light of the text and purposes of Title I and Title II of ERISA.

In the current landscape, the 1975 regulation narrows the broad statutory definition in ways that no longer serve the purposes of Title I and Title II of ERISA to protect the interests of retirement investors. This is especially the case given the growth of participant-directed investment arrangements and IRAs, the conflicts of interest associated with investment recommendations, and the pressing need for plan participants, IRA owners, and their beneficiaries to receive sound advice from professional financial advisers when making critical investment decisions in an increasingly complex financial marketplace. As the SEC and NAIC recognized, many different types of financial professionals, including insurance agents, broker-dealers, investment advisers subject to the Advisers Act, and others, make recommendations to investors for which they are compensated, and investors rightly rely upon these recommendations with an expectation that they are receiving advice that is in their best interest. Like these other regulators, the Department has concluded that it is appropriate to update the existing regulatory structure to ensure that it properly protects the financial interests of retirement investors as Congress intended. As reflected in this regulatory package, after evaluation of the types of investment advisory relationships that should give rise to ERISA fiduciary status, the Department has concluded that it is appropriate to revise the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in the manner set forth herein.

2. Prior Rulemakings

The Department began the process of reexamining the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in 2010. After issuing two notices of proposed rulemaking, conducting multiple days of public hearings, and over six years of deliberations, on April 8, 2016, the Department replaced the 1975 regulation with a new regulatory definition of a fiduciary under ERISA (the 2016 Final Rule) which applied under Title I and Title II of ERISA.[25] In the preamble to the 2016 Final Rule, the Department noted that the 1975 regulation's five-part test had been created in a very different context and investment advice marketplace.[26] The Department expressed concern that specific elements of the five-part test—which are not found in the text of Title I or Title II of ERISA—worked to defeat retirement investors' legitimate expectations when they received investment advice from trusted advice providers in the modern marketplace for financial advice.[27]

The Department identified the ''regular basis'' element [28] in the five-part test as a particularly important example of the 1975 regulation's shortcomings.[29] The Department stated that the requirement that advice be provided on a ''regular basis'' had failed to draw a sensible line between fiduciary and non-fiduciary conduct and had undermined ERISA's protective purpose.[30] The Department pointed to examples of transactions in which a

[18] 84 FR 33669 (July 12, 2019).

[19] Regulation Best Interest release, 84 FR 33318, 33330 (July 12, 2019); *see also* Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation, (''[b]oth [Regulation Best Interest] for broker-dealers and the [Advisers Act] fiduciary standard for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest.''), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

[20] Regulation Best Interest release, 84 FR 33318 (July 12, 2019).

[21] Available at *www.naic.org/store/free/MDL-275.pdf.*

[22] *See https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard.*

[23] *See https://content.naic.org/sites/default/files/inline-files/275%20Final%20Map_2020%20Changes_March%2011%202024.pdf.*

[24] The SEC stated in the Regulation Best Interest release that ''there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.'' 84 FR 33318, 33319 (July 12, 2019). The NAIC Model Regulation section 5.M. defines a recommendation as ''advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice.'' Section 5.B. defines ''cash compensation'' as ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer *in connection with the recommendation* or sale of an annuity from an insurer, intermediary, or directly from the consumer.'' (Emphasis added), *https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.*

[25] *See* Definition of the Term ''Fiduciary,'' 75 FR 65263 (Oct. 22, 2010) (proposed rule); Definition of the Tern ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 80 FR 21928 (Apr. 20, 2015) (proposed rule); Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 FR 20946 (Apr. 8, 2016) (final rule).

[26] Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 FR at 20946.

[27] *Id.* at 20955.

[28] This refers to the requirement in the 1975 regulation that, in order for fiduciary status to attach, investment advice must be provided by the person ''on a regular basis.'' *See* 40 FR 50842 (Oct. 31, 1975).

[29] Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 FR at 20955.

[30] *Id.*

discrete instance of advice can be of critical importance to the plan, such as a one-time purchase of a group annuity to cover all of the benefits promised to substantially all of a plan's participants for the rest of their lives when a defined benefit plan terminates, or a plan's expenditure of hundreds of millions of dollars on a single real estate transaction based on the recommendation of a financial adviser hired for purposes of that one transaction.[31]

The Department likewise expressed concern that the requirements in the 1975 regulation of a ''mutual agreement, arrangement, or understanding'' that advice would serve as ''a primary basis for investment decisions'' had encouraged investment advice providers in the current marketplace to use fine print disclaimers as potential means of avoiding ERISA fiduciary status, even as they marketed themselves as providing tailored or individualized advice based on the retirement investor's best interest.[32] Additionally, the Department noted that the ''primary basis'' element of the five-part test appeared in tension with the statutory text and purposes of Title I and Title II of ERISA.[33] If, for example, a prudent plan fiduciary hires multiple specialized advisers for an especially complex transaction, it should be able to rely upon any or all of the consultants that it hired to render advice, regardless of arguments about whether one could characterize the advice, in some sense, as primary, secondary, or tertiary.[34]

The 2016 Final Rule defined an investment advice fiduciary for purposes of Title I and Title II of ERISA in a way that would apply fiduciary status in a wider array of advice relationships than the five-part test in the 1975 regulation.[35] The 2016 Final Rule generally covered: (1) recommendations by a person who represents or acknowledges that they are acting as a fiduciary within the meaning of ERISA; (2) advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the retirement investor; and, most expansively, (3) recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.[36]

The 2016 Final Rule also specifically superseded a 2005 Advisory Opinion, 2005–23A (commonly known as the Deseret Letter) which had opined that it is not fiduciary investment advice under Title I of ERISA to make a recommendation as to distribution options from an employee benefit plan, even if accompanied by a recommendation as to where the distribution would be invested.[37]

On the same date it published the 2016 Final Rule, the Department also published two new administrative class exemptions from the prohibited transaction provisions of Title I and Title II of ERISA: the Best Interest Contract Exemption (BIC Exemption)[38] and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption).[39] The Department granted the new exemptions with the objective of promoting the provision of investment advice that is in the best interest of retail investors such as plan participants and beneficiaries, IRA owners and beneficiaries, and certain plan fiduciaries, including small plan sponsors.[40]

The new exemptions included conditions designed to protect the interests of the retirement investors receiving advice.[41] The exemptions required investment advice fiduciaries to adhere to the following ''Impartial Conduct Standards'': providing advice in retirement investors' best interest; charging no more than reasonable compensation; and making no misleading statements about investment transactions and other important matters.[42] In the case of IRAs and non-Title I plans, the exemption required these standards to be set forth in an enforceable contract with the retirement investor, which also was required to include certain warranties and disclosures.[43] The exemption further provided that parties could not rely on the exemption if they included provisions in their contracts disclaiming liability for compensatory remedies or waiving or qualifying retirement investors' right to pursue a class action or other representative action in court.[44] In conjunction with the new exemptions, the Department also made amendments to pre-existing exemptions, namely PTEs 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128, to require compliance with the Impartial Conduct Standards and to make certain other changes.[45]

3. Litigation Over the 2016 Rulemaking

The 2016 Final Rule and related new and amended exemptions (collectively, the 2016 Rulemaking) was challenged in multiple lawsuits. In *National Association for Fixed Annuities* v. *Perez,* a district court in the District of Columbia upheld the 2016 Rulemaking in the context of a broad challenge on multiple grounds.[46] Among other things, the court found that the 2016 Final Rule comports with both the text and the purpose of ERISA, and it noted ''if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text. Nothing in the phrase 'renders investment advice' suggests that the statute applies only to advice provided 'on a regular basis.' ''[47] Relatedly, in *Market Synergy* v. *United States Department of Labor,* the U.S. Court of Appeals for the Tenth Circuit affirmed a district court's decision similarly upholding the 2016 Rulemaking as it applied to fixed indexed annuities.[48]

On March 15, 2018, however, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) overturned a district court's decision upholding the validity of the 2016 Final Rule[49] and vacated the entire 2016 Rulemaking, in *Chamber of Commerce* v. *United States Department*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 20955–56.

[35] *Id.* at 20946.

[36] *Id.* at 20997.

[37] *Id.* at 20949.

[38] 81 FR 21002 (Apr. 8, 2016).

[39] 81 FR 21089 (Apr. 8, 2016).

[40] 81 FR 21002 (April 8, 2016).

[41] Best Interest Contract Exemption, 81 FR 21002; *see also* ERISA section 408(a); Code section 4975(c)(2).

[42] Best Interest Contract Exemption, 81 FR at 21077.

[43] *Id.* at 21076.

[44] *Id.* at 21078–9.

[45] 81 FR 21139 (Apr. 8, 2016); 81 FR 21147 (Apr. 8, 2016); 81 FR 21181 (Apr. 8, 2016); 81 FR 21208 (Apr. 8, 2016).

[46] *Nat'l Assoc. for Fixed Annuities* v. *Perez,* 217 F.Supp.3d 1 (D.D.C. 2016) [hereinafter *NAFA*]. On December 15, 2016, the U.S. Court of Appeals for the District of Columbia denied an emergency request to stay application of the definition or the exemptions pending an appeal of the district court's ruling. *Nat'l Assoc. for Fixed Annuities* v. *Perez,* No. 16–5345, 2016 BL 452075 (D.C. Cir. 2016).

[47] *NAFA,* 217 F. Supp. 3d at 23, 27–28.

[48] 885 F.3d 676 (10th Cir. 2018); *see Thrivent Financial for Lutherans* v. *Acosta,* No. 16–CV–03289, 2017 WL 5135552 (D. Minn. Nov. 3, 2017) (granting the Department's motion for a stay and the plaintiff's motion for a preliminary injunction, with respect to Thrivent's suit challenging the BIC Exemption's bar on class action waivers as exceeding the Department's authority and as unenforceable under the Federal Arbitration Act).

[49] *Chamber of Commerce* v. *Hugler,* 231 F. Supp. 3d 152 (N.D. Tex. Feb. 8, 2017) (finding, among other things, that in the 2016 Final Rule, the Department reasonably removed the ''regular basis'' requirement; and noting, ''if anything, however, the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA.'').

of Labor (Chamber).[50] The Fifth Circuit held that the 2016 Final Rule conflicted with ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). Specifically, the Fifth Circuit found that the 2016 Final Rule swept too broadly and extended to relationships that lacked ''trust and confidence,'' which the court stated were hallmarks of the common-law fiduciary relationship that Congress intended to incorporate into the statutory definitions. The court concluded that ''all relevant sources indicate that Congress codified the touchstone of common-law fiduciary status—the parties' underlying relationship of trust and confidence—and nothing in the statute 'requires' departing from the touchstone.'' [51]

In addition to holding that the 2016 Final Rule conflicted with the statutory definitions in Title I and Title II of ERISA, the Fifth Circuit in *Chamber* also determined that the 2016 Rulemaking failed to honor the difference in the Department's authority over employee benefit plans under Title I of ERISA and IRAs under Title II, by imposing ''novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties.'' [52] These included the conditions of the BIC Exemption and Principal Transactions Exemption that required financial institutions and individual fiduciary advisers to enter into contracts with their customers with specific duties, warranties, and disclosures, and forbade damages limitations and class action waivers. Under the Code, IRA investors do not have a private right of action. Instead, the primary remedy for a violation of the prohibited transaction provisions under the Code is the assessment of an excise tax.[53] In the Fifth Circuit's view, the Department had effectively exceeded its authority by giving IRA investors the ability to bring a private cause of action that Congress had not authorized.[54]

In response to the Fifth Circuit's vacatur of the 2016 Rulemaking, on May 7, 2018, the Department issued Field Assistance Bulletin 2018–02, Temporary Enforcement Policy on Prohibited Transactions Rules Applicable to Investment Advice Fiduciaries (FAB 2018–02).[55] FAB 2018–02 announced that, pending further guidance, the Department would not pursue prohibited transaction claims against fiduciaries who were working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.

4. Subsequent Actions by the Department

In 2020, the Department issued a technical amendment to the Code of Federal Regulations (CFR) reinserting the 1975 regulation, reflecting the Fifth Circuit's vacatur of the 2016 Final Rule.[56] The technical amendment also reinserted into the CFR Interpretive Bulletin 96–1 (IB 96–1) relating to participant investment education, which had been removed and largely incorporated into the text of the 2016 Final Rule. Additionally, the Department updated its website to reflect the fact that the pre-existing prohibited transaction exemptions that had been amended in the 2016 Rulemaking had been restored to their pre-amendment form, and also to reflect that the Department had withdrawn the Deseret Letter.

The Department also adopted a new PTE, Improving Investment Advice for Workers & Retirees, also known as PTE 2020–02.[57] The exemption provides relief that is similar in scope to the BIC Exemption and the Principal Transactions Exemption, but it does not include contract or warranty provisions.

The preamble to PTE 2020–02 also included the Department's interpretation of when advice to roll over assets from a workplace retirement plan to an IRA would constitute fiduciary investment advice under the 1975 regulation's five-part test.[58] The preamble interpretation confirmed the Department's continued view that the Deseret Letter was incorrect, and that a recommendation to roll assets out of a Title I plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the 1975 regulatory test, constitutes fiduciary investment advice.[59] The preamble interpretation also discussed when a recommendation to roll over assets from an employee benefit plan to an IRA would satisfy the ''regular basis'' requirement.[60] Additionally, the preamble set forth the Department's interpretation of the 1975 regulation's requirement of ''a mutual agreement, arrangement, or understanding'' that the investment advice will serve as ''a primary basis for investment decisions.'' [61] In April 2021, the Department issued Frequently Asked Questions (FAQs) that, among other things, summarized aspects of the preamble interpretation.[62]

The Department's preamble interpretation and certain FAQs were challenged as inconsistent with the 1975 regulation in two lawsuits filed after the issuance of PTE 2020–02.[63] On February 13, 2023, the U.S. District Court for the Middle District of Florida issued an opinion vacating the policy referenced in FAQ 7 (entitled ''When is advice to roll over assets from an employee benefit plan to an IRA considered to be on a 'regular basis'?'') and remanded it to the Department for further proceedings.[64] On June 30, 2023, a magistrate judge in the Northern District of Texas filed a report with the judge's findings, conclusions, and recommendations, including a recommendation that the court should vacate portions of PTE 2020–02 that permit consideration of actual or expected Title II investment advice relationships when determining Title I fiduciary status, as inconsistent with the 1975 regulation.[65]

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[50] 885 F.3d 360 (5th Cir. 2018); *but see id.* at 391 (''Nothing in the phrase 'renders investment advice for a fee or other compensation' suggests that the statute applies only in the limited context accepted by the panel majority.'') (Stewart, C.J., dissenting).

[51] *Id.* at 369; *but see Mertens* v. *Hewitt Associates,* 508 U.S. 248, 262 (1993) (finding that Congress intentionally departed from the common law of trusts by defining an ERISA '' 'fiduciary' not in terms of formal trusteeship, but in *functional* terms . . . thus expanding the universe of persons subject to fiduciary duties'') (citations omitted).

[52] *Chamber,* 885 F.3d at 384.

[53] Code section 4975(a), (b).

[54] *Chamber,* 885 F.3d at 384.

[55] Available at *https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02.*

[56] 85 FR 40589 (July 7, 2020).

[57] 85 FR 82798 (Dec. 18, 2020).

[58] *Id.* at 82802–9.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions, *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.*

[63] Compl., *Am. Sec. Ass'n.* v. *U.S. Dep't of Labor,* No. 8:22–CV–330VMC–CPT, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023); Compl., *Fed'n of Ams. for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT (N.D. Tex. Feb. 2, 2022).

[64] *Am. Sec. Ass'n.* v. *U.S. Dep't of Labor,* 2023 WL 1967573, at *22–23.

[65] *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Fed'n of Ams. for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *27–29 (N.D. Tex. June 30, 2023) [hereinafter *FACC*]. As of the date of this final rule, the district court judge has not yet taken action regarding the magistrate judge's report and recommendations.

5. Other Regulatory Developments

U.S. Securities and Exchange Commission

Since the vacatur of the Department's 2016 Rulemaking, other regulators have considered and adopted enhanced standards of conduct for financial professionals as a method of addressing, among other things, conflicts of interest. At the Federal level, on June 5, 2019, the SEC finalized a regulatory package relating to conduct standards for broker-dealers and investment advisers. The package included Regulation Best Interest, which established an enhanced best interest standard of conduct applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers.[66]

The SEC's Regulation Best Interest enhanced the broker-dealer standard of conduct ''beyond existing suitability obligations.'' [67] According to the SEC, this

> [A]lign[ed] the standard of conduct with retail customers' reasonable expectations by requiring broker-dealers, among other things, to: Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer; and address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where [the SEC has] determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict.[68]

Regulation Best Interest's ''best interest obligation'' includes a Disclosure Obligation, a Care Obligation, a Conflict of Interest Obligation, and a Compliance Obligation. The Care Obligation requires broker-dealers, in making recommendations, to exercise ''reasonable diligence, care, and skill'' to:

> (A) Understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers;
>
> (B) Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; [and]
>
> (C) Have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile and does not place the financial or other interest of the broker, dealer, or such natural person making the series of recommendations ahead of the interest of the retail customer.[69]

In guidance on the care obligations applicable to both broker-dealers and investment advisers, the SEC staff explained,

> In the context of providing investment advice and recommendations to retail investors, the care obligations generally include three overarching and intersecting components. . . . [T]hese components are:
>
> Understanding the potential risks, rewards, and costs associated with a product, investment strategy, account type, or series of transactions (the ''investment or investment strategy'');
>
> Having a reasonable understanding of the specific retail investor's investment profile, which generally includes the retail investor's financial situation (including current income) and needs; investments; assets and debts; marital status; tax status; age; investment time horizon; liquidity needs; risk tolerance; investment experience; investment objectives and financial goals; and any other information the retail investor may disclose in connection with the recommendation or advice; and
>
> Based on the understanding of the first two elements, as well as, in the staff's view, a consideration of reasonably available alternatives, having a reasonable basis to conclude that the recommendation or advice provided is in the retail investor's best interest.[70]

The Conflict of Interest Obligation requires the broker-dealer to establish, maintain, and enforce written policies and procedures reasonably designed to:

> (A) Identify and at a minimum disclose, [in accordance with Regulation Best Interest], or eliminate, all conflicts of interest associated with such recommendations;
>
> (B) Identify and mitigate any conflicts of interest associated with such recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;
>
> (C) Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, and prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer [in accordance with Regulation Best Interest]; and
>
> (D) Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.[71]

A conflict of interest is defined as ''an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer—consciously or unconsciously—to make a recommendation that is not disinterested.'' [72]

In guidance on conflicts of interest applicable to both broker-dealers and investment advisers, the SEC staff has stated,

> All broker-dealers, investment advisers, and financial professionals have at least some conflicts of interest with their retail investors. Specifically, they have an economic incentive to recommend products, services, or account types that provide more revenue or other benefits for the firm or its financial professionals, even if such recommendations or advice are not in the best interest of the retail investor. . . . Consistent with their obligation to act in a retail investor's best interest, firms must address conflicts in a way that will prevent the firm or its financial professionals from providing recommendations or advice that places their interests ahead of the interests of the retail investor.[73]

In the Regulation Best Interest Release, the SEC stated that ''[t]he Commission has crafted Regulation Best Interest to draw on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers.'' [74] The SEC emphasized that, ''[i]mportantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial

[66] *See* Regulation Best Interest release, 84 FR 33318 (July 12, 2019).

[67] *Id.*

[68] *Id.*

[69] 17 CFR 240.15l–1(a)(2)(ii).

[70] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligations (footnotes omitted), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

[71] 17 CFR 240.15l–1(a)(2)(iii).

[72] *Id.* at (b)(3).

[73] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[74] 84 FR 33318, 33320 (July 12, 2019).

professional ahead of the interests of the retail investor.'' [75] The SEC also noted that the standard of conduct established by Regulation Best Interest cannot be satisfied through disclosure alone.[76]

The SEC's Regulation Best Interest applies to broker-dealers and their associated persons when they make a recommendation to a retail customer of any ''securities transaction or investment strategy involving securities (including account recommendations).'' [77]According to the SEC, this language encompasses recommendations to roll over or transfer assets in a workplace retirement plan account to an IRA, and recommendations to take a plan distribution.[78] However, the SEC also stated that while Regulation Best Interest applies to advice regarding a person's own retirement account such as a 401(k) account or IRA, it does not cover advice to workplace retirement plans themselves or to their legal representatives when they are receiving advice on the plan's behalf.[79]

The SEC Investment Adviser Interpretation, published simultaneously with Regulation Best Interest, reaffirmed and in some cases clarified aspects of the fiduciary duty of an investment adviser under the Advisers Act.[80] The SEC stated that ''an investment adviser's fiduciary duty under the Investment Advisers Act comprises both a duty of care and a duty of loyalty.'' [81] According to the SEC, ''[t]his fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.'' [82] The fiduciary duty under the Federal securities laws requires an adviser ''to adopt the principal's goals, objectives, or ends.'' [83] The SEC stated:

> This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the ''best interest'' of its client at all times.[84]

The SEC further stated, ''[t]he investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.'' [85] An investment adviser's fiduciary duty under the Advisers Act applies to advice about whether to rollover assets from one account to another, including rolling over from retirement accounts into an account that will be managed by the investment adviser or an affiliate.[86]

State Legislative and Regulatory Developments

Since the vacatur of the Department's 2016 Rulemaking, there have also been legislative and regulatory developments at the State level involving conduct standards. For instance, the Massachusetts Securities Division amended its regulations to apply a fiduciary conduct standard under which broker-dealers and their agents must ''[m]ake recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer.'' [87]

Additionally, the NAIC Model Regulation, updated in 2020, provides that insurance agents must act in the consumer's ''best interest,'' as defined by the Model Regulation, when making a recommendation of an annuity, and insurers must establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.[88] The NAIC Model Regulation also provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.[89] According to the NAIC, as of March 11, 2024, 45 jurisdictions have implemented the revisions to the model regulation.[90]

The NAIC Model Regulation includes a best interest obligation comprised of a care obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.[91] If these specific obligations are met, the producer is treated as satisfying the overarching best interest standard as expressed in the NAIC Model Regulation. The care obligation states that the producer, in making a recommendation, must exercise ''reasonable diligence, care and skill'' to:

> (i) Know the consumer's financial situation, insurance needs and financial objectives;
>
> (ii) Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
>
> (iii) Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
>
> (iv) Communicate the basis or bases of the recommendation.[92]

The NAIC conflict of interest obligation requires the producer to ''identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.'' [93] Further, under the NAIC Model Regulation, insurers are required to ''establish and maintain reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time.'' [94]

The NAIC Model Regulation's requirements regarding mitigation of material conflicts of interest are not as stringent as either the Department's approach under ERISA or the SEC's approach. This is made clear in the NAIC Model Regulation's definition of a ''material conflict of interest'' which expressly carves out all ''cash compensation or non-cash compensation'' from treatment as sources of conflicts of interest.[95] ''Cash compensation'' that is excluded from the definition of a material conflict of interest is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the

[75] *Id.* at 33321.

[76] *Id.* at 33390.

[77] 17 CFR 240.15l–1(a)(1).

[78] Regulation Best Interest Release, 84 FR 33318, 33337 (July 12, 2019).

[79] *Id.* at 33343–44.

[80] 84 FR 33669 (July 12, 2019).

[81] *Id.* at 33671 (footnote omitted).

[82] *Id.* at 33670.

[83] *Id.* at 33671.

[84] *Id.* (footnote omitted).

[85] *Id* at 33670. See also *id.* fn. 17 (citing authorities where the Commission previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts).

[86] *Id.* at 33674.

[87] 950 Mass. Code Regs. 12.204 & 12.207 as amended effective March 6, 2020; *see* Consent Order, *In the Matter of Scottrade, Inc.,* No. E–2017–0045 (June 30, 2020); *see also Enf't Section of Massachusetts Sec. Div. of Office of Sec'y of Commonwealth* v. *Scottrade, Inc.,* 327 F. Supp. 3d 345, 352 (D. Mass. 2018) (discussing enforcement actions under Massachusetts securities and other consumer protection laws). A challenge to the regulation was rejected by the Massachusetts Supreme Judicial Court. *See Robinhood Fin. LLC* v. *Sec'y of Commonwealth of Mass,* No. SJC–13381, 2023 WL 5490571 (Mass. Aug. 25, 2023).

[88] Available at *www.naic.org/store/free/MDL-275.pdf.*

[89] NAIC Model Regulation at section 4.B.(1).

[90] *See https://content.naic.org/sites/default/files/inline-files/275%20Final%20Map_2020%20Changes_March%2011%202024.pdf.*

[91] A producer is defined in section 5.L. of the NAIC Model Regulation as ''a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.'' Section 5.L. further provides that the term producer includes an insurer where no producer is involved.

[92] NAIC Model Regulation at section 6.A.(1)(a).

[93] *Id.* at section 6.A.(3).

[94] *Id.* at section 6.C.(2)(h).

[95] *Id.* at section 5.I.

recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer,'' and ''non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.'' [96]

Recent guidance from the SEC staff on broker-dealer and investment adviser conflicts of interest, on the other hand, makes clear that conduct standards in the securities market require a ''robust, ongoing process that is tailored to each conflict.'' [97] The SEC staff guidance provides a detailed list of types of compensation that the SEC staff believes are examples of common sources of conflicts of interest, as follows:

> compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates, including fees and other charges for the services provided to retail investors (for example, compensation based on assets gathered and/or products sold, including but not limited to receipt of assets under management (''AUM'') or engagement fees, commissions, markups, payment for order flow, cash sweep programs, or other sales charges) or payments from third parties whether or not related to sales or distribution (for example, sub-accounting or administrative services fees paid by a fund or revenue sharing);
>
> compensation, revenue or other benefits (financial or otherwise) to financial professionals from their firm or its affiliates (for example, compensation or other rewards associated with quotas, bonuses, sales contests, special awards; differential or variable compensation based on the product sold, accounts recommended, AUM, or services provided; incentives tied to appraisals or performance reviews; forgivable loans based upon the achievement of specified performance goals related to asset accumulation, revenue benchmarks, client transfer, or client retention);
>
> compensation, revenue or other benefits (financial or otherwise) (including, but not limited to, gifts, entertainment, meals, travel, and related benefits, including in connection with the financial professional's attendance at third-party sponsored trainings and conferences) to the financial professionals resulting from other business or personal relationships the financial professional may have, relationships with third parties that may relate to the financial professional's association or affiliation with the firm or with another firm (whether affiliated or unaffiliated), or other relationships within the firm; an
>
> compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates resulting from the firm's or its financial professionals' sales or offer of proprietary products or services, or products or services of affiliates.[98]

The NAIC expressly disclaimed that its standard creates fiduciary obligations, and the obligations in its Model Regulation differ in significant respects from those applicable to broker-dealers in the SEC's Regulation Best Interest or to investment advisers pursuant to the Advisers Act's fiduciary duty.[99] In addition to disregarding all forms of compensation as a source of material conflicts of interest, as discussed above, the NAIC Model Regulation's ''best interest'' standard is satisfied by the four component obligations—the care, disclosure, conflict of interest, and documentation obligations—but these components do not expressly incorporate the best interest obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with the component obligations' terms is treated as meeting the NAIC Model Regulation's ''best interest'' standard. Similarly, the NAIC Model Regulation's care obligation does not repeat the ''best interest'' requirement but instead includes a requirement to ''have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives . . . .'' [100] Additionally, the obligation to comply with the ''best interest'' standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer.

The State of New York took a different approach than the NAIC Model Regulation in its NY Insurance Regulation 187, effective February 1, 2020. Under the New York regulation, an insurance producer acts in the best interest of the consumer when, among other things,

> the producer's . . . recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing. Only the interests of the consumer shall be considered in making the recommendation. The producer's receipt of compensation or other incentives permitted by the Insurance Law and the Insurance Regulations is permitted by this requirement provided that the amount of the compensation or the receipt of an incentive does not influence the recommendation.

Thus, under New York law, insurance producers must act prudently in making a recommendation and must not allow compensation or other incentives to influence their recommendations. According to the American Council of Life Insurers, out of 713 life insurers in the United States, 81 were domiciled in New York in 2022, and annuity direct premium receipts in New York in 2022 totaled $31.4 billion.[101]

The regulatory changes described above cover many, but not all, of the assets held by ERISA retirement plans and IRAs. Further, the SEC's Regulation Best Interest and the NAIC Model Regulation are each limited in important ways in terms of their application to advice provided to ERISA plan fiduciaries.[102] For example, Regulation Best Interest does not cover advice to workplace retirement plans or their representatives (such as an employee of a small business who is a fiduciary of the business's 401(k) plan).[103] The NAIC Model Regulation specifically states that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.[104] And there remain investments held by retirement investors in retirement accounts that are not covered by securities laws or insurance laws, including real estate, certain certificates of deposit and other banking products, commodities, and precious metals. The Department believes that retirement investors and the regulated community are best served by ERISA fiduciary protections in Title I and Title II that apply to all

[96] *Id.* at section 5.B. and J.

[97] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[98] *Id.*

[99] Section 6.A.(1)(d) of the NAIC Model Regulation provides, ''[t]he requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation.'' In recent insurance industry litigation against the Department, plaintiff Federation of Americans for Consumer Choice, Inc., stated that ''[t]here is a world of difference'' between the NAIC Model Regulation and ERISA's fiduciary regime. *See* Pls.' (1) Br. In Opp'n to Defs.' Cross-Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, for Summ. J., and (2) Reply Br. in Supp. of Pls. Mot. for Summ. J, 40, *Fed'n of Ams. for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT (Nov. 7, 2022) (comparing ERISA's best interest requirement to NAIC Model Regulation 275, sections 2.B and 6.A.(1)(d)).

[100] NAIC Model Regulation at section 6.A.(1)(a)(iii).

[101] ACLI 2023 Life Insurers Fact Book, *https://www.acli.com/-/media/public/pdf/news-and-analysis/publications-and-research/2023-fact-book-chapters/2023aclifactbook.pdf.*

[102] The fiduciary obligations of investment advisers under the Advisers Act are not limited in this way, however.

[103] Regulation Best Interest release, 84 FR 33318, 33343–44 (July 12, 2019). Regulation Best Interest would apply, however, to retail customers receiving recommendations for their own retirement accounts. *Id.*

[104] NAIC Model Regulation at section 4.B.(1).

investments that retirement investors may make with respect to their retirement accounts when they receive recommendations from trusted advice providers. Amendments to the ERISA regulation are necessary to achieve that result.

6. Coordination With Other Agencies

Under Title I and Title II of ERISA, the Department has primary responsibility for the regulation of ERISA fiduciaries' advice to retirement investors. Because of the fundamental importance of retirement investments to workers' financial security and the tax-preferred status of plans and IRAs, Congress defined the scope of ERISA fiduciary coverage broadly and imposed stringent obligations on ERISA fiduciaries, including prohibitions on conflicted transactions that do not have direct analogues under the securities and insurance laws. The fiduciary protections and prohibited transaction rules set forth in Title I and Title II of ERISA, as applicable, broadly apply to covered fiduciaries, irrespective of the particular investment product they recommend or their status as investment advisers under the Advisers Act, broker-dealers, insurance agents, bankers, or other status. This final rule is designed to ensure that the standards and rules applicable under Title I and Title II of ERISA are broadly uniform as applied to retirement investors receiving advice from a trusted advisor across different categories of investment advice providers and advisory relationships.

At the same time, many commenters stressed the need to harmonize the Department's efforts with rulemaking activities by other regulators, including the SEC's standards of care for providing investment advice and the Commodity Futures Trading Commission's (CFTC) business conduct standards for swap dealers (and comparable SEC standards for security-based swap dealers). In addition, some commenters have urged coordination with other agencies regarding IRA products and services.

As the SEC has adopted regulatory standards for broker-dealers that are based on fiduciary principles of care and loyalty also applicable to investment advisers under the Advisers Act, and the NAIC has issued a model law that includes a best interest standard, the Department believes that it is possible to hew to the unique regulatory structure imposed by the law governing tax-preferred retirement investments, adopt a regulatory approach that provides a broadly uniform standard for all retirement investors when they receive advice from a trusted advisor, as contemplated by Title I and Title II of ERISA, and avoid the imposition of obligations that conflict with financial professionals' obligations under other applicable Federal and State laws. In particular, in the Department's view, PTE 2020–02, as amended and published elsewhere in today's **Federal Register**, is consistent with the requirements of the SEC's Regulation Best Interest and the fiduciary obligations of investment advisers under the Advisers Act. Therefore, broker-dealers and investment advisers that have already adopted meaningful compliance mechanisms for Regulation Best Interest and the Advisers Act fiduciary duty, respectively, should be able to adapt easily to comply with the amended PTE.

Nevertheless, to better understand whether the proposed rule and proposed amendments to the PTEs would have subjected investment advice providers to requirements that conflict with or add to their obligations under other Federal laws, the Department has reached out to and consulted with the staff of the SEC; other securities, banking, and insurance regulators; [105] the Department of the Treasury, including the Federal Insurance Office; and the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization that oversees broker-dealers.

The Department has also consulted and coordinated with the Department of the Treasury and the Internal Revenue Service (IRS), particularly on the subject of IRAs, and will continue to do so. Although the Department of Labor has responsibility for issuing regulations and prohibited transaction exemptions under section 4975 of the Code, which applies to IRAs, the IRS maintains general responsibility for enforcing the excise tax applicable to prohibited transactions. The IRS' responsibilities extend to the imposition of excise taxes on fiduciaries who participate in prohibited transactions. As a result, the Department and the IRS share responsibility for addressing self-dealing by investment advice fiduciaries to tax-qualified plans and IRAs.

7. Proposed Retirement Security Rule

On October 31, 2023, the Department released the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary, along with proposed amendments to PTE 2020–02 and proposed amendments to other administrative prohibited transaction exemptions available to investment advice fiduciaries.[106] The proposed rule was designed to ensure that protections established by Titles I and II of ERISA would apply to all advice that retirement investors receive from trusted advice providers concerning investment of their retirement assets in a way that ensures that retirement investors' reasonable expectations are honored.[107]

Under the proposal, a person would be an investment advice fiduciary under Title I and Title II of ERISA if they provide investment advice or make an investment recommendation to a retirement investor (*i.e.,* a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary); the advice or recommendation is provided ''for a fee or other compensation, direct or indirect,'' as defined in the proposed rule; and the person makes the recommendation in one of the following contexts:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;
- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or

[105] The Department acknowledges the comments from the NAIC expressing disappointment that the Department coordinated with the NAIC staff rather than with the NAIC members prior to the proposed rule's publication and that the Department did not share its intended approach in advance of public release of the proposal. As the NAIC's comment acknowledged, however, the staff level discussions focused on aspects of the NAIC Model Regulation. Further, immediately after the release of the proposed rule, the Department met with NAIC members and repeatedly offered additional meetings before the rule was finalized. The NAIC also offered substantive comments to the proposed rule after its release, which the Department has carefully considered along with other commenters, including the comments of many others in the insurance industry.

[106] The proposals were released on the Department's website on October 31, 2023. They were published in the **Federal Register** on November 3, 2023, at 88 FR 75890, 88 FR 75979, 88 FR 76004, and 88 FR 76032.

[107] Proposed Retirement Security Rule, 88 FR 75890 (Nov. 3, 2023).

- The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[108]

The proposal's preamble highlighted developments in retirement savings vehicles and in the investment advice marketplace since the 1975 regulation was adopted that have altered the way retirement investors interact with investment advice providers.[109] As noted previously, in 1975, retirement plans were primarily defined benefit plans, which were typically managed by sophisticated financial professionals. IRAs were not major market participants and 401(k) plans were not yet in existence. Today, however, plan participants, IRA owners, and their beneficiaries exercise direct authority over their investments, and depend upon a wide range of financial professionals, including broker-dealers, investment advisers subject to the Advisers Act, insurance agents, and others on how to make complex decisions about the management of retirement assets.

The Department expressed the view in the proposal that when a financial professional satisfies all five parts of the 1975 regulation with respect to a given instance of advice, the professional is properly treated as an investment advice fiduciary in accordance with the parties' reasonable understanding of the nature of their relationship.[110] However, the 1975 regulation, as applied to the current marketplace, is underinclusive in assigning fiduciary status because it fails to capture many circumstances in which an investor would reasonably expect that they can place their trust and confidence in the advice provider as acting in their best interest. The Department's experience in the current marketplace is that the five-part test—in particular, the ''regular basis'' requirement and the requirement of ''a mutual agreement, arrangement or understanding'' that the investment advice will serve as ''a primary basis for investment decisions''—too often works to defeat legitimate retirement investor expectations of impartial advice and allows investment advice providers to hold themselves out as offering individualized advice that is intended to promote the best interest of the customer, when they, in fact, have no such obligation under the 1975 regulation's implementation of Title I or Title II of ERISA.

[108] *Id.*

[109] *Id.* at 75892–3, 75899–900.

[110] *Id.* at 75899.

The proposal noted that these components of the five-part test are not found in the statute's text, and in today's marketplace, undermine legitimate investor understandings of a professional relationship centered around the investor's best interest.[111] In other words, there are currently many situations where the retirement investor reasonably expects that their relationship with the advice provider is one in which the investor can (and should) place trust and confidence in the recommendation, yet which are not covered by the 1975 regulation. The proposal was designed to reconcile the regulatory text with both today's retirement investors' reasonable expectations, along with the statutory text and purpose of ERISA.[112]

The Department stated in the proposal that an important premise of Title I and Title II of ERISA is that fiduciaries' conflicts of interest should not be left unchecked, but rather should be carefully regulated through rules requiring adherence to basic fiduciary norms and avoidance of prohibited transactions.[113] The specific duties to avoid conflicts of interest or comply with a prohibited transaction exemption applicable to fiduciaries under Title I and Title II of ERISA stem from Congress' judgment regarding the best way to protect the public interest in tax-advantaged benefit arrangements that are critical to workers' financial and physical health. In contrast to the Federal laws and other regulatory regimes which can permit certain conflicts if prescribed disclosure obligations are met, the statutory prohibited transaction provisions in Title I and Title II of ERISA contemplate a more stringent approach for the protection of these tax-advantaged retirement savings. In this context, an appropriately constructed regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA is essential.

C. Overview of the Comments Received on the Proposal

The Department received over 400 individual comments and just under 20,000 petition submissions as part of 14 separate petitions on the proposal. These comments and petitions came from consumer groups, financial services companies, academics, trade and industry associations, and others, both in support of, and in opposition to, the proposed rule and proposed amendments to the PTEs.[114]

[111] *Id.*

[112] *Id.*

[113] *Id.*

Commenters on the proposal generally agreed that as a result of the shift from defined benefit plans to 401(k)-type individual account retirement plans, retirement investors today face increased responsibility for ensuring their own secure retirement.[115] Commenters cited studies indicating that many Americans are concerned that they will not have saved enough money to achieve that goal.[116] Many commenters discussed the related importance of retirement investors' access to professional investment advice. In connection with these points, some commenters said the proposed update to the investment advice fiduciary definition would provide important protections that would support retirement investors' access to investment advice intended to advance their interests. Other commenters said the proposed update to the investment advice fiduciary definition was not necessary and that the scope of the proposed definition exceeded the Department's jurisdiction and could reduce access to advice. These comments and the Department's responses are discussed in this preamble Section C. Comments on specific provisions of the proposal are discussed in preamble Section D.

1. Comments Supporting the Proposal

Commenters supporting the proposal echoed many of the concerns expressed by the Department in the proposal's preamble. These commenters emphasized the need to update the 1975 regulation to better align with retirement investor expectations in today's retirement investment marketplace and to fill important gaps in advice relationships where advice is not currently required to be provided in the retirement investor's best interest

[114] The 2023 proposed rule and proposed amendments to the PTEs provided for a 60-day comment period which ended on January 2, 2024. The Department held a virtual public hearing on December 12–13, 2023, at which over 40 witnesses testified. The Department posted a video recording of the virtual public hearing on its website on December 19, 2023, an unofficial hearing transcript on December 22, 2023, and the official hearing transcript on January 10, 2024.

[115] References to ''comments'' and ''commenters'' in this preamble generally include written comments, petitions, and hearing testimony.

[116] *See, e.g.,* Board of Governors of the Federal Reserve System, ''Economic Well-Being of U.S. Households in 2022'' 67 May 2023, *available at https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf,* (''While most non-retired adults had some type of retirement savings, only 31 percent of non-retirees thought their retirement saving was on track, down from 40 percent in 2021.'')

and the investor may not be aware of that fact.

Some commenters expressed specific support for applying ERISA fiduciary protections to recommendations to roll over assets from a workplace retirement plan to an IRA, in light of the significant consequences of that decision. They also expressed support for applying ERISA fiduciary protections to recommendations to plan fiduciaries where, currently, advice regarding plan investment options may not be considered to occur on a regular basis, and therefore would not be considered ERISA fiduciary advice. Commenters said many employers, even larger employers, are not necessarily knowledgeable about selecting prudent investment options for the plans they sponsor.

Commenters also said an updated regulatory definition of an investment advice fiduciary would protect retirement investors from harm caused by conflicts of interest. They said conflicts of interest can expose savers to higher costs, lower returns, and greater risk. Some commenters emphasized that retirement investors with modest balances are more vulnerable to harm from conflicted investment advice, as the high fees would disproportionately diminish their savings. One commenter, a State securities regulator, identified multiple examples of abusive sales tactics impacting retirement investors and said more protections are needed.

In this regard, Morningstar submitted a comment that quantified potential benefits of the proposal in two areas. First, as a result of the proposal's coverage of recommendations to plan fiduciaries about the fund lineups in defined contribution plans, participants in workplace retirement plans would save over $55 billion in the first 10 years and over $130 billion in the subsequent 10 years, in undiscounted and nominal dollars, due to reductions in costs associated with investing through their plans. Second, retirement investors rolling over retirement funds into fixed indexed annuities would save over $32.5 billion in the first 10 years and over $32.5 billion in the subsequent 10 years, in undiscounted and nominal dollars, also due to decreased pricing spreads.[117]

Commenters supporting the proposal discussed the need for application of ERISA fiduciary protections even in light of other regulators' conduct standards. Some commenters said SEC Regulation Best Interest had only limited reach in that it applies only to investments that are securities and some commenters also said it had only limited requirements for conflict mitigation at the financial institution level. A commenter also said there are disparities in the degree to which firms are implementing SEC Regulation Best Interest's requirements. Commenters referenced a 2023 report by the North American Securities Administrators Association on SEC Regulation Best Interest implementation that found that even as firms have updated their investor profile forms and policies and procedures to focus on Regulation Best Interest obligations, many broker-dealers continue to recommend complex products and rely on financial incentives instead of lower cost, lower risk products.[118] One commenter said alternative assets, which they said included for example, precious metals, real estate, private equity, and debt, may not be subject to standards set by the SEC and that state laws vary and leave gaps in protections for investors in these type of investments.

With respect to the insurance marketplace, several commenters described significant conflicts of interest associated with large commissions on some annuity sales, as well as abusive sales practices. Commenters also noted that the terms of annuity contracts, including surrender charges, may often be detrimental to retirement investors but may not be well understood. One commenter said recommendations of annuities for purchase inside retirement accounts deserve special scrutiny because the annuities are often marketed based on purported tax deferral advantages that would not be realized inside an already tax-preferred retirement account.

Some commenters said these issues are not addressed by the NAIC Model Regulation, which some described as providing a best interest standard in name only, when in substance it remains a suitability standard. One commenter presented a guide developed by the Certified Financial Planner (CFP) Board comparing the CFP Board's Code and Standards to the NAIC Model Regulation, which states, among other things, that the NAIC Model Regulation appears to provide a care obligation that does not rise to the level of a ''prudent professional standard.'' The guide further states that the NAIC Model Regulation does not effectively require the client's interests to come first.[119] Even though the NAIC Model Regulation's best interest obligation includes the requirement that the producer shall not place the producer's or the insurer's financial interest ahead of the consumer's interest, several commenters observed that none of the component obligations include a specific requirement for the producer to act in the best interest of the consumer. In other words, the NAIC Model Regulation treats the best interest obligation as satisfied if the producer meets specified component obligations, none of which require the producer to put the client's interests first.

Commenters also said the NAIC Model Regulation does not sufficiently address compensation-related conflicts of interest, noting that it does not include cash and non-cash compensation within the definition of a material conflict of interest. As discussed above, ''cash compensation'' that is excluded from the definition of a material conflict of interest is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer,'' and ''non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.''[120] One commenter expressed the view that an annuity producer that recommends an annuity because that particular annuity pays a larger commission or will help the producer meet a sales goal or ensure the producer wins an expensive trip will meet the best interest standard in the NAIC Model Regulation so long as the annuity is ''suitable'' for the retirement saver.

Another commenter noted that there are abuses in life insurance recommendations as well, and that the NAIC has not addressed investment-oriented life insurance policies even

[117] Available at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00290.pdf.* Morningstar also suggested that the Department should revise its Form 5500 to reduce gaps in the disclosures that would provide additional transparency on fees and compensation. Another commenter suggested that the Department should require plans to provide a 404a–5 participant fee disclosure with cost details, as with their annual reports on Form 5500. The Department acknowledges these comments but notes they are outside the scope of this project.

[118] NASAA, Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II(B) (Sept. 2023) at 2–3, *https://www.nasaa.org/wp-content/uploads/2023/08/Reg-BI-Phase-II-B-Report-Formatted-8.29.23.pdf.*

[119] Available at *https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/compliance-resources/naic-comparison-guide.pdf.*

[120] NAIC Model Regulation at section 5.B. and J.

though regulators receive many thousands of customer complaints about the policies.

Several commenters responded to arguments that disclosures are sufficient for financial professionals to avoid conflicts of interest. The commenters stated that, while disclosures are important components of financial regulation and provide transparency, they are ineffective in protecting investors. The commenters noted that the disclosures are often long and full of technical language. The commenters stated that studies showed that disclosures cause investors to trust and increasingly rely on financial professionals, enhancing the ability of financial professionals to provide information not in the investors' best interest.

Overall, these commenters suggested that the proposal would benefit retirement investors by ensuring that investment advice they receive from trusted advice providers is consistent with ERISA's fiduciary protections under Title I and Title II.

2. Comments Opposing the Proposal

Some other commenters said the Department should retain the 1975 regulation as the applicable regulatory definition of an investment advice fiduciary. They said the five parts of the 1975 regulation are needed to describe a relationship of trust and confidence, consistent with the Fifth Circuit's *Chamber* opinion. Some of the commenters further said that the Department had not provided sufficient evidence of existing problems that would be solved by the updated investment advice fiduciary definition.

Commenters also said the proposed rule exceeded the Department's jurisdiction, for a variety of reasons, including in covering advice to roll over from a workplace retirement plan to an IRA as advice under Title I of ERISA. Many commenters said that the proposal suffered the same legal flaws as the 2016 Final Rule and would be legally vulnerable under the *Chamber* opinion. One commenter said that the statutory language in ERISA section 3(21)(A) and Code section 4975(e)(3) provides that a person is a fiduciary only ''*to the extent*'' they ''provide investment advice for a fee or other compensation, direct or indirect,'' which indicated there were limits on the breadth of what is considered ERISA fiduciary investment advice.

Some commenters also said that financial professionals paid by commission cannot satisfy the ERISA fiduciary duties under Title I which require, among other things, fiduciaries to discharge their duties with respect to the plan ''solely in the interests of the participants and beneficiaries.'' [121] These commenters said they understood this standard to require a complete disregard of any financial interest, which they said is incompatible with the business of broker-dealers and insurance agents. Some commenters also said the Department did not have jurisdiction to create a ''best interest'' standard, which they said has no basis in ERISA. Commenters also said the Department should not rely on ''best interest'' standards of other regulators to demonstrate trust and confidence required for ERISA fiduciary status. Some commenters said the SEC in Regulation Best Interest and the NAIC in its Model Regulation intentionally created standards that were not fiduciary standards, and the Department should not override those decisions.

Many of these commenters also said an updated definition of an investment advice fiduciary is unnecessary in light of the conduct standards in SEC Regulation Best Interest and the adoption by many States of the NAIC Model Regulation. Commenters described these regulatory actions as establishing robust, effective, and workable best interest standards while preserving the ability of retirement investors to work with the financial professional of their choosing and to retain choice as to how they pay for financial services and products.

Some commenters said the proposal's preamble discussion of the NAIC Model Regulation reflected misunderstanding by the Department. They said the NAIC Model Regulation sets forth a clear best interest standard despite not restating the ''best interest'' requirement in the component obligations. They also said that the NAIC Model Regulation did require mitigation of compensation-related conflicts of interest in the area of sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time, and the decision to exclude compensation from the definition of material conflicts of interest demonstrated a conscious choice that the best way to address conflicts is through disclosure.[122] Commenters also identified other types of State insurance laws that provide protection to retirement savers, such as regulations governing insurance advertising. An insurance commissioner commenter said the Department's proposal would displace the requirements of the NAIC Model Regulation as adopted by the States.

In sum, these commenters generally urged the Department to withdraw the proposal and focus its resources on other priorities.

3. Comments About Preserving Access to Investment Advice and Products in the Retail Market

Many commenters addressed the impact of the proposal on access to investment advice and products in the retail market. Some commenters believed that the rule would lead to advice providers imposing account minimums or raising their fees. Commenters also said that imposing ERISA fiduciary protections on advice and recommendations to retirement investors would lead to a decrease in commission-based arrangements and related access to certain investment products. They said this would be the case because status as an investment advice fiduciary would expose financial services providers to additional compliance costs and litigation risk. Commenters further said that the proposal was insufficiently specific about when ERISA fiduciary status would apply, and uncertainty would result in some providers taking a conservative approach and discontinuing serving retirement investors. Commenters said commission-based arrangements provide a valuable source for investment advice and information, and that a reduction in such arrangements would negatively impact retirement investors who may not be best suited for a fee-based investment advice arrangement.

A number of commenters said the proposal would have a negative impact on access to annuities, which are generally sold on commission. These commenters described annuities as an important option for retirement investors seeking a guaranteed lifetime income stream as part of their retirement plan. Some of these commenters said the Department's proposal failed to recognize the value of these products and was inconsistent with congressional intent to promote lifetime income options, as evidenced by recent pension legislation in the SECURE Act [123] and the SECURE 2.0 Act.[124] Commenters specifically mentioned such features as protection

[121] *See* ERISA section 404, 29 U.S.C. 1104.

[122] *See* NAIC Model Regulation at section 6.C.(2)(h).

[123] The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Public Law 116–94, Dec.20, 2019, Division O.

[124] SECURE 2.0 Act of 2022, Public Law 117–328, Dec. 29, 2022, Division T.

against volatility, longevity and inflation risk through guarantees.

In this regard, some commenters said the Department's proposal would impose ERISA fiduciary duties on financial professionals who are traditionally considered salespeople. The commenters said that when the financial professional is paid on commission it should be clear to the retirement investor that the professional is engaging in sales activity, as opposed to providing advice. Commenters said that under the Fifth Circuit's *Chamber* opinion, salespersons are generally not considered to have a relationship of trust and confidence with their customers. One commenter said: ''the fact that a broker-dealer or insurance agent acts in a manner that is trustworthy and provides guidance and recommendations in the investor's best interest does not alter the sales relationship and does not implicate or confer fiduciary status.''

Another commenter discussed the proposal in the context of alternative investments, where the commenter said commissions are relatively large. The commenter said applying ERISA's reasonable compensation standard and the PTEs' conduct standards in this context would likely chill willingness to recommend investment products with higher-than-average commissions, including alternative investments that the commenter said provide diversification, income, and other important portfolio elements. They said that although the SEC in Regulation Best Interest does require a focus on costs associated with an investment, it does not employ a distinct inquiry into the broker-dealer's compensation analogous to ERISA's reasonable compensation standard. Therefore, they did not believe that the Department's proposal was consistent with the SEC's approach in Regulation Best Interest or workable for broker-dealers.

Other commenters generally urged the Department to be skeptical of industry predictions of loss of access to advice and services. They believed providers would remain available to serve retirement investors irrespective of account balance size. They also said they were not aware of any decrease in access to advice and products following the recent adoption of other conduct standards including Regulation Best Interest. Rather, they said, the experience with Regulation Best Interest shows that financial professionals paid on commission can comply with an explicit best interest standard that requires conflict mitigation. A commenter also pointed to the fact that financial professionals paid on commission are among the CFP professionals who have adopted the CFP Board fiduciary duty.

These commenters disagreed that retirement investors are well aware when they are receiving a sales pitch. They said retirement investors generally do not understand how financial professionals are paid or the differences in the regulatory requirements applicable to broker-dealers, investment advisers, and insurance agents.

A number of these commenters also said commission-based financial professionals commonly hold themselves out as trusted advice providers. Commenters said that marketing slogans and titles such as ''financial advisor,'' ''financial consultant,'' and ''wealth manager'' are commonly and deliberately used to establish a sense of trust and confidence. One commenter cited several examples of marketing strategies employed in the insurance industry. One such example described a ''Trusted Advisor Success Training Workshop'' showing insurance agents how they ''can have endless streams of new, repeat, and referral business'' by ''mak[ing] the move from a salesperson to a 'Trusted Advisor!'''

One commenter described a study that found that 25 of the largest insurance companies and broker-dealers substantively market themselves as offering advice services and using advice titles, even as they continued to rely on the regulatory standards that apply to salespersons.[125] Another commenter provided examples, such as the following statement they said was on the annuities page of an insurance company: ''by working with a trusted financial professional, you can discuss your unique circumstances and how best to prepare for the challenges that may lie ahead.'' These commenters did not agree that commission-based financial professionals should categorically be excluded as investment advice fiduciaries or that such a categorical exclusion was compelled by the Fifth Circuit's *Chamber* decision.

A number of comments from financial professionals paid on commission also indicated they did not think of themselves as salespeople. One financial services provider who testified at the Department's public hearing on the proposal and said that most of his customers pay by commission, stated he was not a salesperson and agreed that he did have a relationship of trust and confidence with his customers.[126] He described himself as ''[a]n advisor and somebody who helps and serves my clients, that's my highest ethic and creed. . . . I believe those individuals who are called to serve others gravitate towards professions like ours.'' [127]

The witness represented the National Association of Insurance and Financial Advisors (NAIFA), a large association representing the interests of insurance professionals, and said ''NAIFA members are Main Street advisors who primarily serve and maintain longstanding relationships with individuals, families and small businesses in their communities.'' [128] In describing the process for deciding whether to recommend an annuity to someone and determine what the right annuity is, the witness said: ''basically we have a long-term relationship where I get to know the client, get to know their needs, their objectives, their risk tolerance and try to figure out what the best products and services are to meet those needs.'' [129] Other comments similarly indicated that some financial professionals paid on commission nevertheless view themselves as trusted advisers.[130]

Other commenters said that the Department's proposal would lead to a reduction in sales recommendations in the institutional market and also in the provision of educational information. These comments are discussed in Section E of the preamble. Access to advice in the retail market is further

[125] The commenter cited the following press release relating to the study: ''Review of 25 Major Brokerage Firms & Insurance Companies Find All Posing as Fiduciaries, Misleading Consumers,'' Consumer Federation of America press release, Jan. 18, 2017, *https://consumerfed.org/press_release/review-25-major-brokerage-firms-insurance-companies-find-posing-fiduciaries-misleading-consumers.*

[126] Testimony of Bryon Holz, National Association of Insurance and Financial Advisors, Transcript of the Public Hearing on the Retirement Security Rule: Definition of an Investment Advice Fiduciary, December 12, 2023, at 176, 180, available at *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/hearing-transcript-day-1.pdf.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 174.

[130] *See e.g.,* petition 4, with 3059 submitters (''Having a relationship with a trusted financial advisor helps people save more for retirement. I provide my clients with comprehensive financial advice and as an independent financial advisor, I can recommend products that are in their best interest. Currently, clients can choose how to pay for financial advice by working with financial advisors whose business model aligns with their goals. . . . [C]ommissions are an important way that advisors are able to serve those who may not otherwise be able to afford to work with an advisor because they have less investable assets or because a specific investment strategy with commissions is the most economically available option.''), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/petition-004.pdf.*

discussed in section 7 of the Regulatory Impact Analysis.

4. The Department's Decision to Issue the Final Rule

After careful consideration of the comments discussed in this section, the Department has determined to issue a final rule updating the regulatory definition of an investment advice fiduciary, with changes reflecting input from the commenters. This decision reflects the continued view that applying ERISA fiduciary protections under Title I and Title II to trusted advice to retirement investors about their retirement accounts is necessary and appropriate to protect the retirement investors from conflicts of interest.

The Department's Jurisdiction

To begin with, as some commenters noted, when Congress enacted ERISA, it chose to impose a uniquely protective regime on the management and oversight of plan assets. The law's aim was to protect the interests of plan participants and beneficiaries by imposing especially high standards on those who exercise functional authority over plan investments, including rendering investment advice for a fee.[131] As many courts have noted, ERISA's obligations are the ''highest known to the law.'' [132] Thus, the Department has not deferred completely to the Federal securities laws and State insurance laws, as some commenters advocated, because such deference would not be consistent with congressional intent or ERISA's purposes.

Under Title I of ERISA, the Department has express authority to issue regulations defining terms in Title I and to grant administrative exemptions from the prohibited transactions provisions. Pursuant to the President's Reorganization Plan No. 4 of 1978,[133] which Congress ratified in 1984,[134] the Department's authority was expanded to include authority to issue regulations, rulings, and opinions on the definition of a fiduciary with respect to Title II plans under the Code (including IRAs) and to grant administrative prohibited transaction exemptions applicable to them.[135] Thus, the Department has clear authority to promulgate the regulatory definition of a fiduciary under both Title I and Title II of ERISA, and the Department has taken care in this final rule to honor the text and purposes of Title I and Title II of ERISA.

The final rule is consistent with the express text of the statutory definition and will better protect the interests of retirement investors as compared to the 1975 regulation. It comports with the broad language and protective purposes of the statute, while at the same time limiting the treatment of recommendations as ERISA *fiduciary* advice to those objective circumstances in which a retirement investor would reasonably believe that they can rely upon the advice as rendered by a financial professional who is acting in the investor's best interest and on their behalf.

In today's market, the 1975 regulation's five-part test is underinclusive in assigning fiduciary status as it fails to capture many circumstances in which an investor would reasonably expect that they can place their trust and confidence in the advice provider. As noted above, the Department has become concerned that the 1975 regulation's regular basis test has served to defeat objective understandings of the nature of the professional relationship and the reliability of the advice as based on the investor's best interest. The proposal noted that even a discrete instance of advice can be of critical importance to the plan. As another example, under the 1975 regulation's ''regular basis'' requirement, which is not found in the text of the statute, a financial professional could provide recommendations on a regular basis for many years to an investor regarding the investor's non-retirement accounts and yet still not be considered an investment advice fiduciary with respect to a recommendation to roll over all their retirement savings from the investor's workplace retirement plan to an IRA if that is the first instance of advice with respect to that plan account.

Therefore, the Department does not believe that the 1975 regulation's five-part test is the only test that can properly define an investment advice fiduciary under the statute, and the Department does not believe its authority to revisit the regulatory definition of an investment advice fiduciary and depart from the 1975 five-part test is foreclosed by the *Chamber* opinion. The discrete components of the five-part test are not found in the text of the statute, and commenters did not identify—and the Department's research did not uncover—any common law cases predating enactment of ERISA that limited the application of fiduciary status and obligations to those persons that meet all five of the requirements created and imposed by the 1975 regulation. To the contrary, the Department notes that multiple cases discuss how ERISA's statutory definition of ''fiduciary'' is broad,[136] with one such case indicating that the definition of ''fiduciary'' under ERISA is broader than the more restrictive approach the Department articulated through the 1975 five-part test.[137]

The Department also does not agree with a commenter that said that the proposal would render the ''*to the extent*'' language in the statute a nullity.[138] Under ERISA's functional test of fiduciary status, as the courts have repeatedly recognized, a person is a fiduciary *to the extent* the person engages in specified activities, and only

[131] One commenter provided following statement by the Chair of the Senate Committee on Labor and Public Welfare upon introduction of the Conference Report on ERISA:

Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds. Neither existing State nor Federal law has been effective in preventing or correcting many of these abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to . . . establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets. . . .

Statement by Hon. Harrison A. Williams, Jr., Chairman, Senate Committee on Labor and Public Welfare, 120 Congressional Record S 15737 at 11 (Aug. 22, 1974) (introducing the Conference Report on H.R. 2).

[132] *Donovan* v. *Bierwirth,* 680 F.2d 263, 272 n. 8 (2d. Cir. 1982), *cert denied,* 459 U.S. 1069 (1982).

[133] 5 U.S.C. App. 752 (2018).

[134] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

[135] Sec. 102, 5 U.S.C. App. 752 (2018).

[136] *See Eaves* v. *Penn,* 587 F.2d 453, 458 (10th Cir. 1978); *Farm King Supply, Inc. Integrated Profit Sharing Plan & Tr.* v. *Edward D. Jones & Co.,* 884 F.2d 288, 293 (7th Cir. 1989); *see also Thomas, Head & Greisen Emps. Tr.* v. *Buster,* 24 F.3d 1114, 1117 (9th Cir. 1994) (''[T]he definition of fiduciary under ERISA should be liberally construed.'' (citing *Consolidated Beef Indus. Inc.* v. *New York Life Ins. Co.,* 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied,* 503 U.S. 985 (1992))); H. Stennis Little, Jr., & Larry Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread,* 30 Vanderbilt L. Rev. 1, 4–5 (1977) (referring to the ''broadness of the [statutory] definition'' of ''fiduciary'' under ERISA, such that the definition could cover ''insurance salesmen who recommend the purchase of certain types of insurance and receive a commission on the sale of such insurance'' and ''stock brokers or dealers who recommend certain securities and then participate in the acquisition or disposition of securities and receive a commission for their services'').

[137] *See Farm King,* 884 F.2d at 293 (discussing ''evidence of the wide sweep given to the meaning of 'fiduciary' under ERISA'' in relation to the narrower definition codified in the 1975 test).

[138] ERISA section 3(21)(A)(ii) provides: ''a person is a fiduciary with respect to a plan to the extent . . . (ii) [t]he [person] renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . .''

to that extent.[139] Under both the proposed rule and the final rule, therefore, a person renders fiduciary advice only to the extent they meet the regulatory definition with respect to the particular communication at issue. A person may be a fiduciary for purposes of one advice transaction and not another, and the person must meet the specific requirements of the final rule to be treated as a fiduciary with respect to any given transaction. To the extent a person does not meet the final rule's requirements (*e.g.,* by not making a recommendation, receiving a fee, providing individualized advice, or purporting to act in the investor's best interest), they are not a fiduciary with respect to that recommendation. The final rule fully adopts the statute's functional and transactional approach to the determination of fiduciary status.

The final rule also does not base fiduciary status on firms' or financial professionals' status under other laws, as some commenters have asserted. Instead, the final rule is focused on defining those circumstances in which the retirement investor has a reasonable expectation that the recommendation reflects a professional or expert judgment offered on their behalf and in their interest. In the circumstances specified, a retirement investor would be entitled to treat their relationship with the person making the recommendation as one of trust and confidence. To the extent that a financial professional satisfies the conditions, in part, based on compliance with other regulators' conduct standards, that would merely be a consequence of independent decisions made by other regulators. The final rule does not override those regulators' decisions as to how to characterize their conduct standards, require them to take any particular approach to oversight of investment recommendations, or pin fiduciary status on anything other than a reasonable understanding of the nature of the relationship between the persons giving and receiving the advice. The Department's regulation is based on its unique authority to define a fiduciary for purposes of Title I and Title II of ERISA, establish a uniform definition for all persons giving investment advice to retirement investors under Title I and Title II of ERISA, and fulfill the statute's investor-protective purposes in accordance with the text of the statute.

Moreover, commission-based financial professionals are fully able to satisfy ERISA's fiduciary standard of loyalty in Title I. The Department has long interpreted the duty of loyalty, as set forth in section 404(a)(1)(A) of ERISA (a fiduciary must discharge their duties with respect to the plan "solely in the interests of the participants and beneficiaries") as establishing a standard that prohibits a fiduciary from "subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives." [140] This standard properly applies section 404(a)(1)(A)'s duty of loyalty in the context of advice arrangements. ERISA further permits fiduciaries to receive reasonable compensation—including commission-based compensation—for their services.[141]

Indeed, the statute recognizes the impossibility of avoiding all fiduciary conflicts of interest by giving the Department authority to grant exemptions from the prohibited transaction rules. The mere existence of a conflict is insufficient to defeat fiduciary status or to establish a violation of the prohibited transaction rules. Instead, the conflict of interest must be managed in accordance with a statutory exemption or administrative exemption granted by the Department. This does not prevent commission-based compensation arrangements, as some commenters have asserted, so long as the advice provider does not subordinate the interests of the retirement investor to their own financial interests and does not charge more than "reasonable compensation," as expressly authorized by the statute.[142] Indeed, in many instances, such as those involving advice on "buy and hold" strategies, a commission-based model may be more appropriate for the investor, and a prudent fiduciary may recommend the use of a commission-based structure, rather than advise the investor to enter into an arrangement that requires the payment of ongoing fees without a commensurate need for ongoing advice. Nothing in the text of the statute, the text of the 1975 regulation, or previous guidance draws a distinction between commission-based compensation and other forms of compensation in determining whether a person is a fiduciary when making recommendations for direct or indirect compensation.

One commenter expressed concern that the rule could reduce access to advice on alternative investments because of the relatively large commissions paid in connection with alternative investments. The commenter said the reasonable compensation requirement did not have an analog in Regulation Best Interest and also would be unworkable for broker-dealers. However, the obligation to pay no more than reasonable compensation to service providers has been long recognized under Title I and Title II of ERISA. The statutory exemptions in ERISA section 408(b)(2) and Code section 4975(d)(2) expressly require services arrangements involving plans and IRAs to result in no more than reasonable compensation to the service provider. Financial institutions and investment professionals—when acting as service providers to plans or IRAs—have long been subject to this requirement, regardless of their fiduciary status. The reasonable compensation standard requires that compensation not be excessive, as measured by the market value of the particular services, rights, and benefits the financial institution and investment professional are delivering to the retirement investor.

To the extent an investment advice fiduciary's receipt of compensation would constitute a self-dealing type prohibited transaction under ERISA section 406(b) and Code section 4975(c)(1)(E) or (F), conditional relief for investment advice fiduciaries to receive compensation that varies based on their investment advice is provided pursuant to amended PTE 2020–02 and amended PTE 84–24. One such condition in these PTEs is adherence to a loyalty obligation that the Department has stated is consistent with the "sole interest" standard in ERISA section 404.[143] The use of the standard in the PTEs is an appropriate exercise of the Department's exemptive authority under ERISA section 408(a) and the Reorganization Plan No. 4 of 1978 to provide an exemption that is protective of the interests of retirement investors, not an improper conflation of the two standards, as suggested by some commenters. Based on this discussion, the Department disagrees with the commenter who said the proposal would be unworkable for broker-dealers.[144]

[139] *See, e.g., Mertens* v. *Hewitt Associates,* 508 U.S. 248, 264 (1993); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[140] *See, e.g.,* Advisory Opinion 2008–05A (June 27, 2008); Letter to Harold G. Korbee (Apr. 22, 1981).

[141] ERISA section 408(c)(2), 29 U.S.C. 1108(2); Code section 4975(d)(10).

[142] ERISA section 408(b)(2); 29 U.S.C. 1108(b)(2); Code section 4975(d)(2).

[143] Improving Investment Advice for Workers & Retirees, 85 FR 82798, 82823 (Dec. 18, 2020).

[144] The Department also notes that there are compensation requirements applicable to broker-

Continued

Some commenters also sought to draw a bright line distinction between recommendations made in a sales capacity and those made in a fiduciary capacity, asserting that commission-based recommendations are properly viewed as mere sales pitches that should not lead to ERISA fiduciary status. This approach, however, is neither supported by the text of the statute nor the Department's consistent views starting in 1975 that advice can be compensated through commissions.[145] The text of the statute does not draw a distinction between commissions and other fee-based forms of compensation, but rather broadly refers to ''advice for a fee or other compensation, direct or indirect,'' which the Department has consistently recognized includes commission-based advice. Accordingly, the final rule properly focuses on the nature of the relationship between the parties, rather than the specific mode of compensation. Whether a firm or financial professional has held themselves out as providing the sort of recommendation that may rightly be relied upon as a fiduciary recommendation is a function of the test set forth in the final rule, which requires compensation, but does not draw a bright line between commissions and fee-based compensation. In those circumstances where the final rule's definition is satisfied, the firm or investment professional is doing much more than merely executing a sale. They are offering a professional recommendation that is purportedly based on the investor's best interest, and that recommendation is central to the relationship and a key component of the services offered to the investor.

In this connection, however, it is important to note that neither the proposed rule nor the final rule assigns fiduciary status to a party who merely engages in a sales transaction with a retirement investor. Under the express terms of paragraph (d) of the final rule, merely executing a sale does not give rise to fiduciary status. Moreover, even if one makes a recommendation in connection with a commission-based transaction, that recommendation will not amount to fiduciary advice unless the recommendation meets the specific conditions set forth in the final rule, all of which are aimed at ensuring that the advice goes beyond a mere ''sales pitch,'' and instead reflects the sort of relationship of trust and confidence that should be afforded fiduciary status and protection. To that end, and in response to comments, the Department narrowed the contexts that give rise to fiduciary status, and included a new paragraph confirming that mere sales recommendations devoid of the two covered contexts will not result in ERISA fiduciary status and that investment information or education, without an investment recommendation, will also not result in ERISA fiduciary status.

Finally, some commenters said that the *Chamber* opinion indicated that the Department's authority to regulate conduct in the financial services industry has been limited by the Dodd-Frank Act. The commenters said that under Dodd-Frank, Congress had authorized the SEC, and not the Department, ''to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers who render 'personalized investment advice about securities to a retail customer.' ''

The Department's well-settled authority under ERISA to regulate investment advice rendered by fiduciaries to retirement investors in the context of certain annuity sales was not impaired by the Dodd-Frank legislation. Rather, section 913 of the Dodd-Frank Act directed the SEC to study the effectiveness of the rules applicable to investment advice respecting securities by entities subject to SEC regulation ''and other Federal and State legal or regulatory standards.'' The reference to other standards demonstrates Congress' clear awareness that there are overlapping Federal regulatory schemes. Moreover, this rulemaking is closely aligned with the SEC's standards under both the Advisers Act and under Regulation Best Interest, which was adopted subsequent to the *Chamber* opinion and is rooted in fiduciary principles.[146]

In addition, some commenters posited that section 989J of Dodd-Frank limited regulation of fixed indexed annuities to States (provided certain criteria are met). In making this assertion, commenters cited language in the *Chamber* decision to the effect that ''[s]ection 989J . . . provides that 'fixed indexed annuities sold in states that adopted the [NAIC's] enhanced model suitability regulations, or companies following such regulations, shall be treated as exempt securities not subject to federal regulation.' '' [147] The quoted language, however, was taken from an appellate brief, not section 989J. The statutory language simply states that ''[t]he *Commission* [SEC] shall treat as exempt'' such annuities from regulation as securities. By its express terms, section 989J restricts regulation only by the SEC under the securities laws.[148] It does not address or limit the Department of Labor's separate authority under ERISA or its separate obligations with respect to retirement plans and IRAs. In accordance with its authority under ERISA, the Department has determined that it is appropriate to include investment advice regarding plan and IRA investments in fixed indexed annuities within this scope of this rule.

Need for an Updated Definition of an Investment Advice Fiduciary

The 1975 regulation makes it all too easy for financial professionals and firms to hold themselves out as trusted advisers acting in the individual investor's best interest and based on their individual circumstances when, in fact, they have no obligation to act in

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dealers, *see e.g.,* FINRA rule 2121 (fair prices and commissions).

[145] *See e.g.,* U.S. Department of Labor Adv. Op. 83–60A (Nov. 21, 1983) (Rejecting the interpretation that fiduciary status under ERISA section 3(21)(A)(ii) would not attach to broker-dealers unless a broker-dealer provides investment advice for distinct, non-transactional compensation), The Department stated that ''if . . . the services provided by the broker-dealer include the provision of 'investment advice', as defined in regulation 2510 .3–21(c), it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.'' *Id.* The statutory language broadly encompasses any ''fee or other compensation,'' and even under the five-part test promulgated in 1975, the Department rejected the position that payment of compensation through commissions categorically excluded a broker-dealer from being an investment-advice fiduciary. *See* 40 FR 508842 (Oct. 31, 1975).

[146] *See* Regulation Best Interest release, 84 FR 33318, 33330 (July 12, 2019) (noting that Regulation Best Interest ''draws from key fiduciary principles underlying fiduciary obligations'' and that the ''key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act.''); *see also,* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation (''Both [Regulation Best Interest] for broker-dealers and the [Advisers Act] fiduciary standard for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest.''), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

[147] 885 F.3d at 385 (citation omitted). The decision incorrectly attributes the internally quoted language to the text of Dodd-Frank. *Id.* This language is actually from an appellate brief by the Indexed Annuity Leadership Council (IALC), one of the plaintiffs that challenged the 2016 Rulemaking. Brief of Plaintiff-Appellant, *Chamber of Com. of United States of Am.* v. *U.S. Dep't of Lab.,* 885 F.3d 360 (5th Cir. 2018) (No. 17–10238), 2018 WL 3301737, at *8. The statutory text itself provides no basis for the broad conclusion that fixed indexed annuities sold in a State that follows the NAIC's model suitability (or successor) regulations, among other criteria, are exempt from Federal regulation.

[148] 15 U.S.C. 77c Note (emphasis added).

the investor's best interest or otherwise adhere to the fiduciary standards under Title I and Title II of ERISA. While the actions of other regulators, particularly the SEC's adoption of Regulation Best Interest, have partly addressed this concern, significant gaps remain, and the current patchwork regulatory structure is neither uniform nor sufficiently protective of retirement investors. As discussed in greater detail in the Regulatory Impact Analysis, the Department has determined that the final rule will provide additional benefits and needed protections for retirement investors, even in light of other regulators' recently enhanced conduct standards.[149]

For example, commenters did not dispute the fact that certain recommendations by broker-dealers to retirement investors are not covered by SEC Regulation Best Interest, including recommendations to plan fiduciaries such as the fiduciaries of small employer plans who need assistance in constructing the lineup on a 401(k) plan menu.[150] Several commenters expressed strong support for applying ERISA fiduciary protections in this context, with Morningstar quantifying potential benefits of the proposal's coverage of recommendations to plan fiduciaries on the investment options in defined contribution plans as saving participants over $55 billion in the next 10 years in costs associated with investing through their plans. Other investments that may not be subject to the Federal securities law include: real estate, fixed indexed annuities, certain certificates of deposit and other bank products, commodities, and precious metals. Furthermore, there are a number of persons who provide investment advice services that are neither subject to the SEC's Regulation Best Interest nor to the fiduciary obligations in the Advisers Act. Additionally, some commenters indicated that are disparities in the degree to which firms have implemented Regulation Best Interest. The Department expects the addition of ERISA remedies and the Department's enforcement resources to enhance protection of retirement investors in Title I plans, and to better ensure that advice providers compete on a level playing field where recommendations are made pursuant to a common best interest standard.

Applying ERISA fiduciary protections to the recommendations covered by the rule will also result in increased protections in the insurance market, even in those States that have adopted the 2020 revisions to the NAIC Model Regulation. For example, commenters discussed significant conflicts of interest associated with large commissions on annuity sales, as well as abusive sales practices. Conflicted, imprudent, and disloyal advice with respect to such annuity sales can result in large investor losses. The dangers are compounded by the complexity of the products, which makes sound advice critical.

For example, recommendations of fixed indexed annuities are generally not covered by Regulation Best Interest, but typically are complex products that depend upon careful and expert assessment of myriad contract and investment features. Between 2005 and 2022, the number of indexes available in the market grew from a dozen to at least 150. Many of these indexes are hybrids, including a mix of one or more indexes, as well as a cash or bond component. More than 60 percent of premium allocations for new fixed indexed annuity sales in mid-2022 involved hybrid designs. In addition, the determination of the right annuity requires careful consideration of the method by which the index is credited to the contract's value, charges associated with the contract, potential surrender charges, and any limiting factors on the crediting (such as cap rates, participation rates, or spread). Given the complexity of the products, it is very easy for investors to purchase products that have very different risks and benefits than they thought they were purchasing, and that have considerably more downside than they expected. For all these reasons, fixed indexed annuities have been the subject of various regulatory alerts, warning investors of the dangers associated with the products.[151] Sound advice is critical. In its comment, Morningstar estimates that the Department's proposal would increase retirement investors' savings with respect to fixed indexed annuities by approximately $32.5 billion over the next ten years.

The Department agrees with those commenters who concluded that the NAIC Model Regulation is not as protective as Regulation Best Interest and does not protect retirement investors to the same degree as the fiduciary protections in Title I and Title II of ERISA.[152] Although the NAIC Model Regulation provides that insurers must ''establish and maintain reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time,'' [153] the Department believes that broader conflict mitigation is needed to protect the interests of retirement investors. An important premise of Title I and Title II of ERISA is that fiduciaries' conflicts of interest should not be left unchecked, but rather should be carefully regulated through rules requiring adherence to basic fiduciary norms and avoidance of prohibited transactions.

In particular, the Department is concerned about the NAIC Model Regulation's definition of ''material conflicts of interest'' which must be identified and avoided or reasonably managed and disclosed and which excludes all ''cash compensation'' and ''non-cash compensation.'' As a result, the NAIC Model Regulation excludes ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or

[149] One commenter urged the Department to follow the Statement on Standards in Personal Financial Planning Services implemented by the American Institute of CPAs (AICPA). The commenter described the standards as requiring CPAs to assess whether there are any conflicts of interest related to client engagements. If a conflict of interest exists, the CPA should determine if they can perform the engagement objectively. If they can, they must disclose all known conflicts of interest and obtain written consent. If they cannot, the engagement must be terminated. The Department believes in the context of ERISA fiduciary investment advice to retirement investors, ERISA's prohibited transaction rules provide the appropriate approach by requiring financial professionals to avoid conflicts of interest or comply with a prohibited transaction exemption.

[150] One commenter noted that other securities law protections, such as those under FINRA rules, would be applicable to broker-dealers making recommendations to plan sponsors. However, the commenter suggested that the protections lack a duty of loyalty of comparable rigor to that in PTE 2020–02.

[151] *See, e.g.,* SEC Office of Investor Education and Advocacy Updated Investor Bulletin: Indexed Annuities (July 31, 2020), *https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_indexedannuities;* Iowa Insurance Division, Bulletin 14–02 (September 15, 2014), *https://iid.iowa.gov/media/153/download?inline=.*

[152] The exclusion of commission payments and other compensation as well as non-cash compensation from the definition of a material conflict of interest is in direct contrast to the SEC's approach in Regulation Best Interest. *See* Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019)(''Like many principal-agent relationships—including the investment adviser-client relationship—the relationship between a broker-dealer and a customer has inherent conflicts of interest, including those resulting from a transaction-based (*e.g.,* commission) compensation structure and other broker-dealer compensation.'') *see also* Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest which specifically identifies commissions as an example of a common source of a conflict of interest, available at *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[153] NAIC Model Regulation at section 6.C.(2)(h).

directly from the consumer,'' as well as ''any form of compensation that is not cash compensation'' despite their obvious potential to drive recommendations that favor the financial professional's own financial interests at the expense of the investor's interests. [154]

Although some commenters said that the NAIC's approach reflected the view that the best way to address compensation conflicts is through disclosure, the Department discusses in the Regulatory Impact Analysis its view that disclosure without conflict mitigation is limited in its effectiveness at protecting investors from the dangers posed by conflicts of interest. The NAIC's approach also stands in marked contrast to ERISA's treatment of such competing financial incentives as material conflicts, which give rise to prohibited transactions that require protective conditional exemptions. It also conflicts with the SEC's approach with respect to broker-dealers and investment advisers, in which the SEC staff provided a detailed list of types of compensation that they believe are examples of common sources of conflicts of interest, as follows:

compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates, including fees and other charges for the services provided to retail investors (for example, compensation based on assets gathered and/or products sold, including but not limited to receipt of assets under management (''AUM'') or engagement fees, commissions, markups, payment for order flow, cash sweep programs, or other sales charges) or payments from third parties whether or not related to sales or distribution (for example, sub-accounting or administrative services fees paid by a fund or revenue sharing);

compensation, revenue or other benefits (financial or otherwise) to financial professionals from their firm or its affiliates (for example, compensation or other rewards associated with quotas, bonuses, sales contests, special awards; differential or variable compensation based on the product sold, accounts recommended, AUM, or services provided; incentives tied to appraisals or performance reviews; forgivable loans based upon the achievement of specified performance goals related to asset accumulation, revenue benchmarks, client transfer, or client retention);

compensation, revenue or other benefits (financial or otherwise) (including, but not limited to, gifts, entertainment, meals, travel, and related benefits, including in connection with the financial professional's attendance at third-party sponsored trainings and conferences) to the financial professionals resulting from other business or personal relationships the financial professional may have, relationships with third parties that may relate to the financial professional's association or affiliation with the firm or with another firm (whether affiliated or unaffiliated), or other relationships within the firm; and

compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates resulting from the firm's or its financial professionals' sales or offer of proprietary products or services, or products or services of affiliates.[155]

The Department also notes that the State of New York took a different approach than the NAIC Model Regulation in its NY Insurance Regulation 187. Under the New York regulation, ''[o]nly the interests of the consumer shall be considered in making the recommendation. The producer's receipt of compensation or other incentives permitted by the Insurance Law and the Insurance Regulations is permitted by this requirement *provided that the amount of the compensation or the receipt of an incentive does not influence the recommendation.*'' (Emphasis added.)

The NAIC Model Regulation also specifically disclaims creating fiduciary obligations and differs in significant respects from the protective standards applicable to broker-dealers and investment advisers under Regulation Best Interest and the Advisers Act, respectively, and this final rule. For example, in addition to disregarding compensation as a source of material conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the ''best interest'' obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with these component obligations is treated as meeting the best interest standard. Instead, the core conduct standard of care includes a requirement to ''have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives.'' Additionally, the obligation to comply with the ''best interest'' standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer. In contrast, the standards in the amended PTEs mirror ERISA section 404's standards of prudence and loyalty, and provide that the advice must:

- reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, and
- must not place the financial or other interests of the investment professional, financial institution or any affiliate, related entity, or other party ahead of the interests of the retirement investor, or subordinate the retirement investor's interests to their own.

The amended PTE standards are aligned with the SEC's conduct standards applicable to broker-dealers and investment advisers.[156] Further, as noted above, the NY Insurance Regulation 187 includes a similar standard of care, providing that ''an insurance producer acts in the best interest of the consumer when, among other things, the producer's . . . recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing.''

In response to commenters who expressed concern that the Department's rule would improperly displace State regulation in the annuities market, it bears repeating that in enacting ERISA, Congress imposed a uniquely protective regime on tax-preferred retirement investments. The Department's final rule, which covers compensated retirement recommendations under conditions where it is reasonable to place trust and confidence in the advice, falls well within ERISA's broad fiduciary definition, even if it is more protective of federally-protected retirement investments than State insurance regulations. It is also important to note the interaction between the NAIC Model Regulation and the fiduciary protections under Title I and Title II of ERISA is explicitly recognized in the NAIC Model Regulation's safe harbor for the recommendations and sales of annuities in compliance with comparable standards, including those applicable to fiduciaries under Title I and Title II of ERISA.[157]

Although some commenters maintained the Department misunderstands the NAIC Model Regulation, the Department's analysis is based on the terms of the Model

[154] NAIC Model Regulation at section 5.B. and J.

[155] SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[156] *See generally,* Regulation Best Interest release, 84 FR 33318 (July 12, 2019); SEC Investment Adviser Interpretation, 84 FR 33669 (July 12, 2019).

[157] NAIC Model Regulation at section 6.E.

Regulation and is consistent with that of other commenters, including the CFP Board in their publication discussed above. There can be no misunderstanding with respect to the fact that the NAIC Model Regulation clearly and unambiguously excludes cash and non-cash compensation from the definition of a material conflict of interest.[158] Because of this exclusion, the NAIC Model Regulation does not provide that producers must identify and avoid or reasonably manage material conflicts of interest arising from cash and non-cash compensation. This leaves disclosure as the sole method of addressing such conflicts other than the prohibition of sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time, which are prohibited. The Department's PTEs' more stringent requirements will require insurance market participants not only to disclose but also to more broadly mitigate conflicts of interest associated with commissions and other cash and non-cash compensation to insurance producers providing recommendations to retirement investors, resulting in enhanced protections to consumers.[159]

The Chamber Opinion

Many commenters said the proposed regulation was essentially a re-proposal of the 2016 Rulemaking and had the same legal vulnerabilities. They generally said that, in *Chamber,* the court had approved the 1975 regulation's five-part test as defining a relationship of trust and confidence and they objected to any revision of the five-part test as inconsistent with both the statutory definition and the Fifth Circuit's opinion. The Department disagrees and notes the various differences between the 2016 Rulemaking and this final rule. In writing the proposal and this final rule, the Department has been careful to craft a definition that is consistent with both the statutory text and with the Fifth Circuit's focus on relationships of trust and confidence. The Department's authority to revisit the regulatory definition of an investment advice fiduciary and depart from the 1975 five-part test is not foreclosed by the *Chamber* opinion. In this regard, commenters did not identify for the Department, and the Department's research did not uncover, any common-law cases predating enactment of ERISA that limited the application of fiduciary status and obligations to those persons that meet all five of the requirements created and imposed by the 1975 regulation. Other courts that considered the Department's 2016 Final Rule noted that it was the 1975 five-part test that was difficult to reconcile with the statute, or that the elements of this test, such as the ''regular basis'' prong, do not appear in the text of ERISA.[160] To that end, the Department notes that other cases discuss how ERISA's statutory definition of ''fiduciary'' is broad,[161] with one such case indicating that the definition of ''fiduciary'' under ERISA is broader than the more restrictive approach the Department articulated through the 1975 five-part test.[162]

The final rule is far narrower than the previous rulemaking, which treated all investment recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision as fiduciary in nature, subject to a few carve-outs. By contrast, this rule specifically focuses on whether the investment recommendation can be appropriately treated as trust and confidence advice. Accordingly, and in response to certain comments (which are discussed in greater detail below), the final rule covers recommendations made in the following contexts:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:
  - is based on review of the retirement investor's particular needs or individual circumstances,
  - reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
  - may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
- The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

In these circumstances, the failure to treat the recommendation as fiduciary advice would dishonor the investor's reasonable expectations of professional advice that is offered to advance their best interest and can be relied upon as rendered by a financial professional who occupied a position of trust and confidence. When firms and financial professionals meet the requirements of this definition, it would defeat ERISA's plan-protective purposes and the investor's legitimate expectations of trust and confidence to hold that the advice was not fiduciary. Accordingly, this final rule is wholly consistent with the Fifth Circuit's *Chamber* opinion and the broad language of the statute.

To the extent that the 1975 five-part test excluded such recommendations, it would be underinclusive from the

[158] NAIC Model Regulation at section 5.I.(2).

[159] One commenter provided a summary of the differences between the NAIC Model Regulation and ERISA's fiduciary responsibilities. These differences highlight the additional protection under ERISA in the insurance marketplace. *See* Federation of Americans for Consumer Choice 6 (''The differences between NAIC model regulation best interest and ERISA fiduciary duties include: (i) ERISA has a duty of loyalty to act solely in the interest of the client different from the NAIC model regulation requirement for agents not to put their interests ahead of client interests, (ii) ERISA contains a prudence requirement not considered applicable to insurance producers, (iii) the NAIC model regulation establishes four specified obligations deemed to satisfy the best interest standard consisting of care, disclosure, conflict of interest, and documentation, all of which comport with the sales function of an agent, (iv) the NAIC model regulation requires neither ongoing monitoring nor diversification of assets which may need to be considered by ERISA fiduciaries, (v) the NAIC model regulation does not define conflicts of interest as broadly as ERISA instead relying on disclosure befitting insurance sales practices, (vi) the NAIC model regulation contains no reasonable compensation restrictions but limits certain forms of incentive compensation, and (vii) the NAIC model regulation does not expose agents to common law fiduciary liabilities, DOL oversight, or potential private right of action under ERISA.''), *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00345.pdf.*

[160] *National Association for Fixed Annuities* v. *Perez,* 217 F. Supp. 3d. 1, 23, 27 (D.D.C. 2016); *FACC* v. *U.S. Dep't of Lab.,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *18 (N.D. Tex. June 30, 2023); *see Chamber,* 885 F.3d at 393 (Stewart, C.J., dissenting); *see generally also Market Synergy* v. *U.S. Dep't of Lab.,* 885 F.3d 676 (10th Cir. 2018) (affirming a district court's decision in which several challenges to the 2016 Rulemaking, as it applied to fixed indexed annuities, were rejected).

[161] *See Eaves* v. *Penn,* 587 F.2d 453, 458 (10th Cir. 1978); *Farm King Supply, Inc. Integrated Profit Sharing Plan & Tr.* v. *Edward D. Jones & Co.,* 884 F.2d 288, 293 (7th Cir. 1989); *see also Thomas, Head & Greisen Emps. Tr.* v. *Buster,* 24 F.3d 1114, 1117 (9th Cir. 1994) (''[T]he definition of fiduciary under ERISA should be liberally construed.'' (citing *Consolidated Beef Indus. Inc.* v. *New York Life Ins. Co.,* 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied,* 503 U.S. 985 (1992))); H. Stennis Little, Jr., & Larry Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread,* 30 Vanderbilt L. Rev. 1, 4–5 (1977) (referring to the ''broadness of the [statutory] definition'' of ''fiduciary'' under ERISA, such that the definition could cover ''insurance salesmen who recommend the purchase of certain types of insurance and receive a commission on the sale of such insurance'' and ''stock brokers or dealers who recommend certain securities and then participate in the acquisition or disposition of securities and receive a commission for their services'').

[162] *See Farm King,* 884 F.2d at 293 (discussing ''evidence of the wide sweep given to the meaning of 'fiduciary' under ERISA'' in relation to the narrower definition codified in the 1975 test).

standpoint of trust and confidence, as discussed above. For example, under the 1975 rule, a recommendation to a plan participant to roll over a lifetime of savings and invest them in a fixed indexed annuity would not count as fiduciary advice if the person making the investment recommendation had not regularly made recommendations to the investor about plan assets. This would be true, even if the advice followed a series of meetings about the particular financial circumstances and needs of the investor; purported expert recommendations about how to meet those needs and circumstances based upon consideration of the investor's most intimate financial details; and a clear understanding that the advice was being held out as based upon the best interest of the investor. Moreover, the five-part test would defeat fiduciary status even if the investor had relied upon the financial professional for advice about all aspects of their financial life for a period of many years encompassing many transactions, as long as that advice did not relate to plan assets. It is hard to square such a result with a trust and confidence test, and impossible to square the result with the text of the statute, which contains no such limitation. The final rule avoids such inequitable results, while limiting advice to those circumstances in which the investor reasonably should expect *fiduciary* advice.[163] In this way, the Department believes that treating one-time advice as fiduciary investment advice subject to ERISA is consistent with a relationship of trust and confidence, provided that all of the requirements of the regulatory test are satisfied.[164]

In the final rule, and in response to public comments, the Department has also made changes designed to ensure that it did not capture communications that were not properly viewed as fiduciary advice. Thus, for example, the final rule includes a new paragraph expressly declining fiduciary treatment for mere sales pitches that fall short of meeting the test above. Similarly, the rule makes clear that mere investment information or education, without an investment recommendation, is not treated as fiduciary advice.

This rule is not only a very different rule from the one that was before the Fifth Circuit in *Chamber;* it also addresses a very different regulatory landscape. The regulatory actions taken by the SEC and NAIC to update conduct standards reflect the understanding that broker-dealers and insurance agents commonly make recommendations to their customers for which they are compensated as a regular part of their business; that investors rely upon these recommendations; and that regulatory protections are important to ensure that the advice is in the best interest of the retail customer, in the case of broker-dealers, or consumers, in the case of insurance agents. In this regard, also as discussed above, commenters informed the Department that it is common for broker-dealers and insurance agents to hold themselves out as trusted advisers and take deliberate steps to develop relationships of trust and confidence with their customers.[165] Moreover, as the SEC has repeatedly noted, Regulation Best Interest ''draws from key fiduciary principles underlying fiduciary obligations, including those that apply to investment advisers'' under the Advisers Act.[166] As a result, the final rule is far more consistent with the SEC's regulation of advice than was true of the 2016 Rulemaking, which represented a significant departure from securities law regulation of broker-dealers at the time.

For all these reasons, both the final rule and the regulatory context are far different than the 2016 Final Rule considered by the Fifth Circuit in the *Chamber* opinion. In addition, there are other important ways in which the final rule is different than the 2016 Rulemaking, above and beyond this final rule's clear focus on relationships of trust and confidence:

- The final rule and associated exemptions, unlike the 2016 Rulemaking, contain no contract or warranty requirements. The 2016 Rulemaking required that advisers and financial institutions give their customers enforceable contractual rights. This final rule and amended PTEs do not create any such rights. The sole remedies for non-compliance are precisely those set forth in ERISA and the Code, which include only the imposition of excise taxes in the context of advice to IRAs.
- The amended PTEs, unlike the 2016 Rulemaking, do not prohibit financial institutions and advisers from entering into class-wide binding arbitration agreements with retirement investors.
- PTE 2020–02, as finalized, specifically provides an exemption from the prohibited transaction rules for pure robo-advice relationships, unlike the 2016 Rulemaking.
- PTE 84–24, unlike the 2016 Rulemaking, does not require insurance companies to assume fiduciary status with respect to independent insurance agents, an important concern of insurers with respect to the 2016 Rulemaking.
- Neither PTE 2020–02 nor PTE 84–24, as amended, require financial institutions to disclose all their compensation arrangements with third parties on a publicly available website, as was required by the 2016 Rulemaking.

In sum, commenters err in asserting that this rulemaking is simply a repeat of the 2016 Rulemaking, or in contending that the final rule fails to take proper account of the nature of the relationship between the advice provider and the advice recipient.

[163] As also noted by the magistrate judge in *Federation of Americans for Consumer Choice* v. *United States Dept. of Labor,* the Fifth Circuit's opinion ''did not foreclose that Title I duties may reach those fiduciaries who, as aligned with Title I's text, render advice, even for the first time, '*for* a fee or other compensation.' '' Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *FACC,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *22 (N.D. Tex. June 30, 2023) (quoting ERISA section 3(21)(A)(ii), 29 U.S.C. 1002(21)(A)(ii)) (emphasis in original).

[164] One commenter cited the *Chamber* opinion for the proposition that a relationship of trust and confidence that involves ''control and authority'' is necessary for investment advice fiduciary status. The Department does not read the *Chamber* opinion to state that ''control and authority'' is required, but rather that the use of the terms ''control'' and ''authority'' in the other parts of the statutory fiduciary definition (*i.e.,* ERISA section 3(21)(A)(i) and (iii) and Code section 4975(e)(3)(A) and (C)) indicate that the investment advice part of the definition also involves a ''special relationship.'' *See* 885 F.3d at 376–77. As discussed herein, the final rule appropriately defines an investment advice fiduciary to comport with reasonable investor expectations of trust and confidence which is the special relationship described in the *Chamber* opinion.

[165] It is also worth noting that in the litigation surrounding the 2016 Final Rule, there were affidavits from independent insurance agents describing ongoing relationships with their customers in which detailed personal financial information is shared. One such affidavit filed by Donald E. Wales in *Market Synergy Group, Inc.* v. *United States Department of Labor* stated, ''I take great pride and care in developing deep familiarity with my clients' individual financial circumstances, resources, and goals. All my sales of life insurance and fixed annuities . . . are made following a face-to-face meeting with my clients . . . . I also attempt to have periodic meetings with my clients . . . to review their financial state of affairs and recommend changes . . . to their financial plans. I proudly use the same financial products that I recommend to my clients . . . and often share my own personal results with them.'' Memorandum of Plaintiff-Appellant in Support of Motion for Preliminary Injunction at Exhibit 9, *Mkt. Synergy Grp., Inc.* v. *United States Dep't of Lab.,* No. 5:16–CV–4083–DDC–KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017), ECF No. 11–9, *aff'd,* 885 F.3d 676 (10th Cir. 2018).

[166] Regulation Best Interest release, 84 FR 33318 (July 12, 2019); *see also* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation, (''Both Reg BI for broker-dealers and the IA fiduciary standard for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest,'') *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

D. Discussion of the Final Rule

Under the final rule, a person is an investment advice fiduciary if they provide a recommendation in one of the following contexts:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:
  - is based on review of the retirement investor's particular needs or individual circumstances,
  - reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
  - may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
- The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

The recommendation also must be made ''for a fee or other compensation, direct or indirect'' as defined in the final rule.

The provisions of the final rule are organized into the following paragraphs and discussed in greater detail below. Paragraph (c) of the regulation defines the term ''investment advice.'' Paragraph (d) retains the provision in the existing regulation regarding ''execution of securities transactions.'' Paragraph (e) defines the phrase ''for fee or other compensation, direct or indirect.'' Paragraph (f) sets forth definitions used in the regulation. Paragraph (g) addresses applicability of the regulation. Paragraph (h) confirms the continued applicability of State law regulating insurance, banking, and securities.

1. Covered Recommendations

Definition of a Recommendation

Whether a person has made a ''recommendation'' is a threshold element in establishing the existence of fiduciary investment advice. For purposes of the final rule, whether a recommendation has been made will turn on the facts and circumstances of the particular situation, including whether the communication reasonably could be viewed as a ''call to action.'' The more individually tailored the communication to a specific customer or a targeted group of customers about a security or other investment or group of securities or other investments, the greater the likelihood that the communication may be viewed as a recommendation. The determination of whether a recommendation has been made is an objective rather than a subjective inquiry.

The Department intends that whether a recommendation has been made will be construed in a manner consistent with the SEC's framework in Regulation Best Interest. In the Regulation Best Interest release, the SEC stated,

> [T]he determination of whether a broker-dealer has made a recommendation that triggers application of Regulation Best Interest should turn on the facts and circumstances of the particular situation and therefore, whether a recommendation has taken place is not susceptible to a bright line definition. Factors considered in determining whether a recommendation has taken place include whether the communication ''reasonably could be viewed as a 'call to action' '' and ''reasonably would influence an investor to trade a particular security or group of securities.'' The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a ''recommendation.'' [167]

Commenters generally supported the Department's statement in the preamble for the proposal that it intended to take an approach that is similar to the SEC and FINRA on the definition of a recommendation, and some asked for confirmation that the Department would interpret the definition *consistent* with the SEC's framework in Regulation Best Interest. In this regard, some commenters identified the word ''suggestion'' in the following statement in the Department's preamble, and said this set too low a bar for fiduciary status:

> For purposes of the proposed rule, the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action.[168]

Commenters also said this was inconsistent with the SEC's approach, although some commenters acknowledge this statement was consistent with prior FINRA guidance—and, in fact, quoted that guidance.[169] Based on the word ''suggestion'' some commenters posed scenarios involving the provision of information to a retirement investor and said those communications would appear to be covered as recommendations under the proposal.

Commenters also identified other statements in the proposal's preamble that they believed were not consistent with the SEC's approach in Regulation Best Interest. These statements are: ''the fact that a communication is made to a group rather than an individual would not be dispositive of whether a recommendation exists'' and ''providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security.'' [170]

The Department confirms that, for purposes of the final rule, the Department intends that whether a recommendation has been made will be construed consistent with the SEC Regulation Best Interest and the inquiry will focus on whether there is a ''call to action.'' To the extent a person provides information to a retirement investor that does not rise to the level of a recommendation as defined in this way, the communication would not lead to fiduciary status.

However, the Department does not believe that the statements regarding communications to a ''group'' or

[167] Regulation Best Interest release, 84 FR 33318, 33335 (July 12, 2019)(footnote omitted).

[168] Proposed Retirement Security Rule, 88 FR 75890, 75904 (Nov. 3, 2023).

[169] *See* FINRA Regulatory Notice 11–02 (''[S]everal guiding principles are relevant to determining whether a particular communication could be viewed as a recommendation for purposes of the suitability rule. For instance, a communication's content, context and presentation are important aspects of the inquiry. The determination of whether a ''recommendation'' has been made, moreover, is an objective rather than subjective inquiry. An important factor in this regard is whether—given its content, context and manner of presentation—a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy. In addition, the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation. Furthermore, a series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate.'') (footnote omitted), *https://www.finra.org/rules-guidance/notices/11-02. See also* FINRA Notice to Members 01–23 (''The determination of whether a 'recommendation' has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether—given its content, context, and manner of presentation—a particular communication from a broker/dealer to a customer reasonably would be viewed as a ''call to action,'' or suggestion that the customer engage in a securities transaction.''), *https://www.finra.org/rules-guidance/notices/01-23.*

[170] Proposed Retirement Security Rule, 88 FR 75890, 75904 (November 3, 2023).

communications about ''a selective list of securities'' are inconsistent with the SEC's approach. Both of those concepts appear in the SEC's discussion in the Regulation Best Interest release quoted above that indicates that both communications to a ''targeted group of customers'' and communications about ''a group of securities'' may be considered recommendations.

A commenter also said that the following statement made in the Department's preamble described a concept of a recommendation that was too expansive and unworkable: ''a series of actions, taken directly or indirectly (*e.g.,* through or together with any affiliate), that may not constitute a recommendation when each action is viewed individually may amount to a recommendation when considered in the aggregate.'' [171] The commenter suggested that the Department withdraw that preamble statement and include instead an ''anti-evasion'' provision such as: ''No person shall knowingly act in a manner that functions as an unlawful evasion of the purposes of this regulation.''

Although this quoted language is similar to language that appeared in the previous FINRA guidance, the Department's proposal expanded it to include the language ''directly or indirectly (*e.g.,* through or together with any affiliate).'' [172] This language is not intended to capture all actions of affiliates, however; rather, ''through or together with'' is intended to describe circumstances in which an advice provider, in its interactions with the retirement investor, utilizes an affiliate to formally deliver the recommendation to that investor. Therefore, the Department does not believe that this is unworkable or difficult to monitor. For that reason, the Department does not believe it is necessary to include an anti-evasion provision instead of this preamble discussion. However, the Department cautions that the description of ''indirectly'' is not limited to use of affiliates and would extend to parties working around this provision with non-affiliates.

A few commenters suggested alternative definitions of a recommendation. One commenter's proposed language focused on the nature of a recommendation as an endorsement and expression of support for the retirement investor making or refraining from making a specific investment decision. Another commenter had an opposite view that the Department should clarify that an endorsement or expression of opinion would not rise to the level of a recommendation. The Department did not adopt these suggestions, taking the view that it should remain consistent with the SEC on this familiar and well-established definitional term.

Commenters also asked the Department to include a definition of a recommendation in the regulatory text, as opposed to a preamble discussion, to provide parties greater certainty regarding how the term would be interpreted. In this regard, however, it is important to note that the SEC declined to include a definition of a recommendation in the text of Regulation Best Interest. The SEC said, ''what constitutes a recommendation is highly fact-specific and not conducive to an express definition in the rule text.'' [173] In order to maintain consistency with the SEC's approach, which commenters supported, the Department also declines to create a defined term in the final rule's regulatory text.

Types of Recommendations Covered (Paragraph (f)(10))

Paragraph (f)(10) defines the phrase ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property.'' This phrase largely parallels the language in the SEC's Regulation Best Interest, which applies to broker-dealers' ''recommendation of any securities transaction or investment strategy involving securities (including account recommendations).'' [174] The phrase's broader reference to ''other investment property'' reflects the differences in jurisdiction between the SEC and the Department.

Under paragraph (f)(10), the phrase ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property'' is defined as recommendations as to:

(i) The advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, investment strategy, or how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;

(ii) The management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.,* account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) Rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

The following sections discuss the components of the definition and the comments received.

Recommendations Related to Rollovers, Benefit Distributions, or Transfers From a Plan or IRA

Both paragraphs (f)(10)(i) and (iii) describe types of recommendations related to rollovers, benefit distributions, and transfers from a plan or IRA. Paragraph (f)(10)(iii) describes, as covered recommendations, recommendations as to ''[r]olling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.'' Paragraph (f)(10)(i) describes recommendations as to ''how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA.''

These provisions of the final rule are consistent with the Department's longstanding interest in protecting retirement investors in the context of a recommendation to roll over workplace retirement plan assets to an IRA, as well as other recommendations to roll over, transfer, or distribute assets from a plan or IRA. Decisions to take a benefit distribution or engage in a rollover transaction are among the most, if not the most, important financial decisions that plan participants and beneficiaries, and IRA owners and beneficiaries are called upon to make. Advice provided in connection with a rollover decision, even if not accompanied by a specific recommendation on how to invest assets, is appropriately treated as fiduciary investment advice, provided that it falls within one of the two covered contexts articulated in this final rule and the other provisions of the final rule are satisfied. When an advice provider recommends that a retirement investor transfer assets out of a Title I plan, the recommendation entails the loss of the retirement investor's property

[171] *Id.* at 75904.

[172] *See* FINRA Regulatory Notice 11–02.

[173] Regulation Best Interest release, 84 FR 33318, 33336 (July 12, 2019).

[174] 17 CFR 240.15l–1(a)(1).

rights with respect to the plan, the sacrifice of protections under Title I of ERISA, and consequential changes to the nature of the retirement investor's account, services, fees, asset holdings, and investment options, all of which can affect the risk, reward, and returns associated with the retirement investor's holdings. Even if the assets would not continue to be covered by Title I or Title II of ERISA after they were moved outside the plan or IRA, the recommendation to change the plan or IRA investments in this manner and to extinguish investor interests and property rights under the plan is investment advice under Title I or Title II of ERISA. In the words of section 3(21)(A)(ii) of ERISA, it is advice with respect to ''any moneys or other property of the plan.''

Under paragraph (f)(10)(iii), recommendations on distributions from a workplace retirement plan (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan assets to a particular IRA provider would fall within the scope of investment advice in the final rule, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a). Further, in the Department's view, the evaluation of whether a recommendation constitutes fiduciary investment advice should be the same regardless of whether it is a recommendation to take a distribution or make a rollover to an IRA or a recommendation not to take a distribution or to keep assets in a plan.

The provision in paragraph (f)(10)(i), regarding how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA, addresses an important concern of the Department that investment advice providers should not be able to avoid fiduciary responsibility for a rollover recommendation by focusing solely on the investment of assets *after* they are rolled over from the plan.

The proposal stated that in many or most cases, a recommendation to a plan participant or beneficiary regarding the investment of securities or other investment property after a rollover, transfer, or distribution involves an implicit recommendation to the participant or beneficiary to engage in the rollover, transfer, or distribution.[175] It also stated that a prudent and loyal fiduciary generally could not make a recommendation on how to invest assets currently held in a plan after a rollover, without even considering the logical alternative of leaving the assets in the plan or evaluating how that option compares with the likely investment performance of the assets post-rollover, and that a fiduciary would violate ERISA's 404 obligations if it recommended that a retirement investor roll the money out of the plan without proper consideration of how the money might be invested after the rollover.[176]

The proposal also said that advice to a plan participant on how to invest assets currently held in an ERISA-covered plan is ''advice with respect to moneys or other property of such plan'' within the meaning of ERISA section 3(21)(A)(ii), inasmuch as the assets at issue are still held by the plan.[177]

Many commenters expressed specific support for the proposal's coverage of recommendations to roll over assets from a workplace retirement plan to an IRA as advice under Title I of ERISA. They cited the importance to the retirement investor of the rollover decision; the potential for increased costs outside of a workplace retirement plan; the loss of a fiduciary responsible for prudently selecting investment options in the workplace retirement plan; and financial professionals' conflicts of interest because they are likely to benefit financially if the retirement investor does roll their assets out of the workplace retirement plan. The North American Securities Administrators Association's comment on the proposal said that State securities regulators have routinely observed abuse in rollover and account transfer recommendations.

Other commenters said that recommendations regarding rollovers and recommendations regarding assets after they will leave the plan are not properly considered ERISA fiduciary investment advice under Title I, with the resulting application of the ERISA section 404 duties and the ERISA section 502(a) enforcement provisions. Commenters said that covering these recommendations as Title I advice is inconsistent with the Fifth Circuit's discussion in the *Chamber* decision on the distinction between the Department's jurisdiction under Title I and Title II. A commenter also stated that Congress has had opportunities in recent pension legislation to declare rollover advice as covered under ERISA Title I but has not. Some also said covering these recommendations would create additional liability under Title I for financial services providers where none exists now, which is similar to creating a private right of action that the Fifth Circuit found fault with. Commenters opposing covering these recommendations as fiduciary investment advice also said that the significance of the decision was not a sufficient basis for the Department to assert jurisdiction and that these recommendations would be protected by the conduct standards in Regulation Best Interest and the State insurance laws adopting the NAIC Model Regulation.

Some commenters focused on the Department's statements that recommendations to take a distribution necessarily involved a recommendation to change investments in the plan or to change fees or services directly affecting the return on those investments. One commenter provided examples of discussions about distributions that they did not think involved an investment recommendation, such as recommendations to take a distribution from a defined benefit plan, discussion of the merits of a participant loan or hardship withdrawal or educating a retirement investor about rules related to a required minimum distribution. The commenter suggested that the rule be clarified to provide that discussions about distributions and transfers of assets that are not for the purposes of changing investments are not covered recommendations.

Finally, a number of commenters expressed concern about the Department's position in the proposal that recommendations of how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA often would involve an implicit rollover recommendation. They said this position would lead to the conclusion that all conversations about rollovers would be ERISA fiduciary investment advice under Title I with no opportunity for information to be provided in a non-fiduciary capacity. Commenters believed this outcome would be detrimental to retirement investors. For example, one commenter said it is vitally important for retirement investors to be informed that they can leave their assets in the retirement plan even upon employment termination (if that is the case). Commenters urged the Department to state that the rollover decision can be separate from a recommendation as to how to invest the assets, and that discussions about rollovers can be purely educational. In this regard, one commenter asked the Department to make clear that the delivery of non-individualized information about a financial service

[175] Proposed Retirement Security Rule, 88 FR 75890, 75905 (November 3, 2023).

[176] *Id.*

[177] *Id.*

provider's offering without a reference to a specific investment product or strategy would not be fiduciary investment advice.

As discussed below, the Department views several of the positions taken by commenters as consistent with this final rule. The Department agrees that it is important that retirement investors continue to have access to information about the options available to them regarding rolling over, transferring or distributing retirement assets and that these discussions can be purely educational. However, to the extent there is a recommendation with respect to these options, the recommendation is evaluated under all parts of the final rule, and if the recommendation is with respect to assets held in a workplace retirement plan, it will be fiduciary advice under Title I of ERISA if all parts of the final rule are satisfied. Recommendations to take a distribution from a workplace retirement plan necessarily impact the specific investments in the plan or the fees and services directly affecting the return on those investments, even in the context of a recommendation to roll over from a defined benefit plan, and clearly change the investor's property interests with respect to the plan and associated legal protections. For these reasons, the Department continues to believe it is appropriate to treat such a recommendation as advice under Title I of ERISA if all the parts of the final rule are satisfied, and has not accepted the commenter's suggestion to provide that recommendations about distributions and transfers of assets that are not for the purposes of changing investments are not covered recommendations. The recommendation not to hold an asset in the plan, even if the intention is to hold essentially the same asset outside the plan, is still an investment recommendation. To the extent the recommendation falls within the test set forth in this rule it is clearly fiduciary advice ''with respect to any moneys or other property of such plan,'' within the meaning of ERISA section 3(21)(A)(ii).

The Department also continues to believe that recommendations of how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA often involve an implicit rollover recommendation. Further, in these scenarios too, recommendations regarding Title I plans are made with respect to ''moneys or other property of such plan'' within the meaning of ERISA section 3(21)(A)(ii), so coverage under Title I is appropriate. For this reason, the Department does not agree with a commenter that said a financial professional should be permitted to agree with its customer that any advice to be given will concern how to dispose of assets once removed from a Title I plan and no advice will be given regarding whether to remove the assets from the plan. If the customer is a current participant or beneficiary in a Title I plan, the recommendation necessarily involves the assets currently held in the Title I plan. A different conclusion would create loopholes in the final rule that would undermine the protection of retirement investors in this important context.

These provisions of the final rule do not create a new private right of action but rather adopt a regulatory definition of an investment advice fiduciary with an appropriate scope. The fact that Congress has not addressed the status of rollovers in recent pension legislation leaves the Department's clear jurisdiction, as discussed herein, undisturbed.

The final rule's approach in this respect aligns with the SEC's Regulation Best Interest, and with the Advisers Act fiduciary obligations, which extend to account recommendations to customers and clients as well as recommendations to customers and clients to roll over or transfer assets from one type of account to another. As stated by the SEC in Regulation Best Interest, ''account recommendations are recommendations of an approach or method (*i.e.,* a 'strategy') for how a retail customer should engage in transactions in securities, involve conflicts of interest, and can have long-term effects on investors' costs and returns from their investments.'' [178]

The Department's position is not, however, that all conversations regarding rollovers and distributions are recommendations. A recommendation is a threshold element in the analysis of whether a person is an investment advice fiduciary. For example, consistent with the SEC's position in Regulation Best Interest, the Department will not consider merely informing a retirement investor of the need to take a required minimum distribution under the Internal Revenue Code to be an investment ''recommendation.'' [179] Likewise, absent additional facts, merely discussing the merits of a participant loan or hardship withdrawal would not rise to the level of an investment recommendation. Section E.3. of this preamble provides additional guidance on investment information and education that will not be considered a recommendation leading to investment advice fiduciary status.

Recommendations Involving Securities, Other Investment Property, and Investment Strategies

Paragraph (f)(10)(i) also describes, as covered recommendations, recommendations as to ''the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, investment strategy, or how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA.'' Similar to the SEC and FINRA, the Department will interpret ''investment strategy'' broadly, to include ''among others, recommendations generally to use a bond ladder, day trading . . . or margin strategy involving securities, irrespective of whether the recommendations mention particular securities.'' [180]

The reference to ''other investment property'' is intended to capture other investments made by plans and IRAs that are not securities. This includes, but would not be limited to, non-securities annuities, banking products, and digital assets (regardless of status as a security). The Department does not see any statutory or policy basis for differentiating advice regarding investments in CDs, including investment strategies involving CDs (*e.g.,* laddered CD portfolios), from other investment products, and therefore will interpret paragraph (f)(10) to cover such recommendations.

The term investment property, however, does not include health insurance policies, disability insurance policies, term life insurance policies,

[178] Regulation Best Interest release, 84 FR 33318, 33339 (July 12, 2019); *see also* SEC Investment Adviser Interpretation, 84 FR 33669, 33674 (July 12, 2019) (''An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about . . . account type. Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.,* a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.,* a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.'') The SEC Investment Adviser Interpretation further provides that ''with respect to prospective clients, investment advisers have antifraud liability under section 206 of the Advisers Act, which, among other things, applies to transactions, practices, or courses of business which operate as a fraud or deceit upon prospective clients, including those regarding investment strategy, engaging a subadviser, and account type.'' *Id.,* at 33674 n. 42.

[179] Regulation Best Interest release, 84 FR 33318, 33338 (July 12, 2019).

[180] *Id.* at 33339 (citing FINRA Rule 2111.03 and FINRA Regulatory Notice 12–25, available at *https://www.finra.org/rules-guidance/notices/12-2*).

and other property to the extent the policies or property do not contain an investment component. This is confirmed in a definition of ''investment property'' in paragraph (f)(12). Although there can be situations in which a person recommending group health or disability insurance, for example, effectively exercises such control over the decision that the person is functionally exercising discretionary control over the management or administration of the plan as described in ERISA section 3(21)(A)(i) or section 3(21)(A)(iii), the Department does not believe that the definition of investment advice in ERISA's statutory text is properly interpreted or understood to cover a recommendation to purchase group health, disability, term life insurance, or similar insurance policies that do not have an investment component.

Commenters also asked the Department to provide additional guidance on the definition of investment property. Several focused on the definition as it would relate to group products, as opposed to retail products, and posed various scenarios involving recommendations of assets that they did not think should be considered investment property, including a group annuity contract. For example, one commenter asked the Department to eliminate both group life insurance policies and annuities from the definition of investment property because the purchase decision would be made by a plan fiduciary who already had a duty of loyalty to the plans' participants and beneficiaries. The Department has not accepted that comment, as that result would be contrary to the general approach taken in this final rule to include, as retirement investors, fiduciaries with control with respect to a plan or IRA. In those circumstances in which the person recommending the investment meets the final rule's terms, they occupy a position of trust and confidence with respect to the recommendation, and that recommendation merits fiduciary status. Certainly, nothing in the statute categorically carves out advice to plan fiduciaries. Many commenters supported the application of ERISA's protections in this context. Further, the Department believes there should be little question that the definition of investment property should include a group annuity contract that is a plan asset. Whether the other arrangements mentioned by commenters include an investment component would depend on a review of the specific facts and circumstances.

Recommendations on Management of Securities or Other Investment Property, Including Account Types

Paragraph (f)(10)(ii) of the final rule describes, as covered recommendations, recommendations as to the ''management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.,* account types such as brokerage versus advisory), or the voting of proxies appurtenant to securities.''

In this regard, the statutory text broadly refers to ''investment advice . . . with respect to any moneys or other property of such plan.'' Recommendations as to investment management or strategy fall within the most straightforward reading of the statutory text. Accordingly, the final rule makes clear that covered investment advice is not artificially limited solely to recommendations to buy, sell, or hold particular securities or investment property to the exclusion of all the other important categories of investment advice that financial professionals routinely provide and that have the potential to impact retirement investors' costs and investment returns.

A commenter referenced the fact that this language was not limited to recommendations regarding a specific security or investment as an example that the proposal appeared overly broad. The Department does not think there is a basis for narrowing the definition of a covered recommendation to those regarding buying, holding, or selling particular securities or investment property. Language in the 1975 regulation indicates that it is not that narrow but would extend to recommendations regarding ''investment policies or strategy,'' ''overall portfolio composition,'' and ''diversification of plan investments.'' The SEC has also stated in Regulation Best Interest and the SEC Investment Adviser Interpretation that the conduct standards are not limited to recommendations that mention particular securities.[181]

A few other commenters said this covered recommendation, combined with what they viewed as broad proposed definitions of a ''recommendation'' and ''for a fee or other compensation, direct or indirect,'' would impact and limit information provided to plan sponsors. Other commenters raised questions about the limits of this covered recommendation.

The Department has made a number of changes and clarifications to the final rule to address concerns raised by these commenters. First, the Department has confirmed that it intends that whether a recommendation has occurred will be construed consistent with the SEC's framework in Regulation Best Interest. This should alleviate some commenters' concern about whether merely providing information to a retirement investor, including a plan sponsor, might be considered a covered recommendation under this part of the final rule. Additionally, it is important to remember that all parts of the final rule must be satisfied for ERISA fiduciary status to apply, including receipt of a fee or other compensation, direct or indirect, as defined in the final rule. Finally, the Department has provided additional clarifications regarding the application of the final rule in the institutional market that makes clear that parties are permitted under the final rule to define their own relationships.

This provision of the final rule also makes clear that recommendations as to the selection of investment account arrangements would be covered. Accordingly, a recommendation to move from a commission-based account to an advisory fee-based account (or vice versa) would be a covered recommendation. This provision too, is consistent with the SEC's Regulation Best Interest and the Advisers Act's antifraud provisions, which establish the Advisers Act fiduciary duty.[182]

[181] *Id.* at 33339 (July 12, 2019)(''Existing broker-dealer regulation and guidance stresses that the term ''investment strategy'' is to be interpreted broadly. . . . This approach appropriately recognizes that customers may rely on firms' and associated persons' investment expertise and knowledge, and therefore the broker-dealer should be responsible for such recommendations, regardless of whether those recommendations result in transactions or generate transaction-based compensation.'') (footnotes omitted); *Cf.* SEC Investment Adviser Interpretation, 84 FR at 33674 (''An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.'').

[182] 17 CFR 240.15l–1(a)(1) (''A broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (*including account recommendations*) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.'') (emphasis added); SEC Investment Adviser Interpretation, 84 FR 33669, 33674 (July 12, 2019) (''An adviser's

Continued

Recommendations on the Selection of Other Persons To Provide Investment Advice or Investment Management

Paragraph (f)(10)(ii) extends to recommendations as to the ''selection of other persons to provide investment advice or investment management services.'' Consistent with the Department's longstanding position, the final rule covers recommendations of another person to be entrusted with investment advice or investment management authority over retirement assets. Such recommendations are often critical to the proper management and investment of those assets and are fiduciary in nature if the other conditions of the definition are satisfied.

Recommendations of investment advisers or managers are similar to recommendations of investments that the plan or IRA may acquire and are often, by virtue of the track record or information surrounding the capabilities and strategies that are employed by the recommended fiduciary, inseparable from recommendations as to the types of investments that the plan or IRA will acquire. For example, the assessment of an investment fund manager or management is often a critical part of the analysis of which fund to pick for investing plan or IRA assets.

The Department's proposal discussed that the language in paragraph (f)(10)(ii) regarding recommendations of ''other persons'' to provide investment advice or investment management services was intentional to avoid concerns that the final rule would impose fiduciary status on a person based on the marketing of the person's own advisory or investment management services (sometimes referred to as ''hire me'' communications).[183] Thus, the Department said the proposed language would not result in a person becoming an investment advice fiduciary merely by engaging in the normal activity of marketing themselves (*i.e.,* ''hire me'') as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property.[184]

Commenters on the ''hire me'' discussion generally asked the Department to allow for more expansive communications outside of ERISA fiduciary status for various marketing of services, and to make that explicit in the final rule. These comments and the Department's response are discussed further in Section E.1. of this preamble.

Some commenters also said that the Department should not consider a recommendation of *other persons* to provide investment services as a covered recommendation, as they saw it as distinct from investment advice. Commenters described referral arrangements that they believed are beneficial to investors by assisting in the identification of fiduciary service providers. One commenter asked for a ''hire them'' carve-out, under which a recommendation of another person to provide investment advice or investment management services would not be a covered recommendation for purposes of the final rule unless the person making the referral was specifically engaged to make such a recommendation for a fee or other compensation.

The Department has not eliminated recommendations of other persons to provide investment advice or investment management services as a type of covered recommendation, because it continues to believe that the recommendation of another person to provide investment advice or investment management services is conceptually indistinguishable from recommendations of investments that the plan or IRA may acquire. However, it is important to remember in this context that all parts of the final rule must be satisfied for a covered recommendation to be considered ERISA fiduciary investment advice, including the ''for a fee or other compensation, direct or indirect'' requirement. Accordingly, if the recommendation is not made for a fee or other compensation, direct or indirect, it would not give rise to fiduciary status. As the relevant fee or other compensation may be *direct or indirect,* a referral fee paid by a third party (*e.g.,* the person to whom investors are referred) would be relevant to the inquiry as to whether the person making the referral would be a fiduciary under the final rule.

Proxy Voting Appurtenant to Ownership of Shares of Corporate Stock

Paragraph (f)(10)(ii) also extends to recommendations as to the ''voting of proxies appurtenant to securities.'' The Department has long viewed the exercise of ownership rights as a fiduciary responsibility; consequently, advice or recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature if the other conditions of the final rule are satisfied.[185]

Similar to other types of broad, generalized guidance that would not rise to the level of investment advice, however, guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client's individual interests or investment policy and that are not directed or presented as a recommended policy for the plan or IRA to adopt, would not rise to the level of a covered recommendation under the rule. Similarly, a recommendation addressed to all shareholders in an SEC-required proxy statement in connection with a shareholder meeting of a company whose securities are registered under Section 12 of the Exchange Act, for example, soliciting a shareholder vote on the election of directors and the approval of other corporate action, would not, under the rule, constitute fiduciary investment advice from the person who creates or distributes the proxy statement.

Several commenters addressed including recommendations regarding proxy voting as a covered recommendation under the proposal, with some supporting the inclusion as important and relevant to plan participants' interests and others indicating the inclusion was too broad and likely to impede useful information from being provided to plan sponsors. The Department retained this provision in the final rule, consistent with its long-term position on this issue.

One commenter requested that the final rule regulatory text, as opposed to the preamble, make clear that merely providing proxy voting materials would not lead to investment advice fiduciary status. As discussed in greater detail in Section E, the Department has generally not included exceptions and specific carve-outs in the final rule text for specific circumstances but instead has opted to provide guidance in the preamble as to how the rule will apply.

2. When Covered Recommendations Are Fiduciary Investment Advice (Paragraph (c)(1))

Paragraph (c)(1) establishes the contexts in which a covered recommendation would be considered

fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.'').

[183] Proposed Retirement Security Rule 88 FR 75890, 75906 (Nov. 3, 2023).

[184] *Id.*

[185] *See* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 FR 81658 (Dec. 16, 2020) (''In connection with proxy voting, the Department's longstanding position is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) appurtenant to shares of stock.'').

ERISA fiduciary investment advice if the remaining parts of the final rule are satisfied. Paragraph (c)(1)(i) sets forth an objective facts and circumstances test for when, based on the interactions between the advice provider and the retirement investor, the retirement investor would reasonably place their trust and confidence in the advice provider as acting to advance the retirement investor's best interest. Paragraph (c)(1)(ii) identifies a specific factual scenario—the advice provider's acknowledgment of ERISA Title I or Title II fiduciary status—as one in which the retirement investor can always reasonably place their trust and confidence in the advice provider as acting to advance the retirement investor's best interest. The contexts in the final rule are:

- *Paragraph (c)(1)(i):* The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:
  - is based on review of the retirement investor's particular needs or individual circumstances,
  - reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
  - may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
- *Paragraph (c)(1)(ii):* The person making the recommendation represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

In the proposal, the Department had identified three contexts in which a covered recommendation would be considered ERISA fiduciary investment advice. The contexts identified in the proposal were:

- *Proposed paragraph (c)(1)(i):* The person either directly or indirectly (*e.g.,* through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;
- *Proposed paragraph (c)(1)(ii):* The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
- *Proposed paragraph (c)(1)(iii):* The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[186]

Some commenters supported the paragraphs as proposed and said they would be appropriate to define an investment advice fiduciary. For example, one commenter agreed that in these contexts, clients reasonably expect a professional relationship of trust and confidence involving fiduciary obligations. Commenters who disagreed expressed various bases for their disagreement, including the view that the proposed paragraphs, without any specific exclusions or carve-outs, would result in a final rule that was too broad and did not sufficiently allow for non-fiduciary sales activity. Some commenters expressed particular concern about sales activity in the institutional market. Some of the commenters thought the proposal would result in ERISA fiduciary status being applied outside of a relationship of trust and confidence. Many of these commenters also objected to the possibility that one-time advice could ever lead to ERISA fiduciary status.[187]

One commenter suggested that the Department issue a ''salesperson's'' prohibited transaction exemption under which parties would not have to comply with ERISA's fiduciary obligations as long as they are clear and explicit that they are operating in a sales capacity to retirement investors, as a way of addressing the impact of the historical use of advice-oriented titles and marketing and providing additional clarity between advice services and sales. Another commenter suggested a new provision in the final rule under which recommendations to a plan fiduciary would not give rise to fiduciary status if made ''in the context of a communication or series of communications in which the seller of a product or service clearly indicates that such product or service provider has an interest in the transaction and that such plan fiduciary is responsible for independently evaluating and determining whether to enter into a transaction for the purchase of such product or service, including negotiating the terms of the transaction.'' Other commenters likewise advocated for provisions under which sales activity would not be considered fiduciary investment advice.

In the final rule, the Department made a number of changes to the proposal in response to these comments. As discussed in greater detail below, the contexts for fiduciary status in paragraph (c)(1) were narrowed and clarified, including the elimination of proposed paragraph (c)(1)(i). Additionally, a new paragraph (c)(1)(iii) was inserted in the regulatory text confirming that sales recommendations that do not satisfy the specific contexts for fiduciary advice will not lead to ERISA fiduciary status and that the provision of investment information and education, without an investment recommendation, also will not result in ERISA fiduciary status. Although commenters suggested different ways of addressing sales communications, including the suggestion of a special PTE for salespersons and the carve-out described above, the Department believes the revised regulatory text, including paragraph (c)(1)(iii), provide appropriate clarity with respect to those sales pitches that fall short of fiduciary advice, without creating improper loopholes that would defeat legitimate expectations of trust and confidence. Additionally, the Department revised the definition of a retirement investor to limit the scope of plan and IRA fiduciaries who would be treated as retirement investors to those with authority or control over plan or IRA assets. As a result, communications to plan or IRA fiduciaries acting as investment advice fiduciaries will not result in the person making the communication also being considered an investment advice fiduciary.

This preamble section discusses the contexts for fiduciary status adopted in

[186] Proposed Retirement Security Rule, 88 FR 75890, 75977 (Nov. 3, 2023).

[187] One commenter said the final rule should be revised to insert a proximity requirement between the financial professional providing the recommendation and the financial professional with whom the retirement investor works to act on the recommendation, as well as a time proximity requirement for the retirement investor to act on the recommendation. The commenter suggested this was needed to assist in operationalizing the rule. The Department believes certain principles will avoid the operational concerns suggested by this comment. First, whether ERISA's fiduciary duties and the PTEs' ''impartial conduct standards'' are satisfied will be measured as of the time of the recommendation, not in hindsight. *See Donovan* v. *Mazzola,* 716 F.2d 1226, 1232 (9th Cir. 1983); Improving Investment Advice for Workers & Retirees, 85 FR 82798, 82821 (December 18, 2020). Second, ERISA fiduciary status will occur only if all conditions of the final rule are satisfied, including the ''for a fee or other compensation, direct or indirect'' requirement.

the final rule paragraphs (c)(1)(i) and (ii) and the comments received on the proposed tests. The changes to the definition of a retirement investor are discussed in section D.4. of this preamble. Application of the final rule to certain specific circumstances is discussed in Section E of this preamble.

Proposed Paragraph (c)(1)(i)—Discretion—Not Adopted

Proposed paragraph (c)(1)(i) included a proposed expansion of a provision of the Department's 1975 regulation, which defined as a fiduciary a person who renders advice to the plan as to the value of securities or other property, or makes a recommendation as to the advisability of investing in, purchasing, or selling securities or other property, if the person

> either directly or indirectly (*e.g.,* through or together with any affiliate) . . . has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan.[188]

The Department noted in the proposal's preamble that the proposed language expanded the existing provision beyond discretionary authority or control with respect to investments of the *plan,* to any investments of the *retirement investor,* stating ''[p]ersons that have discretionary authority or control over the investment of a retirement investor's assets necessarily are in a relationship of trust and confidence with respect to the retirement investor.'' [189]

Commenters said the proposed language to expand this context beyond investments of the plan was inconsistent with ERISA. They also said it would be a significant expansion that would be difficult to monitor, particularly in the context of pooled investment vehicles that a retirement investor might be invested in. Commenters also thought the meaning of discretionary authority or control was not clear and might be triggered by limited discretion that would ordinarily not result in ERISA fiduciary status.

Commenters were particularly concerned about the language in proposed paragraph (c)(1)(i) that would consider whether the person had discretion ''directly or indirectly (*e.g.,* through or together with any affiliate).'' [190] Paragraph (f)(1) of the proposal defined an affiliate as ''any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, representative, or relative (as defined in paragraph (f)(12) of this section) of such person; and any corporation or partnership of which such person is an officer, director, or partner.'' [191] Commenters viewed this language as very broad as applied to discretionary asset management and said in the context of a large financial institution, the language in the proposal could be satisfied by an affiliate with no direct relationship with the retirement investor. Other commenters noted that the provision appeared to use affiliates as an example of an indirect discretionary relationship, but the language would not necessarily be limited to affiliates.

Several commenters asked that the provision be revised to include an objective requirement that the advice or recommendation be individualized to the retirement investor. Another comment was that the provision should be revised to add language permitting parties to define their relationship by focusing on whether the facts and circumstances indicate that the recommendation may be relied upon by the investor as a basis for investment decisions that are in their best interest. A few commenters also advocated for complete removal of the provision, believing paragraphs (c)(1)(ii) and (iii) more clearly described an investment advice fiduciary relationship and to the extent paragraph (c)(1)(i) would apply more broadly, it was overbroad.

In response to these comments, the Department has determined not to include proposed paragraph (c)(1)(i) in the final rule. Although it is important to note that an existing provision in the 1975 regulation applies fiduciary status to a person who makes a covered recommendation and ''either directly or indirectly (*e.g.,* through or together with any affiliate) . . . has discretionary authority or control . . . with respect to purchasing or selling securities or other property for the plan,'' the Department is persuaded by commenters who said that the general approach in proposed (c)(1)(ii) would more appropriately define an investment advice fiduciary based on the facts and circumstances surrounding the covered recommendation and would likely include, to a more targeted extent, parties with investment discretion. Accordingly, paragraph (c)(1)(i) of the final rule is a revised version of proposed paragraph (c)(1)(ii). Paragraph (c)(1)(ii) of the final rule is a revised version of proposed paragraph (c)(1)(iii). A new paragraph (c)(1)(iii) clarifies that sales recommendations that are not made in one of the contexts set forth in paragraph (c)(1)(i) or (ii) would not result in a person being an investment advice fiduciary and the provision of investment information and education, without an investment recommendation, also will not result in ERISA fiduciary status.

Adopted Paragraph (c)(1)(i)—Facts and Circumstances

Adopted paragraph (c)(1)(i), establishes an objective facts and circumstances test that is satisfied if the ''person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.''

Investment Recommendations as a Regular Part of Their Business

The requirement that the ''person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business'' is intended to limit application of the final rule to persons who retirement investors would typically view as making investment recommendations based on the retirement investors' interests. It is intended to update the ''regular basis'' prong of the 1975 regulation's five-part test to properly focus on persons who are in the business of providing investment recommendations, rather than defeating legitimate investor expectations by automatically excluding one-time advice from treatment as fiduciary investment advice.

A number of commenters addressed the proposed language which was: ''[t]he person either directly or indirectly (*e.g.,* through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business.'' One commenter specifically supported this provision as indicating the test would suggest that the person making

[188] 29 CFR 2510.3–21(c)(1)(ii)(A).

[189] Proposed Retirement Security Rule, 88 FR 75890, 75901 (November 3, 2023).

[190] *Id.* at 75977.

[191] *Id.* at 75978.

the recommendation has expertise and professionalism.

Other commenters expressed the view that the proposed language did not place meaningful limits on investment advice fiduciary status. Similar to comments on proposed paragraph (c)(1)(i), some commenters said the ''directly or indirectly (*e.g.,* through or together with any affiliate)'' language would make this context very broad and difficult to monitor. Some said the proposed language would cover everyone in the financial services industry.

Commenters also said that whether a person made investment recommendations to investors as a regular part of their business had no bearing on whether there was a relationship of trust and confidence with the particular retirement investor receiving the recommendation, and further, that the ''regular basis'' prong of the 1975 regulation was needed because one-time advice would not be fiduciary advice under the Fifth Circuit's *Chamber* opinion.

The Department has retained this provision in the final rule with a slight revision, discussed below. In response to the commenters who said this requirement had no bearing on a relationship of trust and confidence with the particular retirement investor, the Department states that satisfying this provision, on its own, does not result in status as an investment advice fiduciary. Fiduciary status is imposed only if all parts of the final rule are satisfied. However, the fact that the person regularly provides advice as part of their business is an important component of the test, inasmuch as it limits application of the fiduciary definition to financial professionals who could reasonably be viewed as providing advice that can be relied upon with trust and confidence.

Consistent with the discussion in the preamble to the proposal, this provision is not intended to exclude parties in the financial services industry but rather persons outside the financial services industry who may engage in isolated communications that could fit within the definition of a covered recommendation but under circumstances that would not comport with a general understanding of professional investment advice.[192] In this way, the final rule's version of the regular basis test is more narrowly tailored than the 2016 rule and is relevant to the existence of trust and confidence between the advice provider and retirement investor, because retirement investors consulting advice providers who meet this test are likely to expect professional or expert investment advice that is based on the retirement investors' interests.

The final rule retains the language ''either directly or indirectly (*e.g.,* through or together with any affiliate).'' This language is in the 1975 regulation, and the Department believes it is important to include so as to avoid parties structuring their affiliate relationships to avoid application of fiduciary status. This language is not intended to capture all actions of affiliates, however; rather, ''through or together with'' is intended to describe circumstances in which an advice provider, in its interactions with the retirement investor, utilizes an affiliate to formally deliver recommendations to investors.

One commenter suggested that the Department revise the language of this provision to eliminate the ''indirectly'' reference and instead use the language ''either directly or through or together with any affiliate.'' The Department has not adopted this suggestion because it could result in parties working around this provision with non-affiliates.

Some commenters asked the Department to provide additional clarification as to how it would apply this provision in the rule. A commenter suggested that the final rule would be clearer if it were revised to limit fiduciary status to circumstances in which the person making the recommendation is:

> an employee, independent contractor, agent, or representative of a broker or dealer registered under the Securities Exchange Act of 1934 . . . , a financial institution described in [ERISA section 3(38)(B)], or other organization that provides financial advice on a regular basis as part of its business[.][193]

Another commenter asked the Department to clarify that the test would apply based on whether the individual person making the recommendation made regular investment recommendations as part of their business.

Other commenters said that although the Department's preamble said this provision would exclude human resources employees of the plan sponsor, they were not confident that human resources employees would, in fact, be excluded by the regulatory text, especially if they were employed by a financial services firm. A commenter asked for clarification regarding actions taken by a plan sponsor (either directly or through a third party) in connection with a merger or acquisition to provide information and assistance to affected employees regarding various retirement plan issues.[194] One commenter said the language also appeared to them to extend to real estate agents, life coaches, probation officers and divorce counselors, since those entities may provide financial counseling and education.

The Department will apply the test based on the activities of the ''person'', which would include the firm, and its employees, agents and representatives. The fact that the firm is a broker or dealer registered under the Securities Exchange Act of 1934 or a financial institution described in ERISA section 3(38)(B), would indicate that the test would likely be met, but the final rule is not limited to these financial institutions. Further, not all employees, independent contractors, agents, or representatives of a financial institution would be considered to provide investment recommendations on a regular basis. The test will also focus on the role of the individual providing the recommendation in relation to the retirement investor. Therefore, the Department did not adopt the language suggested by the commenter, as the inquiry will be based on all facts and circumstances.

The Department did revise this provision in the final rule to refer to ''professional'' investment recommendations. This change is designed to provide additional certainty that the provision would not be satisfied by the ordinary communications of a human resources employee, who is not an investment professional, in communications with plan participants.[195] Similarly, this language

[192] *Id.* at 75902.

[193] The financial institutions described in ERISA section 3(38)(B) include an entity that: (i) is registered as an investment adviser under the Advisers Act; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State.

[194] The commenter also asked the Department to provide guidance that agreements regarding the integration of plans as part of a merger or acquisition and resulting plan amendments are settlor acts. The Department declines to address the settlor analysis as part of this final rule but will consider providing sub-regulatory guidance upon request of interested parties.

[195] The Department also would not consider salaries of human resources employees of the plan

Continued

is intended to make clear that the provision would not pick up other employees of the plan sponsor, who are not investment professionals, interacting with plan participants, including in the context of a merger or acquisition. The Department also does not intend that this language will be construed as being satisfied by the common activities of real estate agents selling homes to prospective residents, life coaches, probation officers and divorce counselors.

Trusted Advice Provider

The second element of paragraph (c)(1)(i) is that ''the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.''

This provision is intended to define, objectively, when a retirement investor would reasonably place their trust and confidence in the advice provider. In the Department's view, when a financial professional provides a recommendation under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is individualized to the retirement investor, reflects professional or expert judgment as applied to the individual investor's circumstances, and may be relied upon by the retirement investor to advance their own interests, that financial professional has held themselves out as a trusted advice provider and invited the retirement investor's reliance on them. Several commenters agreed that when financial professionals hold themselves out as trusted advice providers, including through portraying themselves as knowledgeable experts, they have invited the investor's trust, regardless of the form of compensation they will receive.

sponsor to be a fee or other compensation in connection with or as a result of the educational services and materials that they provide to plan participants and beneficiaries. Further, the final rule does not alter the principles articulated in ERISA Interpretive Bulletin 75–8, D–2 (29 CFR 2509.75–8) (IB 75–8). IB 75–8 provides that persons who perform purely administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, but who have no power to make decisions as to plan policy, interpretations, practices or procedures, are not fiduciaries with respect to the plan by virtue of those purely ministerial functions.

In accordance with this facts and circumstances test, the application of paragraph (c)(1)(i) does not turn, however, on whether the financial professional expressly represents that each component has been or will be satisfied. In other words, the specific components of the test are not intended as talismanic phrases that the advice provider must utter before triggering fiduciary status. Rather, the definition turns on whether the facts and circumstances would indicate to a reasonable investor in like circumstances that the paragraph's components were met. For example, the retirement investor doesn't need to be expressly told the recommendation is individualized when it follows the collection of information on the investor's personal financial needs or circumstances. The components of the definition can be satisfied by the various facts and circumstances of the parties' interactions and, as noted above, are evaluated under the objective standard of a reasonable investor in like circumstances. Although the Department did not finalize proposed paragraph (c)(1)(i), which would have applied ERISA fiduciary status based in part on whether the person making the recommendation had investment discretion with respect to the retirement investor's assets, investment discretion could still be relevant to whether adopted paragraph (c)(1)(i) is satisfied. For example, absent unusual circumstances, in any case in which a financial professional has investment discretion with respect to the assets that are the subject of a recommendation, the circumstances would indicate to a reasonable investor in like circumstances that the recommendation is individualized to the retirement investor, reflects professional or expert judgment as applied to the individual investor's circumstances, and may be relied upon by the retirement investor to advance their own interests.

The language in the final rule was changed from the proposal which provided ''the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.''

Some commenters asserted that they found the proposed language ''under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor'' to be meaningless and said the provision should instead require an explicitly customized or tailored communication. They also said the ''may be relied upon'' language set too low a bar for establishing fiduciary status and that the Department should retain the ''primary basis'' test from the 1975 regulation. Commenters said it was not clear whether this language was intended to establish an objective or subjective test, and several commenters suggested language that would specifically reference a ''reasonable'' investor or ''reasonable person in like circumstances.''

Some commenters also said that overall, the proposed test did not define a relationship of trust and confidence as it appeared to focus on the circumstances from the retirement investor's perspective and did not include the ''regular basis,'' ''mutual agreement, arrangement, or understanding'' and ''primary basis'' requirements that they believed were required to identify a relationship of trust and confidence as required by the Fifth Circuit's *Chamber* opinion. They also said the proposed language would apply in all interactions between financial professionals and retirement investors including sales pitches. Finally, commenters said to the extent this language would be satisfied because a financial professional was subject to another regulator's best interest standard, that was inappropriate as those standards are not intended to establish fiduciary standards.

In the final rule, the Department revised the language in several ways in response to comments. The provision is now clearly objective as it references a ''reasonable investor in like circumstances.'' The revised language includes three component parts that the Department believes identify objectively when a person has held themselves out as providing an individualized, reliable recommendation based on the application of their professional or expert judgment, and that is intended to advance the retirement investor's interest. Thus, the final rule will result in the application of fiduciary status under circumstances in which both parties should reasonably understand that the retirement investor would rely on the recommendation for investment decisions.[196]

[196] One commenter asked the Department to clarify that communications to a ''class of investors'' in the private equity context would not be considered individualized. As with the other scenarios posed by commenters, the Department will apply the final rule based on all facts and circumstances.

The final rule also changed the language ''may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest'' to ''may be relied upon by the retirement investor as intended to advance the retirement investor's best interest'' in response to a comment that suggested that the proposed language might cause confusion as to how the rule would apply in the event of a recommendation that is not in retirement investor's best interest. In the context of the final rule, ''best interest'' is not meant to refer back to the elements of the precise regulatory or statutory definitions of prudence or loyalty, but rather to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests.

The Department also notes that the 1975 regulation's language in this respect requires a ''mutual agreement, arrangement *or understanding* ''regarding the retirement investor's reliance on the recommendation. This final rule also will apply in circumstances in which the parties each would reasonably understand that the retirement investor may rely on the recommendation as intended to advance their best interest. The Department continues to believe this is an improvement over the ''primary'' basis requirement in the 1975 regulation, as that requirement, which is not found in the text of the statute, is difficult to apply, unclear in its meaning, and ill-suited to determining whether the advisory relationship is one of trust and confidence. Similarly, the Department does not think that the lack of the ''regular basis'' requirement as expressed in the 1975 regulation means that a relationship of trust and confidence does not exist, as discussed above.

Finally, while other regulators' standards may result in firms and financial professionals being more or less likely to occupy a position of trust and confidence, the final rule's focus is on the nature of the relationship between the advice provider and the advice recipient, not on the specific status assigned to the advice provider under other regulatory regimes. The final rule is neither intended to pick up all interactions between financial professionals and retirement investors, nor to impose fiduciary status based on considerations other than the nature of the relationship as defined in the rule's specific provisions. Paragraph (c)(1)(i) will base fiduciary status on evaluation of the three objective components, as well as the other parts of the final rule.

Use of Titles

In the proposal, the Department said it intended to examine the ways in which investment advice providers market themselves and describe their services in deciding whether the context in proposed paragraph (c)(1)(ii) was satisfied.[197] The preamble noted that stakeholders had previously expressed concern that investment advice providers that adopt titles such as ''financial consultant,'' ''financial planner,'' and ''wealth manager,'' are holding themselves out as acting in positions of trust and confidence, even while simultaneously disclaiming status as an ERISA fiduciary in the fine print or otherwise.[198]

The Department expressed the view that an investment advice provider's use of such titles would routinely involve the provider holding themselves out as making investment recommendations that will be based on the particular needs or individual circumstances of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor's best interest. The Department invited comments on the extent to which particular titles are commonly perceived to convey that the financial professional is providing individualized recommendations that may be relied upon as a basis for investment decisions in a retirement investor's best interest (and if not, why such titles are used). The Department also requested comment on whether other types of conduct, communication, representation, and terms of engagement of investment advice providers should merit similar treatment.

Some commenters who addressed this issue agreed that when a financial professional uses titles such as financial consultant, financial planner, and wealth manager, they give an impression of financial expertise that has an impact on investors and creates a sense that the retirement investor may place their trust and confidence in the professional. One commenter said that in some cases, including in insurance markets, financial professionals characterize themselves as ''trusted advisors.'' In addition, the commenter said, they commonly describe their services as ''investment advice'' or ''retirement planning'' and market those services as designed to serve investors' best interest. These commenters said the Department's proposed approach to titles and marketing was appropriate, although a few commenters said the Department should provide guidance in the final rule to clarify when titles, credentials, and marketing would satisfy the provisions of the rule. Other commenters said that the use of titles should not be determinative or create a *per se* rule regarding ERISA fiduciary status but rather that status should be based on the facts and circumstances of the parties' relationship.

For purposes of evaluating paragraph (c)(1)(i) in the final rule, the Department intends that the use of titles, credentials, and marketing slogans will be a relevant consideration but will not generally be determinative. A person holding themselves out, for example as an adviser, would contribute to a reasonable investor's belief that they are receiving professional or expert advisory services and that the person's recommendations reflect the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.

Adopted Paragraph (c)(1)(ii)—ERISA Title I or Title II Fiduciary Acknowledgment

Under paragraph (c)(1)(ii), a person making a recommendation is a fiduciary if they ''represent[] or acknowledge[] that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, with respect to the recommendation.'' This paragraph identifies a specific factual scenario—the advice provider's acknowledgment of ERISA Title I or Title II fiduciary status—as one in which retirement investors can always reasonably place their trust and confidence in the advice provider as acting to advance the retirement investor's best interest.

As adopted, this provision of the final rule will focus on the substance of the acknowledgment, even if the exact words vary from the regulatory text; and thus, the provision will be satisfied if, for example, the acknowledgment spells out ERISA (*i.e.,* references ''the Employee Retirement Income Security Act''), or if the acknowledgment references the Internal Revenue Code rather than Title II of ERISA. The Department believes that status as an ERISA investment advice fiduciary should apply because a retirement investor who is told by a person that the person will be acting as an ERISA fiduciary reasonably and appropriately views the advice provider as occupying a position of trust and confidence.

[197] Proposed Retirement Security Rule, 88 FR 75890, 75902–3 (Nov. 3, 2023).

[198] *Id.* at 75903 (citing the preamble to Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers Retirees, 85 FR 82798, 82803 (Dec. 18, 2020)).

The Department noted in the proposal that this provision would ensure that parties making a fiduciary representation or acknowledgment cannot subsequently deny their fiduciary status if a dispute arises, but rather must honor their words.[199] The proposal also noted that in the retirement context, the Department has stressed the importance of clarity regarding the nature of an advice relationship and has encouraged retirement investors to ask advice providers about their status as an ERISA fiduciary with respect to retirement accounts and seek a written statement of the advice provider's fiduciary status.[200] Several commenters expressed support for this provision for the reasons stated by the Department in the proposal.

Some commenters said that the Department should consider all the facts and circumstances surrounding the parties' relationship rather than a single acknowledgment, and that they, therefore, did not support including this provision in the final rule. The Department disagrees. To the extent that a person has specifically advised a retirement investor that their recommendation is made in their capacity as a fiduciary under ERISA Title I or Title II or both, they have necessarily assumed a position of trust and confidence with respect to the investor. Therefore, the Department has adopted this requirement in the final rule.

In the final rule, the Department made some changes to the language of the proposal, which read, ''[t]he person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.'' As adopted, paragraph (c)(1)(ii) applies when an advice provider acknowledges their status as a fiduciary under *Title I of ERISA, Title II of ERISA, or both.* This change from the proposal responds to comments that said that acknowledging fiduciary status under Federal securities laws or State laws may be more remotely connected to the retirement investor and should not have the same effect as an ERISA Title I or Title II fiduciary acknowledgment. The Department concurs with this comment and has made the suggested change. Consequently, it is clear that this paragraph will not be satisfied by a person's marketing statements offering to be a ''trusted adviser'' or some term other than a ''fiduciary'' under Title I or Title II of ERISA, as one commenter suggested might be the case, although that type of representation will be relevant under paragraph (c)(1)(i).

Further, some commenters said the proposed language ''when making investment recommendations'' was too open-ended and should focus on the particular recommendation at issue. Otherwise, the commenters said, once a fiduciary acknowledgment had been made, it would appear to apply fiduciary status for every future interaction regardless of the circumstances of that interaction. Additionally, commenters said that if one financial professional acknowledged fiduciary status, this would apply to all financial professionals employed by the financial institution. The Department understands these commenters' concerns and accordingly revised the final rule so that it applies fiduciary status if the person acknowledges ERISA Title I or Title II fiduciary status with respect to *the recommendation.*

Some commenters requested that the Department ensure that for each provision in paragraph (c)(1), an individualized recommendation must be made. In the Department's proposal, only one of the proposed provisions (proposed paragraph (c)(1)(ii)) had included a requirement that the recommendation must be provided ''under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor.'' Commenters expressed concern that this could result in fiduciary status being assigned based on communications that were made broadly to many investors or in marketing materials. As the Department revised the language of paragraph (c)(1)(ii) to be focused on a particular recommendation, the Department believes the commenters' concerns are addressed and has therefore not also revised the language to specify that the recommendation must be individualized.

One commenter suggested that the Department should limit this provision to a written representation. The Department has not adopted that requirement. A written representation will be the clearest way to demonstrate that this context has been satisfied, but the Department does not believe that it is appropriate to rule out oral communications in which an individual committed to fiduciary status. Whether the advice provider makes the acknowledgment in writing or orally, the significance is the same. In both circumstances, the provider is holding themselves out as an ERISA Title I or Title II fiduciary and should be held to that status.

Adopted Paragraph (c)(1)(iii)—Sales Pitches and Investment Education

The final rule includes a new paragraph (c)(1)(iii) that provides confirmation that sales pitches and investment education can occur without ERISA fiduciary status attaching. The paragraph generally provides that a person does not provide investment advice within the meaning of the final rule if they make a recommendation but neither paragraph (c)(1)(i) nor (c)(1)(ii) is satisfied, and further that the provision of investment information or education, without a recommendation, is not advice within the meaning of the final rule.

This provision was added to the final rule in response to commenters who said that the Department's proposal would apply too broadly and would eliminate the ability of salespeople to avoid fiduciary status with respect to mere sales pitches. Paragraph (c)(1)(iii) of the final rule includes a specific example regarding salespersons, which confirms that is not the case so long as the salesperson does not acknowledge fiduciary status under Title I or Title II of ERISA, and so long as the salesperson does not hold themselves out as making an individualized recommendation intended to advance the best interest of the customer based on the person's professional or expert review of the investor's particular needs or circumstances.

When, however, the person making the recommendation meets the specific elements of paragraphs (c)(1)(i) or (ii), they are not merely making a sales pitch. They are holding themselves out as providing an important advisory service, either by expressly acknowledging their fiduciary status under ERISA or by indicating that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest. In these circumstances, they are offering far more than a mere sales pitch. Instead, they have assumed a position of trust and confidence with

[199] *Id.*

[200] *Id.* noting that Department of Labor FAQs, *Choosing the Right Person to Give You Investment Advice: Information for Investors in Retirement Plans and Individual Retirement Accounts* state ''A written statement helps ensure that the fiduciary nature of the relationship is clear to both you and the investment advice provider at the time of the transaction, and limits the possibility of miscommunication,'' available at *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/choosing-the-right-person-to-give-you-investment-advice.*

respect to the investor, and provided a valuable service to the investor which the retirement investor can reasonably rely upon as intended to advance their interests. In such circumstances, it denigrates the work of the advice provider and the reasonable expectations of the investor to characterize the recommendation as a mere sales pitch.

Nothing in the final rule, however, requires mere sales pitches that fall short of the definition to be treated as fiduciary investment advice. Thus, for example, absent additional facts, the following scenario described in the *Chamber* opinion would not be sufficient to establish ERISA fiduciary status under the final rule: ''You'll love the return on X stock in your retirement plan, let me tell you about it,'' even if, as the opinion hypothesizes, the advice recipient buys the stock based solely on this communication.[201] Certainly, the salesperson touts the stock, but the scenario falls short of suggesting that the sales pitch was individualized, the salesperson considered the investor's particular circumstances, applied professional judgment to the investor's particular needs and circumstances, or was providing a recommendation intended to advance the best interest of the investor. Under the final rule, a mere sales pitch of this sort, without more, does not amount to fiduciary investment advice for purposes of ERISA.

Paragraph (c)(1)(iii) also makes clear that the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of the final rule. Investment education is discussed in greater detail in Section E.3. of this preamble.

Proposed Paragraph (c)(1)(iv)—Not Adopted

In the final rule, the Department did not adopt proposed paragraph (c)(1)(iv) which had provided, ''for purposes of this paragraph, when advice is directed to a plan or IRA fiduciary, the relevant retirement investor is both the plan or IRA and the fiduciary.'' One commenter said the meaning of this provision was unclear. Another commenter said, for purposes of analyzing proposed paragraph (c)(1)(ii), it was unclear how or why it would be required to evaluate the ''individual circumstances'' of a financial professional acting as a plan fiduciary.

In the final rule, the Department added a new defined term of a ''retirement investor'' in paragraph (f)(11) that means a plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the plan or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA. The definition of a retirement investor is discussed in Section D.4. of this preamble. In that discussion, the Department notes that under the final rule, for purposes of paragraph (c)(1)(i), when advice is rendered to a plan or IRA fiduciary within the meaning of ERISA section 3(21)(A)(i) or (iii) or Code section 4975(e)(3)(A) or (C), the relevant ''particular needs or individual circumstances'' are those of the plan or IRA, and the determination of whether the recommendation may be relied on by the ''retirement investor'' as intended to advance the ''retirement investor's best interest'', focuses on the plan or IRA.

Adopted Paragraph (c)(1)(iv)—Disclaimers

Paragraph (c)(1)(iv) in the final rule provides that ''[w]ritten statements by a person disclaiming status as a fiduciary under the ERISA Title I or Title II, or this final rule, or disclaiming the conditions set forth in paragraph (c)(1)(i) of this final rule, will not control to the extent they are inconsistent with the person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.''

This paragraph was proposed as paragraph (c)(1)(v) but was redesignated paragraph (c)(1)(iv) in the final rule. The Department's intent in including this paragraph is to permit parties to define the nature of their relationship, but also to ensure that to be given weight under the final rule, any disclaimer is consistent with oral or other written communications or actions, marketing material, State and Federal law, and other interactions based on all relevant facts and circumstances. Firms and financial professionals cannot readily evade fiduciary status through disclaimers that are at odds with their other communications with the retirement investor. Thus, a written disclaimer is insufficient to defeat fiduciary status if the advice provider makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest. For example, a boilerplate disclaimer of fiduciary status is insufficient to defeat fiduciary status under the final rule when the rest of the advice provider's communications are calculated to reassure the investor that, in fact, the advice is precisely the sort of trustworthy advice that meets the regulatory standard.

The disclaimer provision extends not just to broad disclaimers of ERISA fiduciary status, but also to disclaimers of *the conditions set forth in paragraph (c)(1)(i) of this final rule.* Thus, any statement disclaiming that a recommendation is based on review of the retirement investor's particular needs or individual circumstances, that a recommendation reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, or that a recommendation is intended to advance the retirement investor's best interest, would not control to the extent it is inconsistent with other oral or written communications, marketing materials, other interactions with the retirement investor, or with applicable State or Federal law. For example, depending on the facts and circumstances, such disclaimers from a broker-dealer or an investment adviser under the Advisers Act making recommendations to and providing advice to retail customers would generally be ineffective to the extent the disclaimers are inconsistent with their obligations under the securities laws. These obligations, which are rooted in fiduciary principles,[202] include, but are not limited to the requirement under SEC Regulation Best Interest to ''exercise[ ] reasonable diligence, care, and skill to . . . [h]ave a reasonable basis to believe

[201] *Chamber,* 885 F.3d 360, 369 (5th Cir. 2018).

[202] *See* Regulation Best Interest release, 84 FR 33318, 33327 (July 12, 2019) (''key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act.''); *see also* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation (''Both [Regulation Best Interest] for broker-dealers and the [Advisers Act] fiduciary standard for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest.''), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;[203] the obligation under the Advisers Act to provide investment advice ''in the best interest of the client based on a reasonable understanding of the client's objectives;[204] and the requirement in SEC Form CRS to disclose to retail investors the required associated standard of conduct associated with their relationship and services.[205] Waiver of these obligations under Regulation Best Interest and the Advisers Act's is generally not permitted.[206]Likewise, a disclaimer of any of the conditions of paragraph (c)(1)(i) by an insurance agent would not govern to the extent such disclaimer would be inconsistent with State insurance law.

In other contexts, however, firms and financial professionals may rely on disclaimers to a greater degree but must exercise care to ensure that their actions and communications are consistent with their disclaimer of fiduciary responsibility. When a disclaimer is at odds with the investment advice provider's oral or other written communications, marketing material, State or Federal law, or other interactions, the disclaimer is insufficient to defeat the retirement investor's legitimate expectations.

Commenters who supported this provision in the proposal said it would appropriately close loopholes in the 1975 regulation that had allowed financial professionals to disclaim elements of the five-part test in fine print. According to these commenters, instead of allowing fine print disclosures to govern, this provision would result in the consideration of the nature of the parties' other interactions as well as the advice provider's use of titles, marketing materials, and description of services, and would better give effect to retirement investors' expectations.

One commenter said the final rule should not permit a disclaimer to have any effect if the person would have met the fiduciary definition in the absence of the disclaimer. The Department has not adopted this suggestion. To the extent a written disclaimer is otherwise permitted by Federal or State law and the firm and financial professional's communications and conduct are consistent with the disclaimer, it is relevant to determine whether a reasonable investor in like circumstances would have viewed the recommendation as trustworthy advice aimed at advancing the retirement investor's best interest based on their individual needs and circumstances.

Other commenters criticized the proposal's treatment of disclaimers and even suggested that the proposal effectively prohibited disclaimers. Commenters said the proposed provision on disclaimers—along with the contexts in proposed paragraphs (c)(1)(i), (ii), and (iii) which they described as ''status based''—left no viable way for a financial institution or financial professional to define their relationship with an investor even by clearly stating they are not acting as a fiduciary. One commenter said disclaimers should be permitted to manage the legal risk of ''inadvertent'' fiduciary status unintended by the parties. Some commenters focused on the relevance of disclaimers in communications between plan fiduciaries, such as in connection with a request for proposal to provide asset management services, and in communications between asset managers and financial services providers who are themselves plan and IRA fiduciaries. One commenter said the final rule should allow an ''ERISA disclaimer'' that would allow parties to operate under Regulation Best Interest or other securities law but would limit their services merely to investment education to avoid ERISA fiduciary status.

As discussed above, the Department has not prohibited disclaimers of fiduciary status. Under the final rule, weight will be given to a disclaimer to the extent the disclaimer is consistent with State and Federal law, but it is clear that disclaimers are not ''dispositive'' when at odds with State and Federal law, or other actions and communications. To the extent firms and financial professionals wish to avoid fiduciary status, they should take care to ensure that their disclaimers are consistent with their actions and communications with respect to the retirement investor as well as with State and Federal law. Disclaimers should not function as mere legal boilerplate intended to insulate advice providers from fiduciary status and liability, while the remainder of the provider's actions, communications, and marketing materials are designed to reassure the investor that, disclaimer notwithstanding, they are providing the sort of professional advice that falls within the fiduciary definition and can be relied upon with trust and confidence.

The Department believes that concerns about ''status based'' provisions and ''inadvertent'' fiduciary status have been appropriately addressed by the text of the final rule, which provides an objective test based on reasonable investor understandings. As noted above, firms and financial professionals can best ensure that there are no misunderstandings as to fiduciary status by ensuring that they are clear and consistent in their communications with their client. Under the final rule's objective standards, fiduciary status does not turn on the retirement investor's subjective state of mind, but rather on how a reasonable investor in like circumstances would have viewed the relationship and recommendation, including whether the advice provider has expressly acknowledged ERISA fiduciary status. In this manner, the final rule ensures that neither the advice provider's, nor the retirement investor's, reasonable expectations will be dishonored. It is within the advice provider's control to manage how it interacts with and holds itself out to the investor, within the limits of other State and Federal laws.

A commenter additionally requested confirmation that a financial institution may agree with a customer expressly, clearly, and in writing that it is only providing brokerage trade execution services (*i.e.,* acting as an order taker) and such agreement may govern to avoid ERISA fiduciary status, so long as the disclaimer is consistent with the person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor. The Department confirms and notes that this is the case even if other assets of the retirement investor are managed on a discretionary basis by the financial institution or an affiliate. Moreover, as discussed above, the new paragraph (c)(1)(iii) confirms that sales recommendations that do not meet paragraph (c)(1)(i) or (ii) will not give rise to fiduciary status.

[203] 17 CFR 240.15l–1(a)(2)(ii).

[204] SEC Investment Adviser Interpretation, 84 FR 33669, 33673 (July 12, 2019).

[205] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

[206] Regulation Best Interest release, 84 FR 33318, 33327,33330 (July 12, 2019) (noting, among other things, that a ''broker-dealer will not be able to waive compliance with Regulation Best Interest, nor can a retail customer agree to waive her protections under Regulation Best Interest''); SEC Investment Adviser Interpretation, 84 FR 33669, 33672 (July 12, 2019).

The Department believes this provision on disclaimers should also address many commenters' concerns about communications to plan and IRA fiduciaries who are retirement investors under the final rule. Express disclaimers in the context of a request for proposal for asset management services or similar process would be permitted under this provision and would govern, provided the disclaimer is consistent with the other interactions and circumstances set forth in paragraph (c)(1)(iv). Additional discussion of requests for proposals and other specific circumstances is in Section E of this preamble. Also, as discussed in Section D.4. of this preamble, the Department has revised the definition of a retirement investor to make clear that financial services providers serving as plan and IRA investment advice fiduciaries are not captured within that definition.

The Department does not agree, however, that there should be an ''ERISA disclaimer'' under which parties that would otherwise satisfy all of the provisions in the final rule could nevertheless disclaim ERISA fiduciary status and only comply with securities law conduct standards. As Congress enacted ERISA against the backdrop of securities laws with the aim of imposing especially high standards in the context of retirement plans, the Department believes a flat disclaimer to avoid ERISA fiduciary status without limiting conduct accordingly is inconsistent with congressional intent and ERISA's purposes.[207] The final rule defines those circumstances in which a reasonable investor is entitled to rely upon a recommendation as a fiduciary recommendation made from a position of trust and confidence. In such circumstances, the advice provider cannot upend legitimate investor expectations and avoid fiduciary accountability merely by stating that they disclaim responsibility under ERISA, irrespective of the investor's reasonable understandings.

3. Fee or Compensation, Direct or Indirect (Paragraph (e))

Paragraph (e) in the final rule defines ''for a fee or compensation, direct or indirect'' for purposes of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) as follows:

For purposes of section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code, a person provides investment advice ''for a fee or other compensation, direct or indirect,'' if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the investment advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid ''in connection with or as a result of'' such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of investment advice.

In the proposal, the Department explained that the proposed definition was consistent with the preamble of the 1975 regulation, which stated that ''a fee or other compensation, direct or indirect'' includes all fees or other compensation ''incident to the transaction in which the investment advice to the plan has been rendered or will be rendered,'' including, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions.[208] The Department's proposal cited several other instances where the Department confirmed its longstanding view in this respect.[209]

Like the proposal, the definition in the final rule makes clear that there must be a link between the transaction-based compensation and the financial professional's recommendation. Thus, the compensation is treated as paid ''in connection with or as a result of'' the provision of advice only if it would not have been paid but for the recommended transaction or the provision of advice, or if the investment advice provider's eligibility for the compensation (or its amount) is based in whole or part on the recommended transaction or the provision of advice.

This definition in the final rule would also be satisfied by any fee that is paid explicitly for the provision of investment advice. This would include, for example, a fee paid to an investment adviser as defined in the Advisers Act based on the retirement investor's assets under management.

A fee or other compensation received in connection with an investment transaction also would fall within the definition of ''for a fee or other compensation, direct or indirect.'' This treatment of investment compensation is in accord with the actions of other State and Federal regulators, and with the modern marketplace for investment advice in which brokers and insurance agents can do far more than merely execute transactions, close sales, or make sales pitches. Financial professionals are commonly compensated for their advice through the payment of transaction-based fees, such as commissions, which are contingent on the investor's decision to engage in the recommended transaction. In the circumstances described in the fiduciary definition, the advice provider has either specifically acknowledged fiduciary status under Title I or Title II ERISA or both, or has otherwise offered individualized advice reflecting the application of expert or professional judgment to the retirement investor's financial circumstances and needs that may be relied upon to advance the investor's best interest. In these circumstances, the advice provider's compensation is not simply a charge for executing a transaction, but rather compensates the provider for the provision of a valuable fiduciary service.

The SEC acknowledged this reality in the Regulation Best Interest release, noting that ''there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment

[207] *See* statement by the Chair of the Senate Committee on Labor and Public Welfare upon introduction of the Conference Report on ERISA: ''Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds. Neither existing State nor Federal law has been effective in preventing or correcting many of these abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to . . . establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets . . . .'' Statement by Hon. Harrison A. Williams, Jr., Chairman, Senate Committee on Labor and Public Welfare, introducing the Conference Report on HR 2, 120 Congressional Record S 15737 at 11 (Aug. 22, 1974).

[208] Proposed Retirement Security Rule, 88 FR 75890, 75909 (Nov. 3, 2023) (citing 40 FR 50842 (Oct. 31, 1975); 41 FR 56760, 56762 (Dec. 29, 1976)).

[209] *Id.* (discussing the preamble of proposed PTE 77–9, 41 FR 56760, 56762 (Dec. 29, 1976) and U.S. Department of Labor Adv. Op. 83–60A (Nov. 21, 1983), available at *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a*).

recommendations.'' [210] The SEC discussion further contemplated that commissions compensate broker-dealers for their recommendations and may be the preferred method of investment advice compensation with respect to certain transactions; as an example, the SEC stated that retail customers seeking a long-term investment may determine that ''paying a one-time commission to a broker-dealer recommending such an investment is more cost effective than paying an ongoing advisory fee to an investment adviser merely to hold the same investment.'' [211] The SEC also noted that transaction-based compensation is not limited to commissions and includes markups or markdowns, 12b–1 fees and revenue sharing.[212] The Department agrees that there are benefits to ensuring a wide range of compensation structures remain available to retirement investors.

Likewise, the NAIC Model Regulation effectively acknowledged that insurance agents make recommendations and might be compensated for their recommendations through commissions. The NAIC Model Regulation defines a recommendation as ''advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice.'' [213] The definition of ''cash compensation'' in the NAIC Model Regulation is: ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.'' [214]

When a financial professional meets the regulatory fiduciary definition, the services rendered by the professional include individualized advice, and the compensation, including commission payments, is not merely for execution of a sale, but for the professional advice provided to the investor, as uniformly recognized by the Department's previous guidance and by other State and Federal regulators.[215]

The statutory exemption for investment advice to participants and beneficiaries of individual account plans set forth in ERISA section 408(b)(14) indicates that Congress similarly recognized that compensation for advice often comes in the form of commissions and transaction-based compensation.[216] Accordingly, the exemption applies to transactions ''in connection with the provision of investment advice described in section 3(21)(A)(ii)'' including ''the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof . . . in connection with the provision of the advice *or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice.*'' [217]

As has been true since the Department first proposed regulations under this section in 1975 and as discussed above, the Department understands the phrase ''for a fee or other compensation, direct or indirect'' to encompass a broad array of compensation incident to the transaction.[218]

Several commenters indicated the definition of ''for a fee or other compensation, direct or indirect'' in the proposal was too broad in extending to commissions outside the context of the 1975 regulation's five part-test. One said the Fifth Circuit made clear that commissions would fall within this language only if all parts of the of the five-part test are satisfied including a mutual understanding that the commission would be intended to pay for advice. Concern was expressed that the proposed rule would extend fiduciary status to an investment manager based on its provision of information about its services in a hiring context, if it ultimately was hired and paid, and to a platform provider that is hired to manage assets based on the provision of a narrowed-down list of investment options for the plan. In this connection, one commenter asked the Department to state that the definition does not extend to compensation that ''has a connection with 'incidental''' recommendations of financial products or services.

The Department does not believe that the definition of ''for a fee or other compensation, direct or indirect,'' must be narrowed in the context of the final rule. The Department believes the final rule is appropriately constructed to define when retirement investors can reasonably place their trust and confidence in an advice provider and their recommendations, and compensation received ''in connection with or as a result of'' recommended transactions or advice services from such financial professionals is appropriate to establish ERISA fiduciary status. The Department has consistently interpreted the statutory language ''for a fee or other compensation, direct or indirect'' to include transaction-based compensation since the adoption of the 1975 regulation, and the Department believes this approach is consistent with the recognition by the SEC that commissions may be paid, in part, for advice or recommendations. The Department has not adopted the suggestion of the commenter that sought an exception for compensation that has a connection with ''incidental'' recommendations of financial products or services. The commenter did not define ''incidental'' or explain why that restriction would be appropriate under the statutory definition, which provides that a person is a fiduciary ''to the extent'' the person provides compensated advice, without any such carve-out. The Department believes that concerns about marketing advice services and products are appropriately addressed in other ways in the final rule. Section E of this preamble discusses application of the final rule in specific circumstances involving ''hire me'' communications, requests for proposals and platform providers, and others.

Another commenter made a related comment that Federal securities laws recognize that financial professionals receive ''no compensation'' for the provision of advice that is incidental to brokerage services, and that absent specific language to the contrary, Congress must have intended the same in ERISA. The Department has concluded this assertion does not hold up under examination. While the Advisers Act includes an exception from the definition of an investment adviser for broker-dealers ''whose performance of such advisory services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation'' for those services, [219] this does not reflect

[210] Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019).

[211] *Id.*

[212] *Id.* at 33402.

[213] NAIC Model Regulation at section 5.M.

[214] *Id.* at section 5.B.

[215] *E.g.,* U.S. Department of Labor, Adv. Op. 83–60A (Nov. 21, 1983), available at *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a.*

[216] 29 U.S.C. 1108(b)(14). *See* Code section 4975(d)(17) (parallel statutory exemption).

[217] 29 U.S.C. 1108(b)(14) (emphasis added).

[218] *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Americans for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *21 (N.D. Tex. June 30, 2023) (''The expansive choice of investment advice 'for other compensation' indicates an intent to cover any transaction where the financial professional may receive conflicted income if they are acting as a trusted adviser.'')

[219] *See, e.g.,* section 202(a)(11)(C) of the Advisers Act; Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer

a broad view that broker-dealers are uncompensated for their advice or recommendations. Rather, it acknowledges that broker-dealers can provide a form of advice that is incidental to their primary business and that they can get compensated for such advice. They do not go uncompensated for those services, but rather are commonly compensated on a transaction basis for the work required to make a best interest recommendation. The SEC acknowledged this reality in the Regulation Best Interest release.[220] The quotes set forth earlier in this preamble Section D.3 from the NAIC Model Regulation definition of ''cash compensation'' reflect similar views in the insurance context.[221]

In response to another commenter who requested clarification of the analysis that would apply to non-transaction-based compensation models, such as salary or hourly paid positions, the Department responds that the definition of ''for a fee or other compensation, direct or indirect,'' includes any fee that is paid explicitly by any source for the provision of investment advice or any fee paid in connection with investment advice. This would include an assets under management fee, flat fee, or hourly fee paid in connection with advisory work. Other commenters asked the Department to confirm that a set salary or other fixed compensation paid to an individual who is providing information such as product information and operational or administrative information to participants does not constitute a fee or other compensation for rendering investment advice. The Department is unwilling to state that any particular compensation arrangement with an individual would categorically not constitute a ''fee or other compensation''; however, it is important to note that for fiduciary status to apply, all parts of the final rule must be satisfied, including the provision of a covered recommendation.

4. Retirement Investor Definition (Paragraph (f)(11))

Sophisticated Advice Recipients

Many commenters argued that the final rule should explicitly state in the regulatory text that recommendations to certain sophisticated advice recipients would not be considered ERISA fiduciary advice. Many commenters who suggested this type of limitation wanted it to apply to plan sponsors acting as plan fiduciaries and/or independent financial services providers who are themselves plan or IRA fiduciaries. These commenters said the Department should adopt a different approach in the institutional market than the retail market, where they said these plan fiduciaries are not expecting advice in their best interest and do not have a relationship of trust and confidence. The commenters said a specific limitation in the regulatory text for sophisticated advice recipients is needed to avoid impeding the exchange of important information such as market color and market availability and pricing between advice providers and plan fiduciaries. Some commenters pointed to Regulation Best Interest's limitation to recommendations to ''retail customers'' and other securities law provisions, such as for ''accredited investors'' as precedent for this approach.

Some commenters suggested the Department should include a limitation similar to the 2016 Final Rule's limitation for ''transactions with independent fiduciaries with financial expertise,'' while others said the Department should not take that approach again.[222] One commenter suggested including an assets-based test carving out plan sponsors with more than $100 million in assets, based on the commenter's analysis that there would be minimal benefit to plans and their participants from including these plan sponsors as retirement investors. Other commenters suggested securities-law based definitions such as ''accredited investors,'' ''qualified purchasers,'' or ''qualified institutional buyers.''

Some other commenters discussed the issue of sophisticated advice recipients in the context of ''wholesaling'' activity aimed at financial services providers such as broker-dealers, registered investment advisers, banks, insurance companies, and consultants, that are or might be serving in an ERISA Title I or Title II fiduciary capacity to plans or IRA investors. Commenters said asset managers should be free to engage in marketing efforts with these providers, sometimes described as intermediaries, to better inform the providers for purposes of their own fiduciary recommendations to plan and IRA clients. One scenario raised in a number of comments involves the provision of model portfolios. One commenter described a scenario involving model portfolios created by asset managers as a service to the financial services providers, such as broker-dealers, who then use those models in their direct interactions with investor clients. Commenters said that the proposal was not clear as to whether such interactions between wholesalers and advisers constituted fiduciary recommendations, and if they did, ERISA fiduciary status might attach broadly to asset managers providing these models based on the contexts in proposed paragraphs (c)(1)(i), (ii), and (iii).

In this regard, commenters said wholesaling interactions present clear examples where there is no relationship of trust and confidence involving a customer. They said the regulatory text of the final rule should reflect a limitation under which financial services providers receiving information in wholesaling interactions would not be considered ''retirement investors,'' with one commenter suggesting that the Department should eliminate the reference to ''plan and IRA fiduciaries'' altogether in the definition of a retirement investor and leave the reference to ''plans'' and ''IRAs'' as advice recipients. The commenter said this would avoid treating non-fiduciary interactions between financial professionals as fiduciary investment advice. Another commenter suggested that the definition of a retirement investor should be limited to plan fiduciaries that are named fiduciaries and IRA fiduciaries that are in a fiduciary relationship to a particular IRA or IRA owner or beneficiary and

Exclusion From the Definition of Investment Adviser, 84 FR 33681, 33682 (July 12, 2019).

[220] Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019) (''there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.'')

[221] The commenter cited the *Chamber* opinion, 885 F.3d at 372–373, as support for the assertion that financial professionals receive ''no compensation'' for the provision of advice that is incidental to brokerage services. On page 373, the *Chamber* opinion stated, ''[s]tockbrokers and insurance agents are compensated only for completed sales ('directly or indirectly'), not on the basis of their pitch to the client. Investment advisers, on the other hand, are paid fees because they 'render advice.''' The Department does not read this passage as foreclosing the view that, in a completed investment transaction that was the subject of a fiduciary relationship of trust and confidence, a portion of the commission would be considered compensation for the recommendation. This is consistent with the position taken by the Department in Advisory Opinion 83–60A, which was discussed favorably by the court in *Chamber.* In that opinion, the Department said ''if, under the particular facts and circumstances, the services provided by the broker-dealer include the provision of 'investment advice', as defined in regulation 2510.3–21(c), it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.'' Available at *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a.pdf.*

[222] See paragraph (c)(1) of the 2016 Final Rule, 81 FR 20946, 20999 (Apr. 8, 2016).

who are receiving the recommendation on behalf of a specific IRA or IRA owner or beneficiary.

A commenter discussed their views on the potential impact of the proposal on the private equity market. They described communications between fund sponsors and plan fiduciaries as ranging from sales communications to information about fund characteristics and responding to questions to aid in the due diligence process. Similar to other commenters expressing their desire for a sophisticated advice recipient carve-out, the commenter said it is widely understood that these communications are on an arm's length basis. Nevertheless, to avoid impacting ERISA plans' investment in private equity, the commenter suggested adding a provision to the regulatory text as follows:

Communications with sophisticated and independent parties. The provision of any advice, within the meaning of Section 3(21)(A)(ii) of the Act, by a person to a sophisticated and independent party in connection with an arm's length purchase, sale, loan, exchange or other transaction related to the investment of securities or other investment property, if the sophisticated and independent party has expressly acknowledged, in a clear and conspicuous manner, that such person is not acting as a ''fiduciary,'' within the meaning of Section 3(21)(A)(ii) of the Act or Section 4975(e)(3)(B) of the Code, to the sophisticated and independent party with respect to such transaction, and such person does not (i) receive a fee or other compensation directly from the sophisticated and independent party solely for the provision of such advice or (ii) expressly acknowledge or represent that it acts as a ''fiduciary,'' within the meaning Section 3(21)(A) of the Act or Section 4975(e)(3) of the Code, to such sophisticated and independent party with respect to the transaction.

A party is ''sophisticated'' if such person (or such person's representative) (i) is a ''bank,'' as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by a State or Federal agency, (ii) is an insurance carrier which is qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a plan, (iii) is an investment adviser registered under the Investment Advisers Act of 1940 or, if not registered as an investment adviser under the Investment Advisers Act by reason of paragraph (1) of section 203A of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, (iv) is a broker-dealer registered under the Securities Exchange Act of 1934, (v) has total assets or assets under management of at least $25 million, or (vi) meets the requirements of a ''qualified purchaser'' under the federal securities laws.

A party is ''independent'' of another person if the person were not, and were not affiliated with, the other person. For these purposes, an ''affiliate'' of a person is one who controls, is controlled by, or is under common control with, the other person.''

A communication is ''clear and conspicuous'' if it is reasonably understandable and noticeable to a typical sophisticated and independent party.

Many supporters of the Department's proposal, however, counseled against a limitation in the regulatory text regarding sophisticated advice recipients that are plan sponsors acting as plan fiduciaries. They said the various suggested carve-outs from the fiduciary definition do not reliably identify whether an advice recipient is in fact sophisticated, and they did not believe plan sponsors acting as plan fiduciaries would necessarily know that the fiduciary protections under Title I did not apply when they receive recommendations and advice. These commenters also said there is nothing in the text of ERISA that would indicate that Congress intended to deny protections to certain investors based on their presumed sophistication, and at least one commenter said that the use of wealth or income exemptions from public disclosure requirements in the securities context has led to harms to retail investors. Many of these commenters specifically supported extending ERISA's protections to plan sponsors and believed there would be significant benefits to plan participants and beneficiaries as a result. These commenters said that the fact that plan sponsors are neither protected under Regulation Best Interest nor under State laws adopting the NAIC Model Regulation weighs in favor of including them within the definition of a retirement investor.

In the final rule, the Department has determined not to include a provision that would generally exclude plan sponsors acting as fiduciaries from the definition of a retirement investor. The Department believes that rather than attempt to define financial sophistication through a particular asset test or other specific regulatory limitation as suggested by a few commenters, including the commenter advocating for a carve-out for ''communications with sophisticated and independent parties,'' it is preferable to retain the facts and circumstances test set forth in this rule for all recommendations. For example, when a financially sophisticated retirement investor engages in an arm's length transaction with a counterparty who makes an investment recommendation, absent an acknowledgment of fiduciary status under ERISA Title I or Title II, it is appropriate to consider whether a reasonable investor *in like circumstances* would rely on the recommendation as intended to advance the investor's best interest.

In many circumstances, plan fiduciaries with responsibility for plan investments may need professional advice to responsibly discharge their duties. For example, many fiduciaries of small plans do not have specialized investment expertise and are quite dependent on recommendations from financial professionals about the complexities of constructing a prudent 401(k) plan investment lineup. As noted above, in a comment on the proposal, Morningstar quantified the potential benefits from the proposal's coverage of recommendations to plan fiduciaries about the fund lineups in defined contribution plans as exceeding $55 billion in the first 10 years and $130 billion in the subsequent 10 years, in undiscounted and nominal dollars, due to reductions in costs associated with investing through their plans, noting that over 80 percent of these savings would be experienced by small-plan participants. Even plan fiduciaries responsible for large portfolios may require fiduciary advice to make decisions with respect to categories of investment or financial transactions for which they lack expertise. In these circumstances, the regulatory text enables the fiduciary with investment authority to obtain fiduciary advice when that is appropriate in accordance with the same objective test that applies to fiduciary advice generally. This approach will avoid an artificial limitation in the definition of a retirement investor that may not have bearing on the parties' relationships and could undermine application of the ERISA fiduciary protections under Title I to plan sponsors that many commenters supported. Moreover, as explained above, the Department believes this facts and circumstances approach based on the parties' relationship is fully consistent with the *Chamber* opinion's emphasis on relationships of trust and confidence, as opposed to an artificial carve-out from fiduciary status that does not reflect the parties' reasonable understandings.

In this regard, it is worth noting that the Department did not finalize proposed paragraph (c)(1)(i), which would have automatically treated recommendations from persons who had discretionary authority over the retirement investor's assets as fiduciary investment advice provided all the other parts of the definition were satisfied.

Many of the comments related to the proposed rule's overbreadth, especially in the institutional market, were focused on this provision, which the Department has deleted. As discussed in greater detail in Section E of this preamble, the Department has also made a number of other changes to the final rule that should alleviate concerns about the flow of information in the institutional marketplace.

In addition, the final rule does include a limitation in the regulatory text for recommendations to plan and IRA fiduciaries that are merely themselves investment advice fiduciaries. In such cases, the recipient of the communication does not have the authority or control necessary to invest the plans' assets, and the final rule does not treat the recommendation as fiduciary investment advice to the plan. Accordingly, a new paragraph (f)(11) is added in the final rule defining a ''retirement investor'' and it extends only to plan and IRA fiduciaries to the extent they are described in ERISA section 3(21)(A)(i) or (iii) or Code section 4975(e)(3)(A) or (C), which generally involve the exercise of authority or control over plan assets, or discretionary authority or discretionary control with respect to the plan's management, or the possession of discretionary authority or discretionary responsibility in the plan's administration. Any subsequent recommendation made by the investment advice fiduciary directly advising the plan or IRA, however, would itself be treated as fiduciary investment advice to the extent it met the terms of the final rule, including paragraph (c)(1).

In this regard, under the final rule, for purposes of paragraph (c)(1)(i), when advice is rendered to a plan or IRA fiduciary within the meaning of ERISA section 3(21)(A)(i) or (iii) or Code section 4975(e)(3)(A) or (C), the relevant ''particular needs or individual circumstances'' are those of the plan or IRA, and the determination of whether the recommendation may be relied on by the ''retirement investor'' as intended to advance the ''retirement investor's best interest'', focuses on the plan or IRA.

The Department disagrees with commenters' suggestion that the category of fiduciary retirement investors should be limited to the ''named fiduciary,'' inasmuch as it would exclude advice to many fiduciaries who have or exercise direct control over plan investments. The Department did not wholly eliminate the reference to plan or IRA fiduciaries leaving only the ''plan'' and the ''IRA'' as the retirement investor, as suggested by one commenter, out of concern that there would continue to be uncertainty as to whether recommendations received by a financial services provider that is a fiduciary would be considered advice to the plan or IRA.

Some commenters also presented an additional concern that a wholesaler would not be able to tell if a particular financial professional that they are interacting with might be a plan or IRA fiduciary, particularly if the wholesaler is presenting in a group setting such as an educational forum. To the extent that is the case, and the scenario is not addressed through the limited definition of a retirement investor discussed above, it would appear that any communication in this context would not be investment advice under the final rule as it would not be based on the individual needs or particular circumstances of any plan or IRA. Such communications, to the extent they are covered recommendations that are not accompanied by an acknowledgment of ERISA Title I or Title II fiduciary status with respect to the recommendation, would not meet paragraph (c)(1)(i) of the final rule. In the scenario in which a financial professional acts as both an investment advice fiduciary and a fiduciary with control over investment decisions, the limitation in the definition of a ''retirement investor'' would apply only to the extent of their role as an investment advice fiduciary. In their role as a fiduciary with control, communications to them would be analyzed under the provisions of the final rule discussed in this paragraph.

Several commenters also asked the Department to address the status of independent marketing organizations (IMOs), field marketing organizations (FMOs) and other insurance intermediaries, which commenters said play a significant role in the distribution, training, and sales support of producers and insurance carriers. Specifically, the commenter said these entities assist independent producers in training, compliance, marketing, product selection and many other roles. Based on the commenter's description of the interactions, the Department would determine the status of these entities under the final rule based on, among other things, determination of whether the communications involve ''recommendations'' and whether the insurance producers are considered ''retirement investors'' pursuant to this discussion.

Health and Welfare Plans and Health Savings Accounts

The proposal included, as retirement investors, employee benefit plans described in ERISA section 3(3) and Code section 4975(e)(1)(A), as well as IRAs, which were defined to include any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code (HSA). [223]

The proposal further stated:

> For purposes of the proposed rule, the term ''IRA'' is defined as any account or annuity described in Code section 4975(e)(1)(B)–(F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans. However, for purposes of any rollover of assets between a Title I Plan and an IRA described in this preamble, the term ''IRA'' includes only an account or annuity described in Code section 4975(e)(1)(B) or (C). Additionally, while the Department uses the term ''*retirement* investor'' throughout this document to describe advice recipients, that is not intended to suggest that the fiduciary definition would apply only with respect to employee pension benefit plans and IRAs that are retirement savings vehicles. As discussed herein, the rule would apply with respect to plans as defined in Title I and Title II of ERISA that make investments. In this regard, see also proposed paragraph (f)(11) that provides that the term ''investment property'' ''does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.'' [224]

Several commenters asked the Department to exclude HSAs from the final rule. These commenters described HSAs as individually-owned accounts established exclusively to fund health care expenses. They said the HSAs operate more like a deposit account than a retirement savings vehicle, with investments being merely an optional feature that is not commonly utilized. They said HSAs may accept rollovers from IRAs but not from workplace retirement plans, and the amounts they may accept are limited. Commenters expressed concern that routine provider communications regarding HSAs might become fiduciary investment advice under the rule, and they said that this would increase the cost of offering HSAs. Further, commenters said that HSAs are often held and administered by non-bank custodians or trustees, and

[223] Proposed paragraph (f)(6) (the term ''plan'') and (f)(3) (the term ''IRA'').

[224] Proposed Retirement Security Rule 88 FR 75890, 75891 n. 9 (Nov. 3, 2023).

these entities are not ''financial institutions'' eligible to rely on PTE 2020–02 for prohibited transaction exemptive relief.

To the extent the Department decided not to exclude HSAs as retirement investors under the final rule, commenters asked the Department to confirm that HSA providers would be considered the same as platform providers because HSA providers make available investment options that are acceptable to all of their HSA customers, including employers who may select service providers for their employees' HSAs. Commenters also asked the Department to include IRS-approved non-bank trustees and custodians as financial institutions in the final amendment to PTE 2020–02.

One commenter more broadly urged the Department to completely exclude health and welfare plans, policies, and benefits from the final rule. The commenter said these plans are complex and fundamentally different than retirement plans. The commenter expressed appreciation for the definition of ''investment property'' in the proposal but suggested there were additional questions related to that definition.[225]

The Department has not eliminated health and welfare plans and HSAs from the definition of a retirement investor in the final rule. The Department acknowledges commenters' views that there are significant differences in how these plans operate as compared to retirement savings vehicles, and that HSAs may not commonly involve investment activity at all. However, these plans are clearly covered by either Title I of ERISA or by the prohibited transaction provisions in Title II.

Based on commenters' descriptions of HSA operations, the Department agrees that HSA providers may fall within the analysis regarding platform providers, presented below in Section E.2 of the preamble, which confirms that providers who merely identify investment alternatives using objective third-party criteria (*e.g.,* expense ratios, fund size, or asset type specified by the plan fiduciary) to assist plan sponsors and plan fiduciaries in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of the retirement investor, would not be considered under the final rule to be making a recommendation.

However, to the extent that a person makes a covered recommendation and satisfies the rest of the rule's requirements to any of these retirement investors, the Department does not see a reason to treat them differently or provide a lower level of protection for them than other plans covered by ERISA Title I or Title II. To address commenters' concerns about prohibited transaction relief, the Department has accepted the commenters' recommendation to allow IRS-approved non-bank trustees and custodians to rely on the prohibited transaction relief in PTE 2020–02 when they are serving in these capacities with respect to HSAs.

E. Application of the Final Rule to Specific Circumstances

The final rule generally retains the proposed approach of providing a general rule under which investment advice providers can determine their status through application of the facts and circumstances surrounding their interactions with retirement investors, as opposed to including provisions addressing specific circumstances. The use of carve-outs and special provisions in the 2016 Final Rule was criticized by the Fifth Circuit in *Chamber* as evidence of an overbroad rule.[226] Specifically, with respect to the 2016 Rulemaking, the Fifth Circuit's *Chamber* opinion had found that the rulemaking was overly broad and captured relationships that lacked the requisite hallmarks of a relationship of trust and confidence, such that fiduciary status under ERISA should not attach. The court further found that the exemptive relief and other carve-outs included in that rulemaking amounted to ''backdoor regulation'' of parties and transactions that the Department lacked authority to regulate.[227] As reiterated elsewhere in this final rule, the Department carefully considered the Fifth Circuit's emphasis on relationships of trust and confidence in developing this rule. To further distinguish the careful and judicious approach of this rulemaking (to extend fiduciary status to only relationships of trust and confidence) from the framework of the 2016 Rule, here the Department crafted a narrowed functional test that appropriately balances competing interests without the need for carve-outs.

Instead of proposing carve-out provisions in the regulatory text, the proposal's preamble included a discussion of the rule's intended application in certain common circumstances, specifically including circumstances involving sophisticated retirement investors, platform providers and pooled employer plans, swaps and security-based swaps, and valuation of securities and other investments.[228] The proposal sought comment on the discussion presented and whether the regulatory text should be adjusted to address any of the issues discussed.[229]

Commenters generally expressed appreciation for the Department's views presented in the proposal's preamble regarding the specific circumstances, however, many asked the Department to add provisions to the regulatory text to provide additional certainty regarding the Department's position. Some commenters said that without specific limitations in the regulatory text, the rule appeared overly broad and that without increased certainty as to how the rule would apply, providers may limit their services and beneficial information provided to retirement investors in a variety of settings. Commenters proposed specific carve-outs that they would like to see in the final rule to address specific circumstances, including the carve-outs that were included in the 2016 Final Rule. Some commenters also urged the Department to revise its position on some of the circumstances discussed in the proposal's preamble to broaden the circumstances in which ERISA fiduciary status would not apply.

Many commenters particularly highlighted interactions between parties in the institutional market and asserted that in these interactions it is clear that communications are sales activity and parties are interacting on an arm's-length basis. Commenters also described a broad range of circumstances and asked the Department to provide guidance as to how the rule would apply to the circumstances. Commenters also asked the Department to include specific language in the final rule addressing specific circumstances. The circumstances raised by commenters included those circumstances discussed in the proposal's preamble but also ranged to pension risk transfers; services provided by futures commission merchants; persons acting pursuant to CFTC and SEC safe harbors under 17 CFR 23.440 and 240.15Fh–5, respectively, related to swaps and security-based swaps; screening of retirement investors for access to exchange traded funds and futures; compensation arrangements applicable to less liquid, alternative investments; financial wellness programs;

[225] Comments on the definition of investment property are discussed in Section D.1 of this preamble.

[226] *Chamber,* 885 F3d. 360, 381 (5th Cir. 2018).

[227] *See id.* at 387–88 (citing *Hearth, Patio & Barbecue Ass'n* v. *U.S. Dep't of Energy,* 706 F.3d 499, 508–09 (D.C. Cir. 2013)).

[228] Proposed Retirement Security Rule 88 FR 75890, 75907–8 (Nov. 3, 2023).

[229] *Id.* at 75907.

discussions regarding foreign exchange transactions; services in connection with securities lending transactions; and financial professionals who solicit customers to join them when they move to a new firm, among others. One commenter posed a list of factual circumstances and asked the Department to confirm that they would not involve a covered recommendation when made to a retirement investor that is a financial institution, a named fiduciary with respect to an ERISA plan, or an authorized representative of either; the circumstances included, for example, the retirement investor soliciting information from more than one provider during a request for proposals. There were also requests for confirmation in areas outside the scope of this project, including on ERISA coverage issues.[230]

The changes made in the final rule should address many of the concerns expressed regarding application of the final rule and the potential for overbreadth. These changes include:

- confirmation that whether a ''recommendation'' has occurred will be interpreted consistent with the SEC's framework;
- elimination of proposed paragraph (c)(1)(i) and changes to the contexts in adopted paragraphs (c)(1)(i) and (ii) that narrowed them and made them more objective;
- adoption of a new paragraph (c)(1)(iii) confirming that sales recommendations that are not made in the circumstances set forth in paragraph (c)(1)(i) or (ii) will not result in investment advice fiduciary status and that providing investment information or education, without an investment recommendation, is not advice for purposes of the final rule; and
- revision of the definition of a ''retirement investor'' to exclude plan and IRA fiduciaries that are investment advice fiduciaries.

The Department also provided a discussion in Section D.2. of this preamble regarding paragraph (c)(1)(iv) that makes clear that parties can use disclaimers to define their relationships so long as written statements disclaiming fiduciary status are consistent with the person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions. That preamble discussion specifically addressed the use of disclaimers in the context of requests for proposals.

The Department also made clarifications in the amended PTEs in this context. Some commenters said it would be impractical to rely on a PTE during preliminary interactions before they know whether the retirement investor is going to hire them or otherwise act on their recommendations. In response, the Department confirmed in the amended PTEs that the disclosure conditions of the PTEs, such as the acknowledgment of fiduciary status, are not required at the time of the first meeting. Rather, the disclosure obligations apply at or before the time the covered investment transaction occurs. The Department also revised the final amendment to PTE 2020–02 to include a special provision for firms and financial professionals who provide fiduciary advice to a retirement investor in response to a request for proposal to provide services as an investment manager within the meaning of ERISA section 3(38).

The Department has not included provisions in the final rule's regulatory text suggested by commenters to address certain specific circumstances. The Department believes that the text of the rule properly applies a fiduciary definition that is consistent with the Fifth Circuit's *Chamber* opinion and the text of the statute, and that can be properly applied to the wide range of investment interactions described by the commenters, without need of special exceptions or carve-outs. However, below, the Department confirms that the proposal's discussions regarding certain specific circumstances remain applicable and adds some additional discussion to provide further guidance. The Department has also determined that it will not include questions and answers in the regulatory text, as some commenters suggested. The Department does not believe that including questions and answers on these specific factual circumstances would be an efficient or effective way to respond to myriad different factual patterns that could arise under the final rule. The Department looks forward to continuing its engagement with the public following publication of this final rule.

1. ''*Hire Me*'' *Communications*

In the preamble to the proposed rule, the Department stated that the proposal was not intended to result in a person becoming a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property (*i.e.,* ''hire me'' communications). Thus, touting the quality of one's own advisory or investment management services would not trigger fiduciary obligations. This was made clear in the language in proposed paragraph (f)(10)(ii) that extended to recommendations of ''other persons'' to provide investment advice or investment management services.

However, the Department cautioned that the proposal's preamble discussion should not be read to exempt a person from being a fiduciary with respect to any of the investment recommendations covered by proposed paragraph (c)(1) and defined in proposed paragraph (f)(10). There is a line between an investment advice provider making claims as to the value of its own advisory or investment management services in marketing materials, on the one hand, and making recommendations to retirement investors on how to invest or manage their savings, on the other. An investment advice provider can recommend that a retirement investor enter into an advisory relationship with the provider without acting as a fiduciary. But when the investment advice provider recommends, for example, that the investor pull money out of a plan or invest in a particular fund, that advice may be given in a fiduciary capacity even if part of a presentation in which the provider is also recommending that the person enter into an advisory relationship. The Department also said in the proposal's preamble that it believed that this is consistent with the functional fiduciary test laid out in the statute in which an entity is an investment advice fiduciary to the extent that they satisfy the definition. It does not follow from the fact that one piece of advice is not fiduciary investment advice (here, the ''hire me'' recommendation) that the rest of the advice is necessarily excluded from the definition (here, the advice to pull money out of the plan and invest in a particular fund). The investment advice fiduciary could not recommend that a plan participant roll

[230] One commenter asserted that the Department's proposal as applied in the ''hire me'' context conflicted with a decision by the U.S. Court of Appeals for the Fifth Circuit in *D.L. Markham* v. *VALIC,* which the commenter said held that service providers are not ''parties in interest'' before the service provider has started providing services or has at least agreed to do so. *D.L. Markham DDS, MSD, Inc. 401(K) Plan* v. *Variable Annuity Life Ins. Co.,* 88 F.4th 603 (5th Cir. 2023). The decision, which involved a different provision of ERISA than the fiduciary definition at issue here, is inapposite. Under the final rule, a person is treated as a fiduciary only if they have made investment recommendations for which they were ultimately compensated. The rule does not treat an investment professional or firm as a fiduciary before they have rendered the advisory service.

money out of a plan into investments that generate a fee for the fiduciary but make an imprudent recommendation that leaves the participant in a worse position than if the participant had left the money in the plan. Thus, when a recommendation to ''hire me'' effectively includes a recommendation on how to invest or manage plan or IRA assets (*e.g.,* whether to roll assets into an IRA or plan or how to invest assets if rolled over), that recommendation would need to be evaluated separately under the provisions in the proposed regulation.

In this discussion, the Department noted its belief that its proposed approach was consistent with the SEC's approach in Regulation Best Interest. In FAQs, the SEC staff described a scenario involving broker-dealer communications with a prospective retail customer that would not rise to the level of a recommendation.[231] The FAQs describe a scenario where the broker-dealer meets a prospective retail customer at a dinner party and says, ''I have been working with our mutual friend, Bob, for fifteen years, helping him to invest for his kids' college tuition and for retirement. I would love to talk with you about the types of services my firm offers, and how I could help you meet your goals. Here is my business card. Please give me a call on Monday so that we can discuss.'' However, unlike this scenario, the SEC staff cautioned that a recommendation made in the context of a ''hire me'' conversation or otherwise would be subject to Regulation Best Interest.

Some commenters addressing the proposal's ''hire me'' discussion advocated for a broader ''hire me'' limitation. This was based on the assertion that information beyond merely touting the quality of one's own services is commonly exchanged and needed for a robust hiring process. One commenter said that incidental recommendations in the context of a ''hire me'' discussion should not be covered recommendations under the final rule. Commenters further asked the Department to include the limitation in the regulatory text as opposed to the preamble. They argued that, without such a limitation, fear of liability could cause advice providers to curtail beneficial information exchanges.

One commenter described the reality of the selection process for an investment adviser subject to the Advisers Act as involving the adviser describing its investment offerings and services and its investment approach in general, to provide a basis for the retirement investor to make an informed hiring decision. The commenter asked the Department to confirm that this type of information exchange would not result in an adviser becoming an investment advice fiduciary.

Many other commenters addressed the ''hire me'' issue in the context of requests for proposals by plan fiduciaries. Commenters said requests for proposals often involve the plan asking for specific investment ideas, and if responses included information tailored to the plan, that would appear to result in the person marketing their services being considered an ERISA fiduciary under the proposal. Commenters offered varying descriptions of the types of information commonly provided, including ''investment strategies,'' ''industry trends,'' ''performance history,'' ''quality of services,'' ''detailed description of services,'' ''portfolio construction views and approach,'' ''suggestions of one or more strategies that would appear to be a fit for the plan's needs'' and others.

Some commenters asserted that the concern expressed about ''hire me'' conversations was exacerbated by the lack of a limitation in the proposal for recommendations to sophisticated advice recipients that could have otherwise addressed ''hire me'' communications in the institutional market. Commenters said uncertainty in this area will limit important information sharing between financial services providers and plan and IRA fiduciaries. One commenter also asserted that the difference in consequences for a recommendation under Regulation Best Interest as opposed to a recommendation under ERISA are significant enough to warrant different treatment. This is particularly the case if the advice provider would need to comply with a PTE in connection with the recommendation, and the communication occurred before it had entered into a contractual arrangement with the retirement investor, according to the commenter.

Commenters also raised questions about specific circumstances, including marketing bundled services arrangements; marketing additional services where a services relationship already exists; marketing discretionary management services; and communications between limited partners and private equity fund sponsors. One commenter suggested that the rule should be revised to differentiate ''level-fee'' advice providers' ''hire me'' discussions where the advice provider will operate on a level-fee basis after being hired and does not have an incentive to steer investors towards any particular investment product. Another commenter suggested a new paragraph should be added to the regulatory text as follows:

> Marketing or Sales Conversations. A person who engages in marketing or sales conversations with a Retirement Investor as to the advisability of engaging such person (or an affiliate) to provide investment advice or investment management services shall not be deemed to be a fiduciary within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code to the extent of such conversations, provided the person engaging in such conversations does not have discretionary authority or control with respect to a decision to engage the service provider and does not represent or acknowledge that they are acting as a fiduciary with respect to such decision.

In the final rule, the Department has taken the same approach as it took in the proposal regarding ''hire me'' communications. Persons can tout their own services and provide other information (including information about their affiliates' services), but to the extent ''hire me'' communications include covered investment recommendations, those recommendations are evaluated separately under the provisions of the final rule. The Department believes it is important to retain this distinction to avoid opening loopholes in the protections of the final rule similar to those resulting from the 1975 regulation's ''regular basis'' test. When firms and financial professionals make investment recommendations that satisfy the objective terms of the final rule's fiduciary definition, they occupy a position of trust and confidence with respect to those recommendations and are appropriately held to fiduciary protections and accountability under ERISA Titles I and II. In many cases, as in the rollover context or when the recommendation concerns the design of an entire plan portfolio, the investment recommendation made in those initial communications may be among the most important the plan receives. Denying fiduciary status to such recommendations would defeat legitimate investor expectations that meet the terms of the final rule just as it would in subsequent communications that are not associated with ''hire me'' conversations. Thus, the final rule extends ERISA fiduciary status to covered recommendations that are made in accordance with all parts of the final rule, even if the recommendations occur during ''hire me'' communications.

[231] *See* SEC Frequently Asked Questions on Regulation Best Interest, *https://www.sec.gov/tm/faq-regulation-best-interest.*

The Department does not believe this approach in the final rule will realistically expose advice providers to significantly increased litigation risk or unduly impair business interactions in the institutional market. Persons marketing their own services can provide a significant amount of information described by commenters (*e.g.,* ''industry trends,'' ''performance history,'' ''quality of services,'' ''detailed description of services'') that would not appear, without more, to rise to the level of a recommendation. Under the revised provisions of paragraph (c)(1)(i), they can also provide other generalized information, including information on investment strategies, including, for example, portfolio construction views, that are not based on the particular needs or individual circumstances of the plan, without ERISA fiduciary status attaching, as confirmed in paragraph (c)(1)(iii). Under paragraph (c)(1)(iv) they can also reinforce the non-fiduciary nature of their communications by including a clear disclaimer of ERISA fiduciary status with respect to communications provided in connection with the request for proposal, which one commenter said was common, so long as the disclaimer is consistent with person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.

The Department has declined to provide a special provision in the final rule for ''level-fee'' advice providers in connection with their marketing of their own services. The final rule states a functional test that applies based on the facts and circumstances without the need for carve-outs and that assigns fiduciary status in circumstances where a covered recommendation is made and the retirement investor can reasonably place their trust and confidence in the compensated provider. The Department does not agree that the assignment of fiduciary status should vary based on the nature of the compensation arrangement, or that it could plausibly read ''level fees'' out of the broad statutory reference to ''fee or other compensation, direct or indirect.'' The receipt of ''level fees'' may change the nature of conflicts of interest or affect the application of the prohibited transaction rules and administrative exemptions, but it is not a basis for avoiding fiduciary status under the statute or this final rule.

Finally, it is also important to emphasize that investment recommendations that are made during such interactions do not become ERISA fiduciary investment advice unless the elements of the facts and circumstances test are met, and the advice provider receives compensation, direct or indirect, for the advice. Moreover, to the extent concerns about ''hire me'' communications are based on the perceived need to rely on a PTE at the time of a recommendation, additional clarity has been provided in the amended PTE 2020–02 regarding the required timing of disclosures, as discussed above. In addition, a special provision has been added to provide relief for financial professionals providing fiduciary investment advice in response to a request for a proposal to provide services as investment managers within the meaning of ERISA section 3(38).

2. Platform Providers and Pooled Employer Plans

Platform Providers

Platform providers are entities that offer a platform or selection of investment alternatives to participant-directed individual account plans and their fiduciaries who choose the specific investment alternatives that will be made available to participants for investing their individual accounts. In connection with such offerings, platform providers may provide investment advice, or they may simply provide general financial information such as information on the historic performance of asset classes and of the investment alternatives available through the provider.

As stated in the proposal, application of the final rule to platform providers may often focus on whether the communications fall within the threshold definition of a recommendation. Whether a recommendation exists under the final rule will turn on the degree to which a communication is ''individually tailored'' to the retirement investor or investors, and providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Therefore, the inquiry may turn on whether the platform provider presents the investments on the platform as having been selected for and appropriate for the investor *(i.e.,* the plan and its participants and beneficiaries). In this regard, platform providers who merely identify investment alternatives using objective third-party criteria provided by the investor (*e.g.,* expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the final rule to be making a recommendation.

Commenters on the proposal's platform provider discussion generally said additional certainty on the status of platform providers is needed in the regulatory text to avoid loss of assistance to plan sponsors in developing plan investment lineups and support plan formation. One commenter said an exception for platform providers should be explicit in the text of the rule and should be available regardless of the legal structure of a particular investment platform, thus the exception should apply to insurers offering a variable annuity. Some of these commenters said platform provider interactions typically do not involve individualized recommendations, while others said the sample investment lineups are tailored to the plan but both the platform providers and the plans' fiduciaries are aware that the sample lineup is being delivered in the context of an arm's-length business negotiation.

One commenter provided specific language for a platform provider sales exclusion in the regulatory text as follows:

> Proposals of investment line-ups or menus by recordkeeping services investment platform providers, when made within the context of a request for proposal or other vendor selection process or where the platform provider's communications clearly indicate that the proposal is being advanced in connection with a negotiation for the terms of a potential future business relationship shall not give rise to a ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property''.

Another commenter suggested that as a means of avoiding fiduciary status, platform providers should be permitted to make a prominent disclosure on the website for the investment menu that the provider is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

For purposes of applying the final rule, the Department has not changed its position from the proposal that presenting a list of investments as having been selected for and appropriate for the investor *(i.e.,* the plan and its participants and beneficiaries) will not be carved out from ERISA fiduciary status. If the communications between a platform provider and a retirement investor amount to a covered recommendation, ERISA fiduciary status will attach if the

other parts of the final rule are satisfied. If there is a covered recommendation, the fact that it is made in the context of a request for proposal or other negotiation of a future business relationship should not, in and of itself, result in the recommendation being carved out as fiduciary investment advice. Similar to the conclusion reached in the ''hire me'' communications discussion, immediately above, the Department believes this position is important to avoid opening loopholes in the final rule that will defeat legitimate investor expectations and frustrate the text and purposes of ERISA's fiduciary definition.

When a firm or financial professional provides individualized recommendations to a plan on the construction of a prudent fund lineup, and otherwise meets the terms of the rule's definition, the investor is entitled to rely on the recommendation as fiduciary advice intended to advance the plan's best interest. Moreover, such advice is often profoundly important given that it defines and constrains the range of options available to plan participants for their retirement. As noted by some commenters who supported extending ERISA fiduciary protections to plan sponsors, recommendations on plan investment lineups can have significant impact on plan participants' and beneficiaries' retirement security and Morningstar quantified the potential benefits from the proposal's coverage of recommendations to plan fiduciaries about the fund lineups in defined contribution plans as exceeding $55 billion in the first 10 years and $130 billion in the subsequent 10 years, in undiscounted and nominal dollars, due to reductions in costs associated with investing through their plans.

However, the Department's position also remains that platform providers who merely identify investment alternatives using objective third-party criteria (*e.g.,* expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the final rule to be making a recommendation. Likewise, a provider does not make a recommendation merely by offering a preset list of investments as part of a variable annuity, or offering a menu of pre-selected HSA investment options, without additional facts. In this context, the parties can also define their relationship pursuant to paragraph (c)(1)(iv) so long as they conform their other actions and communications accordingly. The Department does not agree, however, that mere website disclosure that the investment menu provider is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity should be dispositive, as suggested by one commenter.[232] In this context, as in other contexts, one must consider all the relevant facts and circumstances and apply them to the tests set forth in the rule. For example, such website disclosure, even if reviewed by the retirement investor, would not defeat fiduciary status to the extent it was inconsistent with other communications and actions by the firm or financial professional that met the terms of the rule's objective test and demonstrated that the recommendation was given from a position of trust and confidence.

Pooled Employer Plans

In the preamble to the proposal, the Department stated that the analysis presented regarding platform providers would apply in the context of pooled employer plans (PEPs), which are individual account plans established or maintained for the purpose of providing benefits to the employees of two or more employers, authorized in the SECURE Act.[233] PEPs are required to designate a pooled plan provider (PPP) who is a named fiduciary of the PEP.[234] PPPs are in a unique statutory position in that they are granted full discretion and authority to establish the plan and all of its features, administer the plan, act as a fiduciary, hire service providers, and select investments and investment managers.

The Department stated in the proposal that when a PPP or another service provider interacts with an employer about investment options under the plan, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants, or beneficiaries.

Commenters that addressed PEPs said preserving marketing and sales activity is especially important in the small plan market where many employers cannot afford an independent adviser and instead may rely on PEP providers to help them understand how plans work. Some believed that the Department's proposal would apply fiduciary status in the event there is only one investment lineup available through a PEP because that will be interpreted as a recommendation of that lineup. Commenters generally said imposing compliance burdens on the formation of these plans is inconsistent with congressional intent in including these type of plans in the SECURE Act.

Another commenter said that communications with employers about joining a PEP involve employers acting in their settlor capacity because they are considering adopting a plan or merging an existing plan into the PEP. Therefore, the commenter believed the Department should revise its discussion of this issue accordingly.

The Department continues to believe that the analysis of when a recommendation is made in the context of a PEP is the same as that of a platform provider. Accordingly, when a PPP or another service provider interacts with an employer about investment options under the plan, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants, or beneficiaries.

This does not mean, however, that marketing a PEP with a single investment lineup is necessarily a recommendation to each employer that will result in ERISA fiduciary status. Whether a recommendation has occurred will be based on the facts and circumstances of the interaction. If a recommendation is made, paragraph (c)(1)(iii) in the final rule makes clear that sales and marketing activity can continue so long as any recommendation is not made in the context of paragraphs (c)(1)(i) or (ii).

The Department does not agree that employers joining the PEP act in a solely settlor capacity in doing so. The provisions in ERISA section 3(43) provide that each employer retains fiduciary responsibility for the selection and monitoring of the PPP and any other person who is designated as a named fiduciary as well as, to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of ERISA section 404(c), the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees). For these reasons, the Department has decided that this final

[232] A commenter also advocated for a platform provider exception that extended to the marketing and provision of brokerage window services and factual information provided to participants through such brokerage windows, as well as to call centers. The commenter did not describe why there was concern about ERISA fiduciary status related to marketing brokerage window services however, so this comment was not accepted. Comments related to call centers are discussed in Section E.3. of this preamble.

[233] ERISA section 3(43), 29 U.S.C. 1002(43).

[234] ERISA Section 3(43)(B), 29 U.S.C. 1002(43)(B).

rule strikes the correct balance and not to adopt changes that would single-out PEPs and PPPs.

3. Investment Information and Education

General

In the proposal's preamble, the Department stated that Interpretive Bulletin (IB) 96–1 relating to participant investment education would continue to provide guidance with respect to the fiduciary advice definition under the rule if finalized. IB 96–1 provides examples of four categories of information and materials regarding participant-directed individual account plans—plan information, general financial and investment information, asset allocation models, and interactive investment materials—that do not constitute investment advice.[235] This is the case irrespective of who provides the information (*e.g.,* plan sponsor, fiduciary, or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (*e.g.,* on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials. The IB states that there may be many other examples of information, materials, and educational services, which, if furnished to participants and beneficiaries, would not constitute ''investment advice.''

Multiple commenters supported the preservation of non-fiduciary investment education under the IB. These commenters highlighted the importance of financial education to retirement investors and stressed the need for such communications to continue freely after adoption of the final rule. The commenters encouraged the Department to clarify that the final rule would not treat investment education as fiduciary advice, and some further suggested that the text of the final rule directly incorporate the IB or incorporate the provisions of the 2016 Final Rule on investment education.

Several commenters asked for confirmation that discussions about the benefits of enrolling and saving in a plan, including increasing contributions, would not be deemed ERISA fiduciary investment advice under the final rule. They said these conversations are important efforts to prepare retirement investors for retirement. Relatedly, commenters asked about educating participants about products and services offered by a plan and communicating the value of investment diversification.

Some commenters requested additional clarity on information relating to distributions and rollovers that can be provided without becoming an investment advice fiduciary. A commenter explained that its members make available beneficial forms of assistance that inform participants of their distribution and rollover options, encourage them to keep money in the retirement system until they retire, and help them connect their individual circumstances to rollover and transfer options that are available to them. In this commenter's view, such tools help reduce the problems associated with abandoned accounts and other issues that result when participants have accounts scattered among various employment-based plans and service providers. Another commenter indicated that participants can have avoidable misconceptions about retirement and termination, such as a mistaken belief that they are required to remove their plan accounts when their employment terminates. The commenter viewed it as critical that retirement educators be able to clearly communicate rules relating to rollovers, plan terms, general financial and investment information, and available distribution options. In this commenter's opinion, such communication could be made consistent with the principles of IB 96–1, but the emphasis on IRA rollover advice in the proposal's preamble raises concern that even general advice about the benefits of retaining retirement funds in a retirement plan as opposed to an IRA would be classified as ERISA fiduciary investment advice.

Some commenters also requested confirmation regarding the permissibility of referencing specific plan investments in non-fiduciary investment education. They noted that the preamble included cautionary language warning that service providers engaging in investment education may cross the line into fiduciary investment advice if the education relates to a specific investment or investments strategy. They requested confirmation that, as provided for conditionally in the IB, investment education may reference specific investment options available under a plan without triggering fiduciary status under the final rule.

Several commenters suggested that the Department take the broader step of generally updating the IB. They explained that there have been significant changes in the types of information being sought by plan participants and plan sponsors (*e.g.,* relating to spend down of assets, and auto-enrollment and auto-escalation plan features) and types of interactions utilized (*e.g.,* electronic and digital) since the IB was first published. They suggested that the Department take the opportunity to evaluate the impact of these developments on the types of information and materials that may be provided without constituting fiduciary investment advice under the final regulation.

In general, for purposes of the final rule, the line between an investment recommendation and investment education or information will depend on whether there is a call to action. Thus, many of the types of information cited by commenters as important to retirement investors could be provided under the final rule without the imposition of fiduciary status. For example, like the SEC in Regulation Best Interest, the Department believes that ''a general conversation about retirement planning, such as providing a company's retirement plan options'' to a retirement investor, would not rise to the level of a recommendation.[236]

In this regard, the Department confirms that providing educational information and materials such as those described in IB 96–1 will not result in the provision of fiduciary investment advice as defined in the final rule absent a recommendation, regardless of the type of retirement investor to whom it is provided. Information on the benefits of plan participation and on the terms or operation of the plan, as described in the first category of investment education in the IB, clearly could include information relating to plan distributions and distribution options. Additionally, an analysis of the plan-information category of investment education applied in the context of IRAs would allow such a plan sponsor or service provider to also provide a wide range non-fiduciary information about IRAs, such as tax benefits associated with rollovers into IRAs.

Likewise, the Department confirms that furnishing the categories of investment-related information and materials described in the ''Investment Education'' provision in the 2016 Final Rule would not result in the provision of fiduciary investment advice under

[235] 29 CFR 2509.96–1; see also 85 FR 40589 (July 7, 2020) (technical amendment reinstating Interpretive Bulletin 96–1 following the vacatur of the 2016 Final Rule).

[236] Regulation Best Interest release, 33337 (July 12, 2019).

the final rule.[237] The provision in the 2016 Final Rule included, for example, information on ''[g]eneral methods and strategies for managing assets in retirement (*e.g.,* systemic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits).''

To the extent parties seek additional confirmation of specific information that may be provided regarding rollovers within the category of investment education, the Department notes that the IRS provides model safe harbor explanations that may be used to satisfy the Code section 402(f) requirement to provide certain information regarding eligible rollover distributions to the distributee within a reasonable period of time prior to making the distribution.[238] The model safe harbor explanations provide a significant amount of information on rollovers, including how to do a rollover, what types of plans accept rollovers, how much can be rolled over, the tax implications of pursuing a rollover or declining the rollover, and information about special circumstances such as offsets against plan balances by outstanding loans or rules involving employer stock. Merely providing the information contained in the model safe harbor explanations would not constitute ERISA fiduciary investment advice.

Some commenters asked the Department to address education to plan fiduciaries. They said that financial professionals may provide information to plan fiduciaries about how plans work as part of the sales process. Several commenters specifically asked about educational interactions between service providers and plan sponsors about features such as automatic enrollment and automatic escalation, among others. As stated above, provision of investment information or education, absent a recommendation, would not cause a financial professional to become a fiduciary under the final rule regardless of the type of retirement investor to whom it is provided. Based on the discussion set forth above, the Department believes there is significant flexibility and clarity for a plan sponsor or service provider to furnish helpful non-fiduciary investment education materials to participants relating to plan participation, distributions and rollovers. Likewise, the final rule is clear that absent a recommendation, provision of investment information to IRA owners and beneficiaries and plan and IRA fiduciaries that are retirement investors would not give rise to fiduciary status.

The Department emphasizes that the inquiry in this respect will focus on whether there is a call to action. Thus, the Department cautions providers against steering retirement investors towards certain courses of action under the guise of education. The SEC similarly stated in Regulation Best Interest that while certain descriptive information about employer sponsored plans would be treated as education, rather than as a recommendation, broker-dealers should ''ensure that communications by their associated persons intended as 'education' do not cross the line into 'recommendations.' ''[239]

The Department further emphasizes that a recommendation to take a distribution, even if it is not accompanied by a recommendation of a specific investment, is a ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property,'' such that if all the other parts of the final rule are satisfied, the person making the recommendation will be an ERISA fiduciary. For example, if a person states, ''After reviewing your plan, I think you should roll over into an IRA''—that is not investment education. Although the Department is not updating IB 96–1 at this time, it intends to monitor investment education practices to determine whether the principles in the IB are being used to evade fiduciary status under circumstances that would otherwise support the conclusion that a recommendation is being made by persons who occupy a position of trust and confidence. The Department may at a later date determine that the IB should be revisited.

Call Centers

Within the context of investment information and education, some commenters specifically addressed the functions of recordkeeper call center personnel and the information they provide to plan participants and beneficiaries who need assistance on a variety of plan-related matters. Several commenters said that the proposal would appear to result in the imposition of ERISA fiduciary status on call center personnel to the extent they provided investment-related information to a retirement investor or referred retirement investors to a financial professional. One commenter said that IB 96–1 is helpful in this context but does not address all matters that may arise in call center interactions. Several commenters stated that call center interactions typically do not involve collecting significant data about the retirement investor because call center representatives do not make individualized recommendations or suggest a specific course of action.

One commenter suggested a paragraph be added to the final rule excluding call center support personnel from fiduciary status as follows:

> Participant and Beneficiary Call Center Support. Notwithstanding other paragraphs of this section, a person who provides participant call center support services on behalf of a recordkeeper or other administrative services provider to a plan shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code with respect to a plan or an IRA solely because such person recommends a securities or investment transaction or any other investment strategy where such recommendation is limited to unbiased suggestions, consistent with generally accepted investment principles and sound plan administrative practices, that are directly responsive to a request for assistance initiated by a participant or beneficiary.

In the Department's view, the discussion earlier in this preamble section about the application of IB 96–1 in the context of the final rule is responsive to some comments on call centers. Further, although commenters said call center personnel may provide investment-related information to retirement investors, commenters generally indicated that call center activities involve neither collecting significant data about the retirement investor nor individualized recommendations or suggestions as to a specific course of action. Under the revised contexts in paragraph (c)(1)(i) and (ii), unless call center personnel provide an acknowledgment of ERISA Title I or Title II fiduciary status with respect to the recommendation, they can provide investment-related information that is not based on the particular needs or individual circumstances of the retirement investor without ERISA fiduciary status attaching, as confirmed in paragraph (c)(1)(iii). The Department declines to provide a broader limitation for call center activity, as requested by some commenters. Covered recommendations that meet all parts of the final rule should be subject to the ERISA fiduciary protections and not a different standard merely because they are made in a call center setting. Advice providers can just as easily hold

[237] Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 FR 20946, 20998 (April 8, 2016).

[238] *See* IRS Notice 2020–62, 2020–35 I.R.B. 476, *https://www.irs.gov/pub/irs-drop/n-20-62.pdf.*

[239] Regulation Best Interest release, 84 FR 33318, 33337 n. 181 (July 12, 2019)

themselves out as trusted advisers in phone communications as in other contexts.

4. Swaps and Security-Based Swaps

Swaps and security-based swaps are a broad class of financial transactions defined and regulated under amendments to the Commodity Exchange Act and the Securities Exchange Act of 1934 (Securities Exchange Act) by the Dodd-Frank Act. Section 4s(h) of the Commodity Exchange Act [240] and section 15F of the Securities Exchange Act [241] establish similar business conduct standards for dealers and major participants in swaps or security-based swaps. Special rules apply for swap and security-based swap transactions involving ''special entities,'' a term that includes employee benefit plans covered under ERISA. Under the business conduct standards in the Commodity Exchange Act as added by the Dodd-Frank Act, swap dealers or major swap participants that act as counterparties to ERISA plans must, among other conditions, have a reasonable basis to believe that the plans have independent representatives who are fiduciaries under ERISA.[242] Similar requirements apply for security-based swap transactions.[243] The CFTC and the SEC have issued final rules to implement these requirements.[244]

In the Department's view, when Congress enacted the swap and security-based swap provisions in the Dodd-Frank Act, including those expressly applicable to ERISA-covered plans, it did not intend to broadly and automatically impose ERISA fiduciary status on the plan's counterparty as it engaged in regulated conduct as part of the swap or security-based swap transaction with the employee benefit plan. The Department conferred with both the CFTC and SEC staff at the time of those agencies' rulemakings, and assured harmonization of any change in the ERISA fiduciary advice regulation so as to avoid unintended consequences.

The Department makes the same assurance with respect to this final rule. The disclosures required of plans' counterparties under the business conduct standards would not generally constitute a ''recommendation'' under the final rule, or otherwise compel the dealers or major participants to act as fiduciaries in swap and security-based swap transactions conducted pursuant to section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act. This includes disclosures regarding material risks, characteristics, incentives and conflicts of interest; disclosures regarding the daily mark of a swap or security-based swap and a counterparty's clearing rights; disclosures necessary to ensure fair and balanced communications; and disclosures regarding the capacity in which a swap or security-based swap dealer or major swap participant is acting when a counterparty to a special entity, as required by the business conduct standards.

This is not to say that a dealer or major participant would necessarily fall outside the scope of the final rule if, in addition to providing the disclosures mandated above, it also chose to make specific investment recommendations to plan clients. In that circumstance, a swap dealer could become a fiduciary by virtue of their voluntary decision to make individualized investment recommendations to an ERISA-covered plan if the subparagraph's conditions were met.[245] To the extent dealers wish to avoid fiduciary status under the final rule, however, they can structure their relationships to avoid making such investment recommendations to plans. Additionally, clearing firms would not be investment advice fiduciaries under the final rule merely as a result of providing such services as valuations, pricing, and liquidity information. As discussed in greater detail in the next section, the final rule does not include valuation and similar services as a category of covered recommendations.

5. Valuation of Securities and Other Investment Property

The final rule does not include valuation services, appraisal services, or fairness opinions as categories of covered recommendations. In this regard, the Department notes that the definition of ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property'' in paragraph (f)(10) does not include reference to any of these functions. Accordingly, the provision of valuation services, appraisal services, or fairness opinions would not, in and of themselves, lead to fiduciary status under the final rule.

F. Scope of Investment Advice Fiduciary Duty

Paragraph (c)(2) of the final rule confirms that a person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice is not deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which that person does not have or exercise any discretionary authority, control, or responsibility or with respect to which the person does not render or have authority to render investment advice defined by the rule. On the other hand, nothing in paragraph (c)(2) exempts such a person from the provisions of section 405(a) of ERISA concerning liability for violations of fiduciary responsibility by other fiduciaries or excludes such person from the definition of party in interest under section 3(14)(B) of ERISA or section 4975(e)(2) of the Code. This provision is unchanged from the current 1975 regulation.

Further, if a person's recommendations relate to the advisability of acquiring or exchanging securities or other investment property in a particular transaction, the final rule does not impose on the person an automatic fiduciary obligation to continue to monitor the investment or the retirement investor's activities to ensure the recommendations remain prudent and appropriate for the plan or IRA. Instead, the obligation to monitor the investment on an ongoing basis would be a function of the reasonable expectations, understandings, arrangements, or agreements of the parties.

One commenter asked the Department to make clear that for one-time recommendations, the parties' reasonable expectations typically do not include an ongoing duty to monitor unless the parties expressly agree to such a duty. The commenter believed that otherwise the Department would conclude that the parties' reasonable expectations always include an ongoing duty to monitor. The Department continues to believe that the parties' reasonable expectations, understandings, arrangements, or agreements should govern the monitoring obligation and does not concur with the commenter's concern that the Department would always conclude under that standard that a duty to monitor exists; accordingly the

[240] 7 U.S.C. 6s(h).

[241] 15 U.S.C. 78o–10(h).

[242] 7 U.S.C. 6s(h)(5); 17 CFR 23.450.

[243] 15 U.S.C. 78o–10(h)(4), (5).

[244] *See* 17 CFR 23.400–451; Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012); 17 CFR 240.15Fh–3 through h–6; Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 FR 29960 (May 13, 2016).

[245] The business conduct standards do not preclude a swap dealer from giving advice if it chooses to do so. *See, e.g.,* 17 CFR 23.434 (imposing requirements on swap dealers that recommend a swap or trading strategy involving a swap to a counterparty); *see also* 17 CFR 240.15Fh–3(f) (similar provision applicable to security-based swap dealers).

discussion was not revised to require an express agreement to monitor.

Also, as has been made clear by the Department, there are a number of ways to provide fiduciary investment advice without engaging in transactions prohibited by Title I or Title II of ERISA because of the conflicts of interest they pose. For example, an investment advice provider can structure the fee arrangement to avoid a prohibited transaction (and the related conflicts of interest) by offsetting third-party payments against direct fees agreed to by the retirement investor, as explained in advisory opinions issued by the Department.[246] If there is not a prohibited transaction, then there is no need to comply with the terms of an exemption, though an investment advice fiduciary with respect to a Title I plan would still be required to comply with the statutory duties including prudence and loyalty.

Several commenters expressed concern about plan sponsors' co-fiduciary liability under ERISA. One commenter specifically focused on call centers and human resources employees. The commenter believed that if call center personnel cross the line and provide fiduciary advice, this would heighten the plan sponsor's obligation to monitor the call center and could expose the plan sponsor to co-fiduciary liability. The commenter asked the Department to provide a safe harbor to avoid plan sponsors having liability for acts of any plan service provider under certain conditions. Another commenter asked the Department to clarify that each fiduciary associated with the plan would not have to continually monitor the others to avoid co-fiduciary liability.

In response, the Department notes that plan sponsors already have fiduciary obligations in connection with the selection and monitoring of plan service providers (both fiduciary and non-fiduciary service providers), including service providers that provide educational materials and assistance to plan participants and beneficiaries. The Department does not believe the rule significantly expands the obligations or potential liabilities of plan sponsors in this regard. Accordingly, the Department does not believe it would be appropriate to create special rules or safe harbors with respect to co-fiduciary status or liability under this final rule, but rather believes that plan sponsor activity should be evaluated under the existing provisions of ERISA.

Paragraph (d) of the regulation is identical to paragraph (d) of the 1975 regulation, apart from updated references. The paragraph specifically provides that the mere execution of a securities transaction at the direction of a plan or IRA owner would not be deemed to be fiduciary activity.[247] The regulation's scope remains limited to advice relationships, as delineated in its text, and does not cover transactions that are executed pursuant to specific direction in which no advice is provided.

One commenter suggested revisions to paragraph (d) to address foreign broker-dealers and transactions in fixed income securities, options, and currency that are not executed on an agency basis. The Department has considered the suggestion but declines to adopt them without a more robust record regarding the reasons for, and impact of, the suggested changes.

G. Application to Code Section 4975

Certain provisions of Title I of ERISA, such as those relating to participation, benefit accrual, and prohibited transactions, also appear in Title II of ERISA, codified in the Code. This parallel structure ensures that the relevant provisions apply to Title I plans, whether or not they are ''plans'' defined in section 4975 of the Code, and to tax-qualified plans and IRAs, regardless of whether they are subject to Title I of ERISA. With regard to prohibited transactions, the ERISA Title I provisions generally authorize recovery of losses from, and imposition of civil penalties on, the responsible plan fiduciaries, while the Title II provisions impose excise taxes on persons engaging in the prohibited transactions. The definition of fiduciary is the same in section 4975(e)(3)(B) of the Code as the definition in section 3(21)(A)(ii) of ERISA, and, as noted above, the Department's 1975 regulation defining fiduciary investment advice is virtually identical to the regulation defining the term ''fiduciary'' under the Code.

To rationalize the administration and interpretation of the parallel provisions in Title I and Title II of ERISA, Reorganization Plan No. 4 of 1978 divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury.[248] Under the Reorganization Plan, which Congress subsequently ratified in 1984,[249] Congress generally granted the Department authority to interpret the prohibited transaction provisions and the definition of a fiduciary in the Code.[250] ERISA's prohibited transaction rules, sections 406 to 408,[251] apply to Title I plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply to tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in Title I of ERISA.[252] In accordance with the above discussion, paragraph (g) of the rule, entitled ''Applicability'' provides that the regulation defines a ''fiduciary'' both for purposes of ERISA section 3(21)(A)(ii) and for the parallel provision in Code section 4975(e)(3)(B).

Paragraph (g) explains the applicability of Title I of ERISA and the Code in the specific context of rollovers. As that paragraph explains, ''a person who satisfies paragraphs (c)(1)(i) or (ii) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of the Act, a fiduciary of such a plan as defined in paragraph (f)(11), or a participant or beneficiary of such a plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to the provisions of Title I of the Act.'' With this example, the Department intends to clarify the application of Title I to recommendations made regarding rollovers from a Title I plan under the final rule.

In the event of a recommendation to roll over assets from a Title I plan that meets the provisions of the final rule, the fiduciary duties of prudence and loyalty and the prohibited transaction provisions of ERISA section 406 would apply to advice to take the distribution and to roll over the assets. After the assets were distributed from the Title I plan into the IRA, fiduciary investment advice concerning investment of and ongoing management of the assets would be subject to obligations in the Code, including the prohibited transaction provisions in Code section 4975. For example, if a broker-dealer satisfies the fiduciary definition set

[246] *See* U.S. Department of Labor, Adv. Op. 97–15A (May 22, 1997).

[247] The citation in paragraph (d) of the proposal to ''section 4975(e)(3)(B) of the Code'' was revised in the final rule to read ''section 4975(e)(3) of the Code,'' consistent with the scope of the 1975 regulation as adopted by Treasury. *See* 40 FR 50840, 50841 (Oct. 31, 1975).

[248] 5 U.S.C. App. 752 (2018).

[249] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

[250] 5 U.S.C. App. 752 (2018).

[251] 29 U.S.C. 1106–1108.

[252] Reorganization Plan No. 4 of 1978 also transferred to the Secretary of Labor the authority to grant administrative exemptions from the prohibited transaction provisions in section 4975 of the Code. *See* Code section 4975(c)(2).

forth in this rule with respect to a recommendation to roll a retirement investor's assets out of their workplace retirement plan to an IRA, the broker-dealer would be a fiduciary subject to Title I with respect to the advice regarding the rollover. Following the rollover, the broker-dealer would be a fiduciary under the Code subject to the prohibited transaction provisions in Code section 4975 to the extent it gave subsequent fiduciary investment advice, within the meaning of the final rule, with respect to the assets rolled out of the plan.

One commenter set forth a series of assertions regarding the Department's jurisdiction to issue the final rule and the preamble discussion in the proposal. The commenter said that the proposal's preamble was misleading in describing prohibited transactions under Title II of ERISA as prohibiting fiduciary conduct, because the provisions in Code section 4975 do not include prohibitive language (*e.g.,* ''shall not'') restricting the conduct of fiduciaries to Title II plans. The commenter also asserted the Department lacked authority to include plan participants and beneficiaries as retirement investors, because the statutory language refers to advice to ''a plan.'' The commenter made several additional arguments that the Department's authority to issue a regulatory definition of an investment advice fiduciary was limited by ERISA section 404(c) (providing conditional relief from certain provisions of Part 4 of Title I of ERISA for fiduciaries of a pension plan that permits participants and beneficiaries to exercise control over the assets in their individual accounts), by ERISA section 408(b)(14) (providing a statutory exemption for transactions in connection with the provision of investment advice described in ERISA section 3(21)(A)(ii) to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account) and by the Reorganization Plan's provision in section 102 transferring authority to the Secretary of Labor to issue ''regulations, rulings, opinions, and exemptions under section 4975 of the Code, except for (i) subsections 4975(a), (b), [and] (c)(3) . . . of the Code.''

The Department disagrees with the assertion that it is misleading to describe the *prohibited transaction* provisions in Code section 4975 as ''prohibiting'' specified fiduciary conduct. Code section 4975(c), entitled ''Prohibited Transaction,'' sets forth a series of transactions, several of which apply only to fiduciaries as defined in Code section 4975(e)(3). For example, Code section 4975(c)(1)(E) defines a prohibited transaction as ''any . . . act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account.'' Fiduciaries are subject to an excise tax for engaging in these transactions.

With respect to the commenter's other assertions, it is important to note that both Congress and the Department have recognized that advice to a participant or beneficiary in a participant-directed plan is advice within the meaning of ERISA section 3(21)(A)(ii).[253] Further, the fact that Congress provided a statutory prohibited transaction exemption applicable to investment advice fiduciaries is not the same as defining an investment advice fiduciary and does not limit the Department's authority to do so, as the commenter suggested. Likewise, the Department does not agree with the commenter's broad assertion that pursuant to ERISA section 404(c), Part 4 of Title I does not apply to individual account plans when participants have control and discretion over their individual accounts. The relief provided in ERISA section 404(c) is conditional and limited, and does not, for example, relieve a plan fiduciary from its duty to prudently select and monitor designated investment alternatives offered under the plan; therefore, there is no reason the Department could not define an investment advice fiduciary to include persons making recommendations to such plan fiduciaries. Finally, given the Reorganization Plan's clear assignment of authority to the Department under Code section 4975(e)(3), the Department does not agree that the reservation of authority with respect to Code section 4975(a), (b), or (c)(3) indirectly limits this authority. For these reasons, the Department does not agree with the commenter that the final rule exceeds the proper exercise of its regulatory authority under ERISA section 505, or that the rule expanded the definition of a ''plan'' in violation of ERISA section 514(d).

H. State Law

Paragraph (h) is entitled ''Continued applicability of State law regulating insurance, banking, or securities'' and provides ''[n]othing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.'' This paragraph acknowledges that ERISA section 514 expressly saves State regulation of insurance, banking, and securities from ERISA's express preemption provision, and confirms that the regulation is not intended to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of insurance, banking, or securities.

I. Effective Date

The final rule is effective September 23, 2024. The amendments to the PTEs also finalized today are effective September 23, 2024. Both amended PTE 2020–02 and amended PTE 84–24 include a one-year transition period after their effective dates under which parties have to comply only with the Impartial Conduct Standards and provide a written acknowledgment of fiduciary status for relief under these PTEs.

In the proposed rule, the Department proposed that the rule would be effective 60 days after publication in the **Federal Register** but sought comment on whether additional time would be needed before the rule became applicable. Many commenters said 60 days would be an inadequate amount of time to review their businesses and prepare for and implement the compliance obligations in the rulemaking package, many of them noting that in previous rulemaking on this topic, the Department had provided more transition time than 60 days. Commenters requesting a delay suggested a range of compliance timetables which generally fell between 12 months and 36 months. The Department was also urged to stay enforcement for a period after applicability. On the other hand, several supporters of the proposal asked the Department to finalize it without undue delay.

The timetable established in the final rule and amendments to the PTEs provides a phased transition period. First, parties have approximately 5 months following the date of publication in the **Federal Register** before the final rule and amendments to the PTEs are effective. As of this effective date, the rules under Title I and Title II of ERISA would become applicable to parties who satisfy the final rule and compliance with the PTEs' Impartial Conduct Standards and

[253] *See* ERISA section 408(b)(14) (providing a statutory exemption for transactions in connection with the provision of investment advice described in ERISA section 3(21)(A)(ii) to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account); Code section 4975(d)(17) (same); *see also* Interpretive Bulletin 96–1, 29 CFR 2509.96–1.

the fiduciary acknowledgment would be required for relief under the amended PTEs. Compliance with all the conditions of the amended PTEs, in order to obtain relief under the PTEs, would not be required until the expiration of the PTEs' one-year transition period. The Department believes this approach addresses commenters' request for additional time before they would need to comply with the final rule and PTEs without unduly delaying the important protections in this rulemaking. The Department also confirms that, rather than take an enforcement-oriented approach in the initial period following applicability, its primary focus will be on promoting compliance and providing assistance to parties working in good faith to comply with the law's obligations.

Commenters also asked for assurances related to recommendations made and arrangements entered into before the effective or applicability date of the final rule and amended PTEs. One commenter described services agreements that would need revision to recognize that agreed upon services would now be considered fiduciary advice services. While the Department confirms that the final rule and amended PTEs apply to recommendations made after the applicability date, it cannot confirm that all existing agreements can be maintained as described by the one commenter.

J. Severability

The Department proposed that the rulemaking include a severability provision. The Department stated its intent that discrete aspects of the regulatory package would be severable.[254] The Department explained that it intended that the definition of investment advice fiduciary finalized in this rule would survive even if the amendments to any of the PTEs were set aside by a court.[255]

The Department received one comment in favor of including a severability provision. The commenter expressed the view that a severability provision is important for closing the regulatory gap to ensure that small business owners receive retirement investment advice that is not conflicted. The commenter suggested language the Department could include in the operative text stating that any aspects of this rulemaking package not vacated by potential court action would then remain in force. Separately, one commenter expressed the view that the Department provided its ''general intentions on the subject'' of severability but did not propose a specific severability provision or provide any rationale for severability.

Moreover, several commenters expressed opposition to a severability provision on the ground that the rulemaking package is not amenable to severability. The Department received many comments describing the entire rulemaking, namely the amendments to the regulation and PTEs, as a ''comprehensive regulatory package.'' Other commenters described the new fiduciary investment advice definition and PTE amendments as ''inextricably linked'' or an ''integrated package'' with individual parts that operate together. One commenter suggested that the entire rulemaking be vacated if any one part is vacated because the elimination of one such component could result in a ''gap for which there is no regulatory or exemptive solution.'' In this same vein, another commenter added that retaining any aspects of the rulemaking when another aspect is overturned would cause ''unintended impacts and harms.''

Other commenters suggested that the remaining aspects of the rulemaking would be unnecessary if part of the rulemaking is overturned. One commenter said that the amendments to existing PTEs were included to ''blunt'' the ''over inclusiveness'' (sic) of the new regulation. That same commenter added that the ''new affirmative obligations'' under amended PTEs 2020–02 and 84–24 lead to the conclusion that the elements of the rulemaking are not severable.

The Department acknowledges, as one commenter noted, that the notice of proposed rulemaking did not propose a specific severability provision. The Department disagrees, however, with the commenter that the Department did not provide notice of its ''initial position'' on severability. As noted above, when this rule was proposed, the Department expressed its intention that the definition of investment advice fiduciary finalized in this rule would survive even if the amendments to any of the PTEs were vacated by a court. This remains the Department's position. While courts take into account severability language in a rule when analyzing severability, a specific severability provision is not required for one element of a rulemaking to be severable from another.[256]

The Department also disagrees with the comments that different aspects of the rulemaking are inextricably linked. While the regulation updates the definition of an investment advice fiduciary to better accord with marketplace changes and the reasonable expectations of retirement investors, the amendments to the PTEs provide additional clarity for investment advice fiduciaries seeking to receive compensation for their advice, among other changes. In all its regulatory actions, the Department endeavors to ensure that any changes to the regulatory structure function smoothly. In accordance with that guiding principle, the Department has worked to ensure that each separate regulatory action being finalized today works together and works within ERISA's full framework. Together, these changes reduce the gap in protections with respect to ERISA-covered investments and level the playing field for all investment advice fiduciaries. Still, the amended regulation and PTEs operate independently and should remain if any component of the rulemaking is invalidated.

K. Administrative Procedure Act

Reliance Interests

The Department received comments that the proposed rulemaking failed to properly weigh reliance interests of advice providers in the pre-existing regulatory and exemptive framework, in violation of the Administrative Procedure Act (APA). One commenter states that, under the APA, when an agency reverses an existing policy and ''changes course,'' the agency must take into account ''serious reliance interests'' associated with the existing policy. The commenter further states that an agency must provide a ''reasoned explanation'' for the policy change. The commenter believes that the proposal did not adequately justify changing the definition of fiduciary investment advice when compared to the advice providers' reliance interests at stake and that the Department did not consider that advice providers have provided one-time rollover advice, for a fee or other compensation, for decades without needing to rely on exemptive relief from the prohibited transaction provisions in ERISA Title I and Title II. Other commenters described reliance interests in aligning their business

[254] 88 FR 75890, 75912.

[255] *Id.*

[256] *E.g., Bd. of Cnty. Commissioners of Weld Cnty., Colorado* v. *Env't Prot. Agency,* 72 F.4th 284, 296 (D.C. Cir. 2023) (''If parts of a regulation are invalid and other parts are not, we set aside only the invalid parts unless the remaining ones cannot operate by themselves or unless the agency manifests an intent for the entire package to rise or fall together. This is true for agency rules in general . . . .'').

models in accordance with the 1975 regulation and the existing PTEs.

The Department notes that even when there are certain reliance interests, an agency may change an existing policy if the new policy is permissible under the respective statute and the agency provides a reasoned explanation for the change—namely that the agency demonstrates awareness of the change and justifies the change with ''good reasons.'' [257] The Department is aware that a ''more detailed justification'' for a policy change is required ''when [the] prior policy has engendered serious reliance interests that must be taken into account.'' [258] In the event of ''significant'' reliance interests, an agency must ''weigh any such interests against competing policy concerns.'' [259] The Department has considered the reliance interests described by commenters and ultimately determined that these interests are outweighed by the public interest in protecting the interests of retirement investors to ensure the security of the retirement benefits of America's workers and their families.

As the Department outlines extensively throughout this document, there have been significant changes in the retirement plan landscape and investment marketplace since the 1975 regulation was adopted. Individuals, regardless of their financial literacy, have become increasingly responsible for their own retirement savings, and have increasingly become direct recipients of investment advice. At the same time, there has been a dramatic increase in the variety and complexity of financial products and services, which has widened the information gap between investment advice providers and their clients. One of the particular concerns of the Department is that recommendations to roll over from a workplace retirement plan to an IRA should be made in accordance with the retirement investors' best interest. This rulemaking ensures that ERISA's fiduciary protections in Title I and Title II apply to all advice that retirement investors receive from trusted advice providers concerning investment of their retirement assets in a way that aligns with the retirement investors' reasonable expectations.

Fundamentally, this rulemaking responds to the pervasiveness of conflicts of interest in investment advice, and the associated cost of these conflicts. Ultimately, that cost is borne by workers saving for a secure retirement, as the conflicts leave plan participants vulnerable to lower returns on their critical investment savings. Likewise, as greater numbers of retirement savers consider whether to roll over their retirement savings from a workplace retirement plan into an IRA or other plan, these savers are receiving conflicted advice from financial professionals, despite their reasonable expectations that the advice is provided in a fiduciary capacity and in each saver's best interest.

The Department recognizes that the final rule will result in some advice providers newly becoming investment advice fiduciaries. However, under the final rule, these providers would be fiduciaries only to the extent they make covered recommendations in contexts in which retirement investors reasonably expect that they can place their trust and confidence in the recommendation. As discussed above, the advice provider will be aware, by its conduct, that it has invited this trust and confidence. Accordingly, the advice provider should be able to adhere to the basic fiduciary norms of care and loyalty that correspond to such relationships of trust and confidence. Further, in developing the final rule and amended PTEs, the Department has considered the compliance burden on investment advice fiduciaries and has taken care to ensure that the compliance obligations—which generally involve adherence to fundamental obligations of fair dealing—align with the conduct standards adopted by the SEC and other regulators. These regulators too have moved to more protective standards in recent years, so that the Department's actions are consistent with the broad trend in the regulatory landscape. The Department has also taken care to ensure that to the extent that providers had implemented compliance with PTE 2020–02 prior to its amendment, the providers can build on that compliance to implement the amended PTE, without undue burden. Finally, the Department notes that this rulemaking follows more than 14 years in which the Department has expressed concern that the 1975 regulation no longer sensibly defined an investment advice fiduciary.[260] In light of each of these considerations, the Department does not believe that these providers' reliance interests in the 1975 regulation and current exemption structure, with the associated lack of comprehensive protections against conflicts of interest, outweigh the interests of America's retirement investors.

Comment Period

After the rulemaking was proposed, the Department received several requests for an extension of the public comment period beyond the original 60-day public comment period.[261] The Department considered the requests and decided not to extend the public comment period for the reasons explained in response to the requests.[262] The Department also received several comments that the comment period was too short. In the first instance, commenters said that a 60-day comment period is insufficient for a rule of this scope. Further, several commenters expressed the view that the comment period was effectively cut short because it overlapped with year-end holidays and because the Department held two days of public hearings on the proposal during the comment period.

The APA does not specify a minimum number of days for a comment period,

[257] *Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 221 (2016); *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

[258] *Fox,* 556 U.S. at 515.

[259] *Dep't of Homeland Sec.* v. *Regents of the Univ. of California,* 140 S. Ct. 1891, 1915 (2020).

[260] *See e.g.,* Definition of the Term Fiduciary, 75 FR 65263, 65265 (Oct. 22, 2010) (''The Department does not believe [the 1975 regulation's] approach to fiduciary status is compelled by the statutory language. Nor does the Department believe the current framework represents the most effective means of distinguishing persons who should be held accountable as fiduciaries from those who should not. For these reasons, the Department believes it is appropriate to update the 'investment advice' definition to better ensure that persons, in fact, providing investment advice to plan fiduciaries and/or plan participants and beneficiaries are subject to ERISA's standards of fiduciary conduct.''); see also Fall 2009 Regulatory Agenda (''This rulemaking is needed to bring the definition of 'fiduciary' into line with investment advice practices and to recast the current regulation to better reflect relationships between investment advisers and their employee benefit plan clients. The current regulation may inappropriately limit the types of investment advice relationships that should give rise to fiduciary duties on the part of the investment adviser,'') *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200910&RIN=1210-AB32.*

[261] Although the proposal was officially published in the **Federal Register** on November 3, 2023, the text of the proposal was announced and released on October 31, 2023. Press Release, EBSA, US Department Of Labor Announces Proposed Rule to Protect Retirement Savers' Interests by Updating Definition of Investment Advice Fiduciary (Oct. 31, 2023), *https://www.dol.gov/newsroom/releases/ebsa/ebsa20231031.* The Department first alerted the public that this rulemaking was underway in the Spring 2021 Unified Regulatory Agenda, nearly three years ago. U.S. Dep't of Lab., Unified Regulatory Agenda, RIN: 1210–AC02 (last visited Jan. 26, 2024), *available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1210-AC02.*

[262] Letter from Lisa M. Gomez, Assistant Secretary, EBSA, to Lisa J. Bleier, SIFMA (Nov. 14, 2023) (on file with Department).The Department noted that the Department did not agree that an extension of the comment period was warranted in light of the significant public engagement on the topic of fiduciary investment advice since at least 2010, as well as the more recent informal engagements with an array of stakeholders, among other reasons. *Id.*

though it must be long enough to afford the public a meaningful opportunity to comment.[263] Ultimately, courts recognize the broad discretion agencies have in determining the reasonableness of a comment period, and courts have frequently upheld comment periods that were significantly less than the 60-day comment period here.[264] Moreover, holding hearings within the comment period did not limit the opportunity to comment; to the contrary, it provided commenters a forum for exchanging views and sharpening their own understanding prior to submitting comments. The record generated by the public notice and comment process was robust and reflected strong input from a wide range of affected parties on a wide range of issues. Based on its careful review of that record, the Department is confident that the process was full and fair, the process served its important goals, and the final rulemaking benefitted from the thoughtful input of the thousands of commenters, including firms, investment professionals, consumers, and others who participated in the process.

Regulatory Impact Analysis

The Department received a comment stating that it had failed to provide the underlying documents on which the regulatory impact analysis relied. Specifically, the commenter noted that the proposal's regulatory impact analysis cited a Department-sponsored study by Panis and Padmanabhan (2023) that had examined how investors timed the purchase and sale of mutual funds between 2007 and June 2023.[265] Two commenters noted that the study was not publicly available at the time the proposal was released.[266] One such commenter requested a copy of the study through a Freedom of Information Act filing. On November 28, 2023, that same commenter also requested a copy of the study through a submission to the Federal eRulemaking Portal. The Department promptly provided a link to the study the following day, November 29, 2023.

Another comment also noted that the proposal discussed Form 5500 data for 2021, which was taken from the Department's Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports (Bulletin)—a report that was ''forthcoming'' at the time of the proposal's publication.[267] That report was made publicly available December 13, 2023. Because the Panis and Padmanabhan (2023) study and updated Bulletin were not made available until the comment period was already underway, one commenter believes this hindered the commenter's ability to evaluate the proposal.

The Department understands the requirement that an agency supply technical studies and data relied upon as part of a rulemaking, including in particular ''critical factual data'' on which a rulemaking relies.[268] Here, the Panis and Padmanabhan (2023) study is discussed only briefly in the proposal and was made available during the comment period.[269] The Department concluded that the results of the study were consistent with an interpretation that Regulation Best Interest enhanced the standard of conduct for broker-dealers.[270] This conclusion is not disputed by commenters. The Department's assessment that there remains a gap in protections with respect to ERISA-covered investments is independent of this study. The Panis and Padmanabhan (2023) study does not represent critical factual data that are central to this rulemaking.

The Department used data in the updated Bulletin to estimate the number of plans that would be affected by the proposed amendments to the rule and related PTEs.[271] When this rule was first proposed, the Bulletin was undergoing internal departmental clearances for publication. The Bulletin was subsequently published online[272] on December 13, 2023. One group said that its assessment of the proposal was ''hindered'' due to the delayed release of the Bulletin and the Panis and Padmanabhan (2023) study. The data in these documents supplements the information in the rulemaking record, and confirms the Department's earlier assessments.

The Bulletin summarizes Form 5500 data filed by private-sector retirement plans for plan years ending in 2021. The underlying data on which the Bulletin relies were extracted from these publicly available Form 5500 filings. Therefore, while the Bulletin summaries were not available at the time the proposal was published, interested parties had the underlying data available to them and had the option to perform independent analyses of the relevant Form 5500 data.[273] The proposal details how the Department arrived at its estimates of affected entities, and the Bulletin analysis expands on and confirms the information in the proposal. The commenter did not explain how the release of the Bulletin summaries hindered the commenter's ability to examine and provide comments on the proposal, nor does the Department believe that the public's ability to meaningfully engage with the proposal was negatively affected by the timing of the publications of the Panis and Padmanabhan (2023) study and the Bulletin. This supplemental information confirms the Department's prior assessments, but does not change the methodology.

L. Other Legal Issues[274]

McCarran-Ferguson Act

A few commenters raised questions about the role of the McCarran-Ferguson

[263] *E.g., N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (holding that there is no bright-line rule for the number of days necessary for adequate notice); Executive Orders 12866 and 13563 generally instruct Federal agencies to provide 60 days of public comment on a proposed rulemaking. *See* E.O. 12866 § 6(a)(1); E.O. 13563 § 2(b).

[264] *E.g., Nat'l Lifeline Ass'n* v. *FCC,* 921 F.3d 1102 (D.C. Cir. 2019) (endorsing 30 days for meaningful review of ''substantial rule changes'' (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984))); *Connecticut Light & Power Co.* v. *Nuclear Regulatory Comm'n,* 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding adequacy of 30-day comment period); *see North American Van Lines* v. *ICC,* 666 F.2d 1087, 1092 (7th Cir. 1981) (upholding a 45-day comment period); *see also Mayor & City Council of Baltimore* v. *Azar,* 439 F. Supp. 3d 591, 610–11 (D. Md. 2020) (upholding a 60-day comment period for a proposal that was ''complex or based on scientific or technical data'' (internal quotation marks omitted)), *aff'd sub nom. Mayor of Baltimore* v. *Azar,* 973 F.3d 258 (4th Cir. 2020).

[265] 88 FR 75890, 75943.

[266] The proposal noted that the study was then an ''unpublished draft.'' 88 FR at 75943 fn.414 (citing Constantijn Panis Karthik Padmanabhan, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds,* Intensity, LLC. (August 14, 2023). Unpublished draft.).

[267] 88 FR at 75929 fn. 290, 75931 fn. 299.

[268] *E.g., Window Covering Mfrs. Ass'n* v. *Consumer Prod. Safety Comm'n,* 82 F.4th 1273, 1283 (D.C. Cir. 2023); *Am. Radio Relay League, Inc.* v. *F.C.C.,* 524 F.3d 227, 239 (D.C. Cir. 2008) (citation omitted).

[269] To access a copy of the study on EBSA's website, see *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/analysis/retirement/buy-low-sell-high-the-ability-of-investors-to-time-purchases-and-sales-of-mutual-funds.pdf.*

[270] 88 FR at 75943, 75943 fn. 414.

[271] 88 FR at 75929–31.

[272] To access a copy of the Bulletin on EBSA's website, see *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf.*

[273] The Department's Form 5500 search tool allows users to filter filings by plan year, for example, and export the data to a Microsoft Excel spreadsheet. This search tool is available at *https://www.efast.dol.gov/5500search/.*

[274] Some commenters raised questions about the authority of Acting Secretary of Labor Julie A. Su. The Department disagrees and notes that Acting Secretary Su is serving lawfully in accordance with both the Department's organic statute and the Federal Vacancies Reform Act of 1998. *See* 5 U.S.C. 3345(a)(1)–(3); 29 U.S.C. 552. The Department also notes that the signatory for this rulemaking is Assistant Secretary for Employee Benefits Security Lisa M. Gomez, who is authorized to promulgate this rule pursuant to a valid delegation of authority. *See* Secretary's Order 1–2011 § 4, 77 FR 1088 (Jan. 9, 2012).

Act and the Department's authority to regulate insurance products. The McCarran-Ferguson Act states that Federal laws do not preempt State laws to the extent they relate to or are enacted for the purpose of regulating the business of insurance; it does not, however, prohibit Federal regulation of insurance.[275] Specifically, the Supreme Court has made it clear that ''the McCarran-Ferguson Act does not surrender regulation exclusively to the States so as to preclude the application of ERISA to an insurer's actions.'' [276] The Supreme Court further held that ''ERISA leaves room for complementary or dual federal or state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated.'' [277] The Department has designed the final rule and amended PTEs to work with and complement State insurance laws, not to invalidate, impair, or preempt State insurance laws.[278]

Major Questions

The Department received several comments regarding the Major Questions Doctrine. One commenter stated that the Doctrine did not apply because the Department is closing loopholes and making relatively minor updates to existing exemptions. This commenter pointed to the dramatic changes in the retirement space since ERISA's enactment, stating that the Major Questions Doctrine ''does not prevent agencies from addressing new threats to the public interest that come with such changes.'' Other commenters disagreed, characterizing the proposal as an unprecedented and sudden change in the Department's regulatory scheme that lacked firm footing in ERISA. Many of those same commenters described the proposal as enormously impactful both economically and politically, and characterized it as a ''novel'' and ''unprecedented'' expansion of the Department's regulatory authority over a substantial segment of the U.S. economy. One commenter took specific issue with the compliance costs of the proposal as well as the proposal's impact on financial markets involving trillions of dollars.

In certain ''extraordinary cases . . . the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion,'' has led the Supreme Court to consider ''whether Congress in fact meant to confer the power the agency has asserted.'' [279] In such cases, courts require a showing of ''clear congressional authority'' for the regulatory activity at issue.[280]

As is the case here, the Major Questions Doctrine does not apply where the regulatory action is grounded in neither an ancillary statutory provision [281] nor in the sudden ''discover[y] . . . [of] an unheralded power.'' [282] This final rule is rooted in one of the most fundamental provisions of ERISA upon which many of the statute's duties, protections, and liabilities are conditioned—the statute's definition of a fiduciary. This final rule builds on an extensive and continuous history of Department-issued regulatory and sub-regulatory guidance of investment advice fiduciaries. Although the Department first issued a regulation defining investment advice in 1975, it has continued to regulate in this space. The Department has issued numerous class PTEs regarding the provision of investment advice (*e.g.,* 75–1, 80–03, 81–8, 84–24, 86–128, 2020–02). Additionally, the Department issued Interpretive Bulletin 96–1, Advisory Opinions 97–15A, 2001–09A, and 2005–23A, Field Assistance Bulletins 2007–01 and 2018–02, and proposals to change the regulatory definition in 2010, 2015, and 2023. The Department's regulation of commission-earning insurance agents and brokers bears an equally extensive regulatory history, dating back to 1976 with the issuance of a proposal for what would become PTE 77–9. The PTE was issued in response to a class exemption request submitted by pension consultants and other interested parties, including the ACLI and ICI.[283] The applicants also requested the Department rule that ''the normal sales presentation and recommendations made by an insurance agent or broker to a plan or plan fiduciary will not be considered to constitute the rendering of investment advice for a fee so as to classify such agent or broker as a fiduciary,'' [284] but this request was notably absent from both the proposed and final versions of PTE 77–9.[285] This regulatory history highlights the Department's unique experience and expertise in matters involving employee benefit plans and their fiduciaries and the fact that the Department has the ''great[est] familiarity with the ever-changing facts and circumstances surrounding [employee benefit plans and their fiduciaries]'' of any agency.[286]

In any event, even if the Major Question Doctrine applied, Congress has clearly and expressly granted the Department the authority to issue the current proposal. Title I of ERISA delegates broad authority to the Department to issue regulations defining terms used in Title I and to establish exemptions from prohibited transactions.[287] The Department was granted the same regulatory authority with respect to Title II plans, including IRAs, by the President's Reorganization Plan No. 4 of 1978, as ratified by Congress in 1984.[288]

First Amendment

One commenter posits that the proposed amendments to the definition of an investment advice fiduciary amount to ''content-based'' and ''viewpoint-based'' regulation of speech that would presumptively violate the First Amendment to the U.S. Constitution. This commenter believes the new definition ''would directly regulate truthful sales speech by insurance agents and broker-dealers by prohibiting their recommendations about retirement products unless the rule's onerous fiduciary requirements are satisfied.'' As a result, the commenter claims that the Department must show the rule both advances a compelling government interest and is narrowly tailored to achieve that interest.

[275] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 97–101 (1993) (holding that ''ERISA leaves room for complementary or dual federal or state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated'').

[276] *John Hancock,* 510 U.S. at 98.

[277] *Id.*

[278] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to ''impair'' a State law is to hinder its operation or ''frustrate [a] goal of that law.'' *Humana Inc. V. Forsyth,* 525 U.S. 299, 308 (1999).

[279] *West Virginia* v. *EPA,* 597 U.S. 697, 721 (2022).

[280] *Id.* at 723.

[281] *W. Va.,* 597 U.S. at 725, 730; *Whitman* v. *Am. Trucking Ass'ns, Inc.,* 531 U.S. 457, 468 (2001).

[282] *Util. Air Regulatory Grp.* v. *Envtl. Prot. Agency,* 537 U.S. 302, 324 (2014).

[283] PTE 77–9, 41 FR 56,760, 56,761 (Dec. 28, 1976) (known as ''PTE 84–24'' following the 1984 amendment).

[284] *Id.* Even here, the applicants noted that ''even if their requested ruling is issued, the consultative or advisory services performed for plans by insurance agents and brokers are such that in particular cases the agent or broker would become a plan fiduciary.''

[285] *Id.* at 56, 763–65.

[286] *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000).

[287] 29 U.S.C. 1108(a), 1135.

[288] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

The rule applies to transactions, and does not prohibit speech based on content or viewpoint or in any capacity, nor does it prohibit financial professionals from recommending any type of investment. Rather, the rule imposes fiduciary duties on covered parties when those parties are providing covered investment advice to tax-preferred accounts. The rule works to ensure that such advice is in the client's best interest, is not conflicted, and accords with the reasonable expectations of client-investors. In this way, the rule regulates professional conduct, rather than speech. Courts have generally applied a deferential standard of review to regulations of professional conduct.[289] The Department is not aware of any cases in which a court has held that requiring that a fiduciary act in accordance with fiduciary obligations would violate the First Amendment. The rule does not fundamentally implicate—much less violate—the First Amendment. For example, an adviser who did not receive conflicted compensation (*e.g.,* received an hourly fee regardless of what was recommended), would not be governed by the rule in any way.

When the Federal Government (or a State) regulates professional conduct in a way that incidentally burdens speech, the regulation does not violate the First Amendment if the measure is sufficiently drawn to protect a substantial governmental interest.[290]

This rule directly advances the Government's substantial interest in protecting retirement savers, and their tax-preferred accounts, from conflicted investment advice, the harms of which are discussed throughout this preamble. Moreover, the Department drafted this rule to be responsive to the Fifth Circuit's decision in *Chamber,* which emphasized relationships of trust and confidence. In this way, and in contrast to the 2016 Final Rule, this rule provides that fiduciary status attaches only if compensated recommendations are made in certain specified contexts, each of which describes circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider. Accordingly, this rule advances a substantial governmental interest and is sufficiently drawn to advance that interest, and, as a result, does not violate the First Amendment.

[289] *Nat'l Inst. of Fam. & Lifdvocs.* v. *Becerra,* 138 S. Ct. 2361, 2372–73, 2377 (2018) [hereinafter *NIFLA*] (citations omitted).

[290] *Cap. Associated Indus., Inc.* v. *Stein,* 922 F.3d 198, 208–09 (4th Cir. 2019); *see NIFLA,* 138 S. Ct. at 2375. In the case of a rule with an incidental burden on speech, a deferential standard of review applies. *See id.* at 2372.

M. Regulatory Impact Analysis

This section analyzes the economic impact of the final rule and amendments to the following class administrative exemptions (PTEs) providing relief from the prohibited transaction rules that are applicable to fiduciaries under Title I of ERISA and the Code: PTEs 2020–02, 84–24, 75–1, 77–4, 80–83, 83–1, and 86–128. The Department is publishing the amendments to the PTEs elsewhere in this issue of today's **Federal Register**. Collectively, the final rule and amendments to the PTEs are referred to as the ''rulemaking'' for this section for ease of discussion.

The final rule and the amendments to the PTEs are designed to work independently and are each separate regulatory actions. In order to consider the full impact of the regulatory actions, the costs, benefits, transfers and alternatives to each aspect of this rulemaking are discussed below.

Employment-based retirement plans and IRAs are critical to the retirement security of millions of America's workers and their families. Because Retirement Investors often lack financial expertise and are increasingly responsible for deciding how to invest their retirement savings, professional investment advice providers can play a critical role in guiding their investment decisions. Prudent professional investment advice helps consumers set and achieve appropriate retirement savings and decumulation goals more effectively than consumers would on their own. For many years, the benefits of professional investment advice, however, have been persistently undermined by conflicts of interest that occur if financial services firms compensate individual investment advice providers in a manner that incentivizes them to steer consumers toward investments and transactions that yield higher profits for the firms. These practices can bias the investment advice that providers render to Retirement Investors and detrimentally impact consumers' retirement savings by eroding plan and IRA investment results with excess fees and lower performance.

This rule focuses on the provision of fiduciary investment advice to ERISA plans, participants, beneficiaries, IRAs, IRA owners and beneficiaries, and plan and IRA fiduciaries with authority or control over the plans and IRAs, and seeks to reduce or eliminate the impacts of conflicts of interest on advice they receive, as well as to ensure that trusted advisers adhere to a stringent professional standard of care when making investment recommendations. The rule amends the definition of a fiduciary so that investors can be confident that the recommendations they receive are made by advisers relying on their professional judgment, based on the investor's individual circumstances or needs, and made with the expectation the investor will act on that advice. This change in the definition of a fiduciary will primarily impact service providers to plans, those recommending rollovers, and independent insurance producers recommending non-securities-based annuities.

The amendments to PTE 2020–02 build on the existing conditions to provide more certainty for Retirement Investors receiving advice and clarity for Financial Institutions and Investment Professionals that are complying with the exemption's conditions. The amendments expand the scope of the exemption to cover transactions involving ''pure'' robo-advice providers and recommendations to buy or sell a product on a principal basis. The amendments revise the disclosure obligations to more closely align with existing SEC disclosure requirements. The amendments will also provide more guidance for Financial Institutions and Investment Professionals complying with PTE 2020–02's requirements related to Financial Institutions' policies and procedures.

PTE 84–24 is also being amended to provide relief for compensated investment advice only for independent insurance producers that recommend annuities from multiple unaffiliated insurance companies to Retirement Investors, subject to conditions similar to those in PTE 2020–02. Additionally, PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 are being amended to eliminate relief for the receipt of compensation resulting from fiduciary investment advice, as defined under ERISA.

Rather than look to an assortment of different exemptions with different conditions for different transactions, investment advice fiduciaries—apart from independent insurance producers—will generally be expected to rely solely on the amended PTE 2020–02 for administrative exemptive relief for covered investment advice transactions. These amendments extend the same or similar requirements for the provision of advice to Retirement Investors, regardless of the market and investment product.

The most significant benefits of the rulemaking are expected to result from (1) changing the definition of a fiduciary by amending the 1975 five-part test, (2) requiring advice given to a broader range of advice recipients, including plan fiduciaries and non-retail investors, to meet fiduciary standards under ERISA, (3) extending the application of the fiduciary duties of care and loyalty in the market for non-securities-based annuities, to create a uniform standard of trust and confidence for investment advice across different retirement products and markets, and (4) requiring that more rollover recommendations be in the Retirement Investor's best interest.

These amendments generally align with the Advisers Act and the SEC's Regulation Best Interest. ERISA has a functional fiduciary test [291] and imposes fiduciary status only to the extent the functional test is satisfied.[292] The Department intends for the compliance obligations under this rulemaking to broadly align with the standards set by the SEC in Regulation Best Interest and the Advisers Act where practicable and has tried to accomplish such alignment in this rulemaking. The Department believes that by harmonizing the application of fiduciary duty for retirement investment advisers, irrespective of the type of product they recommend, Retirement Investors will benefit from more uniform protections from conflicted advice that ensures prudent and loyal investment recommendations from financial advisers regardless of the type of investment vehicle used. While extending fiduciary duties to more entities will generate costs, the Department believes any new compliance costs will not be unduly burdensome, as the rulemaking broadly aligns with those compliance obligations imposed under the Advisers Act and the SEC's Regulation Best Interest on investment advisers and broker-dealers, respectively, and simply expands these protections to additional sectors of the retirement market.

The Department has examined the effect of the rulemaking as required by Executive Order 13563,[293] Executive Order 12866,[294] the Regulatory Flexibility Act,[295] section 202 of the Unfunded Mandates Reform Act,[296] and Executive Order 13132.[297]

1. Executive Orders

Executive Orders 12866 (as amended by 14094) and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[298] entitled "Modernizing Regulatory Review," section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may:

(1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this rulemaking is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the rulemaking's costs, benefits, and transfers, and OMB has reviewed the rulemaking. Pursuant to the Congressional Review Act, OMB has determined that the rule and amended PTEs are "major rules," as defined by 5 U.S.C. 804(2).

2. Need for Regulatory Action

In preparing this analysis, the Department has reviewed recent regulatory and legislative actions concerning investment advice, market developments in industries providing investment advice, and research literature weighing in on investment advice. From this review, the Department believes there is compelling evidence that Retirement Investors remain vulnerable to harm from potentially imprudent advice and conflicts of interest in the investment advice they receive. Given this evidence, and the Department's mission to ensure the security of retirement benefits of America's workers and their families, the Department is amending the definition of fiduciary and certain exemption relief.

Why Being an ERISA Fiduciary Matters

As described above, fiduciaries under ERISA are subject to specific requirements. ERISA section 404 requires Title I fiduciaries to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Further, fiduciaries must carry out their duties "solely in the interest of the participants and beneficiaries" of the plan. Title II of ERISA, codified in the Internal Revenue Code, governs the conduct of fiduciaries to tax-qualified plans and IRAs. Under both Title I and Title II, fiduciaries are subject to prohibited transaction rules that forbid them from, among other things, self-dealing.[299] The aim of the prohibited transaction provisions is to protect plans, their participants, and beneficiaries from dangerous conflicts of interest that threaten the safety and security of plan benefits.[300]

This combination of a high standard of conduct and personal liability for violations of the standard of conduct for Title I fiduciaries, and restrictions on behavior for Title I and Title II fiduciaries, functions to protect plans, participants, and beneficiaries from fiduciary misdeeds. Previously, the Department conducted an economic analysis [301] (2016 Regulatory Impact

[291] *E.g., Perez* v. *Bruister,* 823 F.3d 250, 259 (5th Cir. 2016) (discussing ERISA's "functional fiduciary" test).

[292] *See Pegram* v. *Herdrich,* 530 U.S. 211, 225–26 (2000) (explaining the "two hats" doctrine under ERISA and how one may be a "fiduciary only 'to the extent' that [the person] acts in such a capacity in relation to a plan" (citing 29 U.S.C. 1002(21)(A))).

[293] 76 FR 3821 (Jan. 21, 2011).

[294] 58 FR 51735 (Oct. 4, 1993).

[295] Public Law 96–354, 94 Stat. 1164 (Sept. 19, 1980).

[296] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

[297] 64 FR 43255 (Aug. 9, 1999).

[298] 88 FR 21879 (Apr. 6, 2023).

[299] ERISA section 406, 29 U.S.C. 1106; Code section 4975(c), 26 U.S.C. 4975(c).

[300] *Lockheed Corp.* v. *Spink,* 517 U.S. 882 (1996); *Commissioner* v. *Keystone Consol. Industries, Inc.,* 508 U.S. 152 (1993).

[301] Employee Benefits Security Administration (EBSA), *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for*

Continued

Analysis (RIA)) of then-current market conditions and the likely effects of expanding the definition of fiduciary to include more individuals. It reviewed evidence that included:

- statistical comparisons finding poorer risk-adjusted investment performance in more conflicted settings;
- experimental and audit studies revealing questionable investment advice provider conduct, including recommendations to withdraw from low-cost, well diversified portfolios and invest in higher-cost alternatives likely to deliver inferior results;
- studies detailing gaps in consumers' financial literacy, errors in their financial decision-making, and the inadequacy of disclosure as a consumer protection;
- Federal agency reports documenting abuse and investors' vulnerability;
- economic theory, which predicts that when expert investment advice providers have conflicts of interest, non-expert investors will be harmed; and
- international experience with harmful advisory conflicts and responsive reforms.

The Department's analysis found that conflicted investment advice was widespread and caused serious harm to Retirement Investors, and that solely disclosing conflicts would fail to adequately mitigate the conflicts or remedy the harm. While subsequent market developments and changes to the regulatory landscape have mitigated some of this harm, the Department still finds that Retirement Investors are subject to conflicted investment advice and that conflicted advice causes Retirement Investors harm. Therefore, extending fiduciary protections to more types of advice will reduce advisory conflicts and deliver substantial net gains for Retirement Investors.

Some commenters criticized the Department's use of research and reports pre-dating the passage of Regulation Best Interest to justify the need for this rulemaking and in assessing its costs and benefits. The Department is aware of the limitations of using findings that precede the SEC's regulatory action to measure the impact of this rulemaking, and requested data measuring both the impact of Regulation Best Interest on mitigating harm from conflicted advice as well as how that action may have impacted markets not covered by the SEC's Regulation. While the Department relied on updated data and research as much as possible, it also utilizes earlier evidence that clearly demonstrates that conflicted advice causes harm and that, without a uniform standard requiring that all advisers act with both loyalty and prudence, Retirement Investors will continue to be subject to significant harm.

Also, while Regulation Best Interest caused important changes to the investment marketplace, Regulation Best Interest, in tandem with the Advisers Act, covers only a subset of the investment products and Investment Professionals covered by the Department's rulemaking. To a considerable degree, this rulemaking would extend the same important protections provided by Regulation Best Interest and the Advisers Act to the wider range of advisory relationships and transactions that ERISA covers, but Regulation Best Interest and the Advisers Act do not (*e.g.,* non-security recommendations, recommendations by broker-dealers to persons other than retail investors, such as plan fiduciaries, and advice given by Investment Professionals who are not broker-dealers or registered investment advisers). A large body of evidence, dating from before and after 2016, supports a finding that conflicted advice causes significant injury to investors, and that the broader and more uniform imposition of ERISA's fiduciary standards to such relationships will result in improved investor outcomes.

Changes in Retirement Savings Since the 1975 Regulation

While the 1975 regulation that established the five-part test has remained fixed, the private retirement savings landscape has changed dramatically. In the late 1970s, private retirement savings were mainly held in large employer-sponsored defined benefit plans. Under the terms of these plans and the governing legal structure, the plans and plan sponsors promised fixed payments to retirees, generally based on a percentage of their compensation and years of employment with the sponsoring employer. Plan sponsors hired professional asset managers, who were subject to ERISA's fiduciary obligations, to invest the funds, and the employers or other plan sponsors shouldered the risk that investment returns were insufficient to pay promised benefits. Individual plan participants did not take direct responsibility for management of the assets held by the plan and did not depend on expert advice for the sound management of funds, which were directly controlled by Investment Professionals.

Since then, much of the responsibility for investment decisions in employment-based plans has shifted from these large private pension fund managers to plan participants and beneficiaries, as well as IRA owners and beneficiaries, many with low levels of financial literacy.[302] Over time, the share of participants covered by defined contribution plans, in which benefits are based on contributions and earnings within an individual account, grew substantially, from just 26 percent in 1975 to 79 percent in 2021.[303] By 2021, 94 percent of active participants in defined contribution plans had responsibility for directing the investment of some or all of their account balances.[304] The Department could not have foreseen such a dramatic shift when it issued the existing fiduciary investment advice regulation in 1975. The passage of ERISA authorized IRAs in 1974, and IRAs remained in their infancy when the 1975 rule was issued. The vast majority of consumers were not managing their own retirement savings, nor consulting with investment advisers to do so, because 401(k) plans did not even exist in 1975.

Though workers have assumed more of the responsibility for their investment decisions, they still receive significant ERISA fiduciary oversight and protections while participating in certain employment-based plans—for example, plan fiduciaries must ensure that 401(k) plan lineups are prudently constructed and that the assets of defined benefit plans are managed in full conformity with ERISA's fiduciary duties. However, workers who change jobs or retire often roll over their retirement savings to an IRA, where they assume full responsibility for investing the assets in the larger marketplace without the protections

Final Rule and Exemptions, (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[302] Indeed, the American College of Financial Services announced in early 2024 the results of its 2023 Retirement Income Literacy Study, a ''comprehensive survey of retirement income literacy.'' Press Release, Am. C. of Fin. Servs., Retirement Income Literacy Study (Feb. 14, 2024), *available at https://www.theamericancollege.edu/knowledge-hub/press/study-finds-that-improving-financial-literacy-supports-retirement-wellness-and-confidence.* According to the study, ''older Americans [age 50–75] lack actionable retirement knowledge—averaging 31% [out of 100 percent] on a retirement literacy quiz.'' *Id.*

[303] EBSA, *Private Pension Plan Bulletin Historical Tables and Graphs 1975–2021,* Table E4, (Sept. 2023), *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.*

[304] EBSA, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports*, Table D5, (Sept. 2023), *https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf.*

that an employment-based plan could offer. Not only is it very common for defined contribution plan participants to roll over their retirement savings into an IRA, but it is also increasingly common among defined benefit plan participants. Defined benefit plan participants have the option to perform a rollover if their plan allows them to take a lump-sum payment when they separate from service. About 36 percent of private industry workers in traditional defined benefit plans have a lump-sum payment available at normal retirement, as do virtually all private industry workers in non-traditional defined benefit plans, such as cash balance plans.[305]

In 1981, private defined benefit plans held more than twice the assets in private defined contribution plans, and roughly 10 times more than IRA assets. By the third quarter of 2023, the order had reversed: IRAs held $13.0 trillion in assets, private defined contribution plans held $8.4 trillion, and private defined benefit plans held $3.7 trillion in assets.[306] This trend is expected to continue as Retirement Investors are projected to move $4.5 trillion from defined contribution plans to IRAs from 2022 through 2027.[307]

Moreover, workers have become more reliant on their retirement savings as Social Security benefits have eroded in recent decades. The age to receive full retirement benefits is gradually increasing from 65 to 67 between 2003 and 2027. Those who claim Social Security before age 66—which in 2021 was 57 percent of new retired-worker beneficiaries—receive reduced benefits.[308] For a hypothetical medium wage earner who first claims benefits at age 65, their Social Security benefit, as a share of average career earnings, was more than 40 percent in 2005 but is projected to be only about 35 percent in 2025.[309]

Investment Advice and the 1975 Regulation

As the nature of retirement savings has changed since 1975, investment advice has also evolved. Commercial relationships between employment-based pension plan sponsors and investment managers and their consulting advisers have been supplanted by retail relationships between consumers and the trusted experts they turn to for help managing their retirement plan and IRA savings.

Instead of ensuring that trusted advisers give prudent and unbiased advice in accordance with fiduciary norms, the 1975 regulation erected a multi-part series of conditions for fiduciary responsibility requiring, among other things, that advice must be on a ''regular basis'' and be ''a primary basis for investment decisions'' to confer fiduciary status. While advice providers that meet all of these conditions clearly occupy a position of trust and confidence, and are appropriately treated as fiduciaries under ERISA, the 1975 rule's technical requirements often defeat legitimate expectations of trust and confidence by failing to treat advice providers as fiduciaries, even though they hold themselves out as providing individualized and expert recommendations on behalf of the Retirement Investor and in the Retirement Investor's best interest. Advice providers that are not ERISA fiduciaries are not subject to its stringent duties of prudence and loyalty, leaving plans and plan participants vulnerable to advice providers who may engage in self-dealing transactions that would otherwise be flatly prohibited by ERISA and the Code. Moreover, the Department has found that the 1975 regulation requirement that a ''mutual agreement, arrangement, or understanding'' that advice would serve as ''a primary basis for investment decisions'' had unwittingly encouraged investment advisers, who presented themselves to investors as making a recommendation that considered an individual's personal circumstances and was in their best interest, to use fine print disclaimers stating that no such agreement or understanding exists, as potential means of avoiding ERISA fiduciary status.

While consumers often use financial advisers for investment advice related to their retirement savings, if an investment recommendation does not meet *all* five parts of the 1975 test, the adviser is not treated as a fiduciary under ERISA, no matter how complete the investor's reliance on recommendations purported to be based on their best interest in light of their individual circumstances.

For example, if a plan participant seeks advice on whether to roll over all their retirement savings, representing a lifetime of work, out of an ERISA-covered plan overseen by professional ERISA fiduciaries to purchase an annuity, the person making the recommendation with respect to the purchase of the annuity has no obligation to adhere to a best interest standard unless they meet all prongs of the 1975 rule, including regularly giving advice to the plan participant. This is true even if the person giving the advice holds themselves out as an investment expert whose recommendation is based solely on a careful and individualized assessment of the investor's needs or who has regularly provided advice to that investor on non-ERISA related investments such as the purchase of insurance products, the plan participant has no investment expertise whatsoever, and both parties understand that the participant is relying upon the advice for the most important financial decision of their life. Because the advice had not previously been rendered on a ''regular basis'' with respect to plan assets under the 1975 rule, in the absence of an expectation of ongoing advice to the Title I Plan, the adviser has no obligation under ERISA to adhere to fiduciary standards in the context of the rollover recommendation, and thus would not be subject to ERISA's requirement to act solely in the interests of the participant, allowing the adviser to recommend an annuity that is imprudent and ill-suited to the participant's circumstances, and favor the adviser's own financial interests at the expense of the participant.[310] This is not a sensible way to draw distinctions in fiduciary status, and finds no support

[305] U.S. Bureau of Labor Statistics, *National Compensation Survey: Retirement Plan Provisions For Private Industry Workers in the United States, 2022,* Table 6, (Apr. 2023), *https://www.bls.gov/ebs/publications/retirement-plan-provisions-for-private-industry-workers-2022.htm.*

[306] Board of Governors of the Federal Reserve System, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts: Third Quarter 2023,* Tables L.117 & L.118, (Dec. 7, 2023), *https://www.federalreserve.gov/releases/z1/20231207/z1.pdf. https://www.federalreserve.gov/datadownload/Build.aspx?rel=z1.*

[307] Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent,* Exhibit 8.06, (2023).

[308] Cong. Res. Ser., *The Social Security Retirement Age* (July 6, 2022), *https://sgp.fas.org/crs/misc/R44670.pdf.*

[309] Social Security Administration, Office of the Chief Actuary, *Replacement Rates for Hypothetical Retired Workers,* Actuarial Note, 2021.9, Tables B & D (Aug. 2021), *https://www.ssa.gov/oact/NOTES/ran9/an2021-9.pdf.*

[310] Investors have suffered significant losses when an Investment Professional does not act in the investor's best interest. For example, in 2021, the SEC settled with Teachers Insurance and Annuity Association of America (TIAA) for $97 million, citing disclosure violations and failure to implement policies and procedures. *See https://www.sec.gov/litigation/admin/2021/33-10954.pdf.* While the SEC was able to settle, the Southern District of New York recently dismissed a complaint by plaintiffs in this same TIAA plan who argued that TIAA acted as an ERISA fiduciary when advising plan participants to roll over assets from their employer-sponsored plan to a TIAA managed account product. Although TIAA represented in market materials that it ''[met] a fiduciary standard'' when providing investment recommendations, the court found that it did not provide this advice on a regular basis and therefore did not satisfy the five-part test to be considered an ERISA fiduciary. *See Carfora* v. *TIAA*, 631 F. Supp. 3d 125, 138 (S.D.N.Y. 2022).

in the text of ERISA, which makes no mention of a ''regular basis'' requirement.

When the Department issued PTE 2020–02, it sought to ameliorate some of the effects of the regular basis requirement by suggesting that rollover advice could be treated as falling within the 1975 rule if it was rendered at the beginning of an ongoing advisory relationship. Accordingly, in an April 2021 FAQ, in the context of advice to roll over assets from an employee benefit plan to an IRA, the Department acknowledged that a single instance of advice would not satisfy the regular basis prong of the 1975 test [311] but explained that ''advice to roll over plan assets can also occur as part of an ongoing relationship or as the beginning of an intended future ongoing relationship that an individual has with an investment advice provider.'' [312]

Ultimately, however, that policy interpretation was struck down as inconsistent with the text of the 1975 rule.[313] In *American Securities Association* v. *United States Department of Labor,* the court found that ''the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan.'' [314] Further, the court held that, ''[b]efore a rollover occurs, a professional who gives rollover advice does so with respect to an ERISA-governed plan. However, after the rollover, any future advice will be with respect to a new non-ERISA plan, such as an IRA that contains new assets from the rollover. The professional's one-time rollover advice is thus the last advice that he or she makes to the specific plan.'' [315] As a result, the first instance of advice with respect to the assets that were rolled over will not be treated as fiduciary advice, no matter how important the recommendation (*e.g.,* to expend a lifetime of savings on a single annuity), even though the professional had previously made recommendations about plan assets and planned to continue making recommendations after the rollover. Based on the court's ruling, the Department sought to remedy the shortcomings of the ''regular basis'' test, which has no basis in the statutory text of ERISA, through new rulemaking.

Inexpert Customers

Researchers have consistently found that many Americans demonstrate low levels of financial knowledge and lack basic understanding of investment strategies. In particular, for the population age 50 and older and nearing retirement, many ''fail to grasp essential aspects of risk diversification, asset valuation, portfolio choice, and investment fees.'' [316] Such customers appear to be particularly vulnerable to receiving harmful advice. Egan et al. (2019) found that misconduct among investment advice professionals was higher in counties with populations that were less financially sophisticated, including those who are less educated and older.[317]

Retirement Investors face increasingly complex investment options that vary widely with respect to return potential, risk characteristics, liquidity, degree of diversification, contractual guarantees and/or restrictions, degree of transparency, regulatory oversight, and available consumer protections. As a result, Retirement Investors often rely on professional investment advice. While, theoretically, individuals know more about their personal assets and risk preferences than an adviser, Schwarcz and Siegelman argue in the insurance context that agents are much better situated than consumers to appreciate the implications of these facts and that the ability to process such information requires training and experience.[318] Due to high information costs, Retirement Investors are in a poor position to assess the quality of the advice they receive while the advisers' incentives are often misaligned with the investors' interests.[319] The dependence of inexpert clients on advisers with significant conflicts of interest creates a large risk of investment advice and investment decisions that are not in the best interest of Retirement Investors.

The Department's 2016 regulatory impact analysis [320] demonstrated that the balance of research and evidence indicates that the aggregate harm from cases in which consumers received bad advice due to investment advice providers' conflicts of interest is significant. The complex nature of financial markets alone, particularly for insurance products, creates information asymmetry that makes it difficult for inexpert investors to navigate savings for retirement. Multiple studies cited found that Retirement Investors often lack a basic understanding of investment fundamentals.[321] A subsequent 2018 FINRA study of non-retired individuals age 25–65 found that those investors who only had retirement accounts through their employment routinely scored lower on financial literacy questions than active investors and that these workplace-only investors scored only two percentage points higher than the general population (32 percent versus 30 percent) on a composite question regarding interest, inflation and risk diversification.[322] In

[311] EBSA, *New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions,* (April 2021), *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption*; Notably, although the Department does not think that a single instance of advice would satisfy the regular basis prong of the 1975 regulation, a single instance of advice can be sufficient to satisfy the language of the statute. See Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Ams. for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *18, (N.D. Tex. June 30, 2023) (''First-time advice may be sufficient to confer fiduciary status and is consistent *with ERISA.*'') (emphasis added).

[312] EBSA, *New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions,* (April 2021), *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.*

[313] *Am. Sec. Ass'n* v. *U.S. Dep't of Lab.,* No. 8:22–CV–330VMC–CPT, 2023 WL 1967573, at *14–*19 (M.D. Fla. Feb. 13, 2023).

[314] *Id.* at *16.

[315] *Id.* at *17; *id.* (''Because assets cease to be assets of an ERISA plan after the rollover is complete, any future provision of advice is, by nature, no longer to that ERISA plan.''); Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Americans for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *18 (N.D. Tex. June 30, 2023) (''ERISA's text defines Title I and Title II 'plans' distinctly. By utilizing these separate definitions, Congress indicated how each Title's plans should be treated differently due to the nature of the relationship between financial professionals and Retirement Investors in Title I and Title II Plans. As the New Interpretation purports to consider recommendations as to Title II Plans when determining Title I fiduciary status, it conflicts with ERISA.'') (internal citation omitted).

[316] Annamaria Lusardi, Olivia Mitchell, & Vilsa Curto, *Financial Literacy and Financial Sophistication in the Older Population,* 13(4) Journal of Pension Economics and Finance 347–366, (Oct. 2014).

[317] Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct,* 127(1) Journal of Political Economy, (2019).

[318] Daniel Schwarcz and Peter Siegelman, *Insurance Agents in the 21st Century: The Problem of Biased Advice,* in D. Schwarcz & P. Siegelman (Eds.), *Handbook on the Economics of Insurance Law* (pp. 36–70). (Edward Elgar), *https://doi.org/10.4337/9781782547143.*

[319] Mark Egan, *Brokers vs. Retail Investors: Conflicting Interests and Dominated Products,* 74(3) Journal of Finance 1217–1260, (June 2019).

[320] 2016 RIA in this document refers to EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[321] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 108–109 & 136–137, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[322] Jill E. Fisch, Andrea Hasler, Annamaria Lusardi, & Gary Mottolo, *New Evidence on the Financial Knowledge and Characteristics of Investors* (Oct. 2019), *https://gflec.org/wp-content/*

addition to lacking rudimentary financial knowledge, many Retirement Investors do not understand the roles of different players in the investment industry and what those players are obligated to do.

The SEC has commissioned several studies on whether investors can differentiate between different types of investment service providers. A 2005 study considered four focus groups in different geographic locations and found that investors were generally unclear about distinctions between broker-dealers, financial advisers, investment advisers, and financial planners and often used the terms indistinguishably.[323] A 2008 household survey found that while most of the survey respondents had ''a general sense of the difference in services offered by brokers and by investment advisers but that they are not clear about their specific legal duties.'' [324] A 2018 study also evaluated four focus groups and found that participant understanding of the distinction between broker-dealers and investment advisers was low, even among those who were provided information describing the classifications of the two categories.[325] If investors are unable to distinguish between types of advice providers, they cannot be expected to understand legal distinctions of the standard to which that advice is held.

Confusion regarding the different types of advice providers and the different standards of conduct to which they must adhere is often made worse by industry marketing and other practices.[326] To attempt to address this, the SEC adopted as part of its 2019 Rulemaking a new required disclosure of a ''Form CRS Relationship Summary,'' under which registered investment advisers and broker-dealers must provide retail investors with certain information about the nature of their relationship with the firm and its financial professionals in plain language.[327] Although it does not apply to all of the products that a Retirement Investor might purchase, one of the purposes of the Form CRS is to help retail investors better understand and compare the services and relationships that investment advisers and broker-dealers offer in a way that is distinct from other required disclosures under the securities laws.[328]

Many investors also cannot effectively assess the quality of investment advice they receive. Research suggests that, in general, consumers often fail to fully comprehend the quality of professional services they receive, including services from doctors, lawyers, and banks in addition to investment advice providers.[329] The 2016 regulatory impact analysis cited research that advisers may inflate the bias in their advice to counteract any discounting that might occur because of the disclosure of conflicts.[330] It further cited evidence that advice from providers often encouraged investors' cognitive biases, such as return chasing, rather than correcting such biases; that payments made to broker-dealers influenced the advice provided to clients; and that funds distributed through more conflicted broker channels tend to perform worse.[331] Research also suggests that investors' opinions of adviser quality can be manipulated. For instance, Agnew et al. (2014) found that if an adviser first provides good advice on a financial decision that is easy to understand, the client will subsequently trust bad advice on a more difficult or complicated topic.[332] Investors who are unable to discern when they are receiving bad advice are at greater risk of being persuaded to make decisions that are not in their best interest.

The complexity of evaluating investment results to assess the quality of advice received is difficult for most Retirement Investors. Multiple studies have found that many individuals, across a variety of demographic groups, are not able to correctly answer questions about even the most basic principles of finance.[333] [334] [335] Furthermore, even if investors can determine whether investment returns are favorable, this is not tantamount to determining whether an adviser provides consistently sound investment advice.[336] Investment returns are noisy, and even several years of experience cannot reveal with high confidence whether the performance difference between an adviser's recommendations and a benchmark are due to chance or skill, unless the difference is substantial and persistent.[337]

Overall, the evidence demonstrates that the combination of inexpert customers and conflicted advisers results in investment underperformance compounded over time and negative outcomes for Retirement Investors. A substantial body of research showed that prior to 2016, IRA holders receiving conflicted investment advice could expect their investments to underperform by approximately 50 to 100 basis points per year.[338] Compounded over a 10 to 20 year investment period could mean that a retiree spending their savings down over 30 years would have 6 to 12

uploads/2019/10/FINRA_GFLEC_Investor_FinancialIlliteracy_Report_FINAL.pdf?x20348.

[323] Siegel & Gale, LLC, & Gelb Consulting Group, Inc, *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures: Report to the Securities and Exchange Commission* (March 2005).

[324] Angela Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, & Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* RAND Institute for Civil Justice, (Oct. 2008), *https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.*

[325] Brian Scholl, & Angela A. Hung, *The Retail Market for Investment Advice* (Oct. 2018), *https://bit.ly/3hGGNj4.*

[326] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 108, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[327] SEC, *Form CRS Relationship Summary: Amendments to Form ADV,* (September 19, 2019). *https://www.sec.gov/info/smallbus/secg/form-crs-relationship-summary*

[328] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

[329] William Rogerson, *Reputation and Product Quality,* 14(2) The Bell Journal of Economics 508–516 (1983).

[330] George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest,* 101(3) American Economic Review 423–28, (May 2011).

[331] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 145–158 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[332] Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, & Susan Thorp, *Individual Judgment and Trust Formation: An Experimental Investigation of Online Financial Advice,* Australian School of Business Research Paper No. 2013 ACTL21, (2014).

[333] Lusardi, Annamaria, Olivia Mitchell, and Vilsa Curto. Financial Literacy and Financial Sophistication among Older Americans. NBER Working Paper 15469, 2009.

[334] Lusardi, Annamaria, and Olivia Mitchell. ''Financial Literacy and Retirement Planning in the United States.'' Journal of Pension Economics and Finance 10, no. 4 (2011): 509–525.

[335] Lusardi, Annamaria, and Olivia S. Mitchell. Financial Literacy: Evidence and Implications for Financial Education. Dartmouth College and University of Pennsylvania, 2009.

[336] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 136–140 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[337] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 136–140 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[338] Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings,* (2015), *https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.*

percent less to spend.[339] If a retiree encounters conflicts of interest and experiences a 100-basis point reduction in performance but still spends as though they were not encountering conflicts of interest, they would run out of retirement savings more than five years early.[340]

Pervasiveness of Conflicts of Interest in Investment Advice

Since the Department finalized the current rule in 1975, consolidation of the financial industry and innovations in products and compensation practices have multiplied opportunities for self-dealing and made fee arrangements less transparent to clients and regulators. Moreover, the existence of safeguards in only certain markets, such as those regulated by the SEC's Regulation Best Interest or the Advisers Act, creates incentives for agents to recommend conflicted products in less regulated markets.[341]

While the relative newness of Regulation Best Interest makes it challenging to measure its impact on the quality of advice in other markets, there is research demonstrating similar impacts from other policies addressing financial conflicts of interest or misconduct that varied across markets. Consistent with the previous version of their paper cited in the proposal, Bhattacharya et al. (2024) found that higher fiduciary standards lead to the sale of higher quality annuity products, identified as products with higher risk-adjusted returns.[342] Honigsberg et al. (2022) showed that variation in regulatory oversight regimes leads to a situation where the worst financial advisers, with a history of serious misconduct, operate in the most lightly regulated regimes.[343] Blanchett and Fichtner (2023) found that among households with higher levels of financial wealth, those that worked with commission-based financial advisers (*i.e.,* broker-dealers) claimed Social Security benefits two years earlier than those working with advisers paid hourly. This raises concerns that commission-based advisers were not acting in their clients' best-interest, as claiming Social Security earlier is generally inconsistent with the interests of higher income households who have more discretion on when they claim Social Security, and delaying claiming is associated with improved retirement-income outcomes.[344] Charoenwong et al. (2019) found that under lighter regulation, advisers were more likely to receive complaints, particularly advisers with past complaints or with conflicts of interest.[345] This rulemaking will impose the impartial conduct standards on trusted advice pertaining to ERISA-covered investments, regardless of the market, thereby extending the protections associated with fiduciary status under ERISA and ensure the security of retirement benefits of America's workers and their families.

Conflicts of Interest After the SEC's Regulation Best Interest

Under the Advisers Act, the SEC imposes a fiduciary duty on investment advisers, requiring them to act in a client's best interest. In 2019, with Regulation Best Interest, the SEC extended a ''best interest'' standard of conduct for broker-dealers and associated persons when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities, including recommendation of types of accounts.[346] In the Regulation Best Interest Release, the SEC stated that ''[t]he Commission has crafted Regulation Best Interest to draw on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers.'' [347] The SEC emphasized that, ''[i]mportantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.'' [348]

The SEC also noted that the standard of conduct established by Regulation Best Interest cannot be satisfied through disclosure alone.[349] A conflict of interest is defined as ''an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer—consciously or unconsciously—to make a recommendation that is not disinterested.'' [350] In guidance on conflicts of interest applicable to both broker-dealers and investment advisers, the SEC staff stated,

> All broker-dealers, investment advisers, and financial professionals have at least some conflicts of interest with their retail investors. Specifically, they have an economic incentive to recommend products, services, or account types that provide more revenue or other benefits for the firm or its financial professionals, even if such recommendations or advice are not in the best interest of the retail investor. . . . Consistent with their obligation to act in a retail investor's best interest, firms must address conflicts in a way that will prevent the firm or its financial professionals from providing recommendations or advice that places their interests ahead of the interests of the retail investor.[351]

The SEC Investment Adviser Interpretation, published simultaneously with

[339] For example, an ERISA plan investor who rolls $200,000 into an IRA, earns a 6 percent nominal rate of return with 2.3 percent inflation, and aims to spend down her savings in 30 years, would be able to consume $11,034 per year for the 30-year period. A similar investor whose assets underperform by 0.5, 1, or 2 percentage points per year would only be able to consume $10,359, $9,705, or $8,466, respectively, in each of the 30 years. The 0.5 and 1 percentage point figures represent estimates of the underperformance of retail mutual funds sold by potentially conflicted brokers. These figures are based on a large body of literature cited in the 2015 NPRM RIA, comments on the 2015 NPRM RIA, and testimony at the Department's hearing on conflicts of interest in investment advice in August 2015. The 2-percentage point figure illustrates a scenario for an individual where the impact of conflicts of interest is more severe than average. *See* EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* p. 4 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[340] Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings* (2015), *https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.*

[341] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct, Stanford Law Review* 797, (2022).

[342] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (February 27, 2024), *https://www.dropbox.com/scl/fi/gj5skfflsip2nhee1662c/Draft.pdf?rlkey=msd12c734n8ddrct8uzqg0qut&dl=0.* This is an updated version of the working paper cited in the proposal. (*See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (May 20, 2020), *https://www.nber.org/papers/w25861.*)

[343] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct, Stanford Law Review* 797, (2022).

[344] David Blanchett and Jason Fichtner. *Biased Advice? The Relationship between Financial Professionals' Compensation and Social Security Benefit Claiming Decisions,* 12(1) *Retirement Management Journal* (December 2023)

[345] Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation,* 109(10) *American Economic Review* (October 2019), *https://www.aeaweb.org/articles?id=10.1257/aer.20180412.*

[346] *See* 17 CFR 240.15l–1.

[347] 84 FR 33318, 33320 (July 12, 2019).

[348] *Id.* at 33321.

[349] *Id.* at 33318.

[350] 17 CFR 240.15l–1(b)(3).

[351] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

Regulation Best Interest, reaffirmed and in some cases clarified aspects of the fiduciary duty of an investment adviser under the Advisers Act.[352] The SEC stated that ''an investment adviser's fiduciary duty under the Investment Advisers Act comprises both a duty of care and a duty of loyalty.'' [353] According to the SEC, ''[t]his fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.'' [354] The fiduciary duty under the Federal securities laws requires an adviser ''to adopt the principal's goals, objectives, or ends.'' [355]

The SEC stated:

> This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the ''best interest'' of its client at all times.[356]

While the standards of care imposed under the Advisers Act and Regulation Best Interest overlap with ERISA's fiduciary standard, the SEC's jurisdiction does not cover all transactions that are covered under ERISA. Specifically, Regulation Best Interest does not cover advice to non-retail investors, and the SEC's authority under Regulation Best Interest and the Advisers Act is tied to the regulation of securities. Similarly, while there is a large overlap in the substance of the different regulatory regimes, in enacting ERISA, Congress provided special protections for tax-advantaged retirement savings that do not apply more broadly. For example, Congress prohibited transactions (absent an exemption) that were determined to raise significant risk to retirement plan participants and beneficiaries.

Regulation Best Interest shares the same goal as the Department's own rulemaking, in seeking to ensure investors are receiving investment advice in their best interest. Further, Regulation Best Interest expands protections in some of the same markets that are a concern of this rulemaking.

After Regulation Best Interest's adoption, the North American Securities Administrators Association's (NASAA) Broker-Dealer Section Committee concluded a review of over 200 examinations evaluating broker-dealers' compliance of Regulation Best Interest by State Examiners in 25 States.[357] This review revealed steady implementation progress, including that firms had been updating investor profile forms and policies and procedures; that firms recommending complex, costly or risky products were imposing restrictions based on ages, income/net worth and risk profiles; and that firms were utilizing cost-comparison tools to better consider reasonable investment alternatives.[358]

Moreover, the majority of the firms did not cease (94 percent) or restrict (76 percent) sales of any products following Regulation Best Interest. Only 2 percent or less of firms ceased the sale of options, non-traded real-estate investment trusts (REITs), highly-leveraged products, private securities, cryptocurrency or other digital assets, Special-purpose Acquisition Companies (SPACs), leveraged or inverse ETFs/ETNs, and penny stocks or other thinly-traded securities.[359] The report noted, however, that firms still struggled with considering reasonably available alternatives and conflict mitigation; ignoring lower cost and less risky products when recommending complex, costly and risky products and relying on financial incentives to sell them; and that firms have not enhanced point of sale disclosures.[360]

The SEC began conducting limited scope broker-dealer examinations and risk-based inspections in June 2020 to assess whether firms established written policies and procedures to comply with Regulation Best Interest and had made reasonable progress in implementing those policies and procedures. In their reviews, staff identified instances of deficiencies with respect to Regulation Best Interest's Disclosure, Care, Conflict of Interest, and Compliance Obligations.[361] FINRA has identified similar deficiencies in its Report on Examination and Risk Monitoring Program.[362] At the same time, the SEC's Division of Examination notes that, in response to deficiency letters identifying these issues, many broker-dealers modified their practices, policies and procedures.[363] In addition, the SEC staff released additional guidance in April 2023 focused on broker-dealers' and investment advisers' obligations with respect to their care and conflicts of interests obligations, in addition to account recommendations.[364]

The SEC staff announced in January 2023 that it intends to incorporate compliance with Regulation Best Interest into retail-focused examinations of broker-dealers [365] and both the SEC and FINRA have begun enforcement actions related to Regulation Best Interest.[366] In June 2022, the SEC charged a firm and five brokers for violating Regulation Best Interest and selling high-risk bonds to retirees and other retail investors [367] and in February 2024, the SEC reached a settlement of over $2.2 million with TIAA–CREF for failing to comply with Regulation Best Interest in connection with

[352] 84 FR 33669 (July 12, 2019).

[353] *Id.* at 33671 (footnote omitted).

[354] *Id.* at 33670.

[355] *Id.* at 33671.

[356] *Id.* (footnote omitted).

[357] North American Securities Administrators' Association, *Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II (A),* (November 2021), *https://www.nasaa.org/wp-content/uploads/2021/11/NASAA-Reg-BI-Phase-II-A-Report-November-2021_FINAL.pdf?_hsenc=p2ANqtz-8omG4E39GJ9JKayUxU4AB8lSU7LF_fvSNO6y Co9KraMk81h65TjgkywccFhKf2QJUpgyaoj1iNEfMJ-b-l-2CDTG-fTw;* and North American Securities Administrators' Association, *Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II (B)* (Sept. 2023) *https://www.nasaa.org/wp-content/uploads/2023/08/Reg-BI-Phase-II-B-Report-Formatted-8.29.23.pdf.*

[358] Ibid.

[359] Ibid.

[360] Ibid.

[361] SEC, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest*, (Jan. 30, 2023), *https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.*

[362] FINRA, *2023 Report on FINRA's Examination and Risk Monitoring Program,* (Jan. 2023), *https://www.finra.org/sites/default/files/2023-01/2023-report-finras-examination-risk-monitoring-program.pdf.*

[363] SEC, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest,* (Jan. 30, 2023), *https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.*

[364] SEC, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligation,* (Apr. 20, 2023), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers;* SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors,* (Mar. 20, 2022), *https://www.sec.gov/tm/iabd-staff-bulletin;* SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest,* (Aug. 2, 2022), *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest; Securities and Exchange Commission, Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation,* (Apr. 20, 2023), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

[365] SEC, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest,* p. 1, (Jan. 30, 2023), *https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.*

[366] See SEC, *Press Release: SEC Charges Broker-Dealer with Violations of Regulation Best Interest and Fraud for Excessive Trading in Customer Accounts,* (Sept. 28, 2023), *https://www.sec.gov/enforce/34-98619-s; SEC Charges Broker-Dealers with Violations of Regulation Best Interest and Form CRS Rules for Failing to Effect Delivery of Required Disclosures,* (Sept. 28, 2023), *https://www.sec.gov/enforce/34-98609-s;* and *SEC Charges Wisconsin Broker-Dealer with Violations of Regulation Best Interest,* (Sept. 22, 2023), *https://www.sec.gov/enforce/34-98478-s.*

[367] SEC, *Press Release: SEC Charges Firm and Five Brokers with Violations of Reg BI,* (June 16, 2022), *https://www.sec.gov/news/press-release/2022-110.*

recommendations to retail customers to open a TIAA IRA.[368] Meanwhile, FINRA levied its first Regulation Best Interest-related fine in October 2022 and suspended two New York-based brokers in February 2023.[369]

Conflicts of Interest in Advice Given to Plan Fiduciaries

Concerns regarding investment advice extend to that received by ERISA plan fiduciaries. Pool et al. (2016) found that while mutual fund companies involved in plan management for 401(k) plans included both funds from their own family as well as unaffiliated funds in the menu of investment options, poor performing funds were less likely to be removed and more likely to be added to the menu if they were affiliated with the plan trustee.[370] In 2005, the SEC staff found evidence that some pension consultants do not adequately disclose their conflicts and steer plan fiduciaries to hire money managers based partly on the consultants' own financial interests.[371] The U.S. Government Accountability Office (GAO) found these inadequately disclosed conflicts were associated with substantial financial losses. GAO's study found that between 2000 and 2004, plans associated with pension consultants without adequate disclosure of their conflicts of interest saw annual rates of return 1.2 to 1.3 percentage points lower than plans associated with pension consultants with adequate disclosure of conflicts of interest.[372] In another study, GAO found that ERISA plan sponsors often are confused as to whether the advice they receive is fiduciary advice, and small plans in particular may suffer as a result.[373] This confusion leaves plan participants vulnerable to lower returns due to conflicted advice.

Conflicts of Interest in Rollover Recommendations or Advice

The treatment of rollover recommendations or advice under the 1975 rule has been a central concern in the Department's regulation of fiduciary investment advice. The decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings.

Most IRA assets are attributable to rollover contributions, and the amount of assets rolled over to IRAs is large and expected to increase substantially.[374] In 2021, IRA rollovers from defined contribution plans increased by 4.9 percent. Cerulli Associates estimates that aggregate rollover contributions to IRAs from 2022 to 2027 will surpass $4.5 trillion.[375]

The decision to roll over one's retirement savings from an ERISA-covered employment-based plan into an IRA or other plan has significant consequences, and for many investors is the single most consequential advice they will receive and affects a lifetime of savings. About 57 percent of traditional IRA-owning households indicated that their IRAs contained rollovers from employment-sponsored retirement plans and of those households, 85 percent indicated they had rolled over their entire account balance in their most recent rollover.[376] In 2020, more than 95 percent of the dollars flowing into IRAs came from rollovers, while the rest came from regular contributions.[377]

Retiring workers must decide how best to invest a career's worth of 401(k) savings, and many look to an investment advice provider for guidance. Financial Institutions face an innate conflict of interest, in that a Financial Institution that provides a recommendation or advice concerning a rollover to a Retirement Investor may expect to earn transaction-based compensation such as commissions and/or receive an ongoing advisory fee that it likely would not receive if the assets were to remain in an ERISA-covered plan. Further, under the 1975 rule, if an investment advice provider makes a one-time recommendation that the worker move the entire balance of their retirement plan into an IRA and invest it in a particular annuity, and there is no expectation of ongoing advice to the original retirement plan, then the advice provider has no fiduciary obligation under ERISA to honor the worker's best interest unless this recommendation is part of a preexisting "ongoing" advice relationship with respect to plan assets. Moreover, if the advice provider makes the recommendation for the first time after the participant rolled the money out of the plan, and before they have received advice on specific investments in the IRA from the provider, the recommendation to invest all the assets in an annuity would not be treated as fiduciary advice, even if the adviser had regularly made recommendations to the participant for years about investments in the ERISA-covered plan or about other non-IRA investments. The resulting compensation represents a significant revenue source for investment advice providers.

While PTE 2020–02 mitigates some of these concerns by requiring investment advice fiduciaries to render advice in their customer's best interest in order to receive certain types of compensation from otherwise prohibited transactions resulting from rollover advice, the limitations of the existing five-part test for fiduciary status under the 1975 rule still result in significant portions of the retirement investment market operating outside of the PTE's protections.

Uniformity Across Markets and Product Types

The current regulatory approach to investment advice results in standards that vary by advice market and investment product.[378] As a result, Retirement Investors cannot rely on a single protective standard, and their exposure to risk is not only based on the types of products they invest in but also by who gives that advice or makes that recommendation and in what capacity they are acting. This creates investor confusion and makes room for regulatory arbitrage, where investment advice providers can use more favorable

[368] Securities and Exchange Commission, *Press Release: SEC Charges TIAA Subsidiary for Failing to Act in the Best Interest of Retail Customers,* (February 16, 2024), *https://www.sec.gov/news/press-release/2024-22.*

[369] Melanie Waddell, *FINRA Fines Long Island BD Over Reg BI,* Think Advisor, (Feb. 13, 2023), *https://www.thinkadvisor.com/2023/02/13/finra-fines-long-island-bd-over-reg-bi/.*

[370] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plans*, 71(4) Journal of Finance 1779–1812, (2016).

[371] The report's findings were based on a 2002 to 2003 examination of 24 pension consultants. *See* SEC, *SEC Staff Report Concerning Examination of Select Pension Consultants,* (May 16, 2005), *http://www.sec.gov/news/studies/pensionexamstudy.pdf.*

[372] GAO Publication No. GAO–09–503T, *Private Pensions: Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans,* (2009), *https://www.gao.gov/assets/gao-09-503t.pdf.*

[373] GAO Publication No. GAO–11–119, *401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest,* (2011), *http://www.gao.gov/products/GAO-11-119.*

[374] IRS, *SOI Tax Stats—Accumulation and Distribution of Individual Retirement Arrangement (IRA),* Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

[375] Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent,* Exhibit 8.06, (2023). Note that these numbers include public sector plans.

[376] Investment Company Institute, *The Role of IRAs in US Households' Savings for Retirement, 2021,* 28(1) ICI Research Perspective, (Jan. 2022), *https://www.ici.org/system/files/2022-01/per28-01.pdf.*

[377] Internal Revenue Service, *SOI Tax Stats—Accumulation and Distribution of Individual Retirement Arrangement (IRA),* Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

[378] For more information on the different regulatory regimes, refer to the Regulatory Baseline section in this analysis.

rules in one market to circumvent less favorable regulations elsewhere. The Department identifies the following nuances of the regulatory landscape as sources of investor confusion:

- Regulation Best Interest only applies to recommendations made by broker-dealers to retail customers. As a result of this limitation, broker-dealers' recommendations of securities transactions, investment strategies, plan design, and plan investment options to plan fiduciaries, generally fall outside its scope. This may be particularly confusing and, similar to retail individuals as described above, raise risks for small plan fiduciaries that lack investment expertise.
- Securities laws (*i.e.,* the Advisers Act and Regulation Best Interest) may not apply to advice on investments such as real estate, fixed indexed annuities, commodities, certain certificates of deposit, and other bank products.
- Variable annuities and some indexed annuities are considered securities and are subject to securities laws, while fixed annuities, including fixed indexed annuities, are subject to State law. As discussed in the Regulatory Baseline section, these laws vary significantly from State to State.
- The NAIC Model Regulation, which sets standards and procedures for recommending annuity products, has been adopted in most, but not all, States. Some States made substantive changes to the NAIC Model Regulation when adopting it, to ensure more robust protections, while other States adopted it in its entirety, including carve-outs that the regulation established for cash and non-cash compensation from best interest protections.

This list is not exhaustive but provides a sense of how many seemingly similar investments are subject to widely different regulators and protective standards.

Honigsberg et al. (2022) identified associated persons of broker-dealers who had been registered with FINRA between 2010 and 2020 but were no longer registered with the regulatory authority. Of those that exited, roughly one-third continued providing financial advice under a different regulatory regime, and eight percent of those had a history of serious misconduct while registered with FINRA. This share increased to 12 percent when compared to those that were still providing financial advice as an insurance producer registered with the NAIC and 13 percent when compared to the National Futures Association members providing advice regarding derivatives. The authors argued that the existing framework for regulating adviser misconduct creates incentives for the worst advisers to migrate to more poorly regulated State regimes.[379]

The risk posed by non-uniform regulatory environments is exemplified by the annuity market. A recent survey of insurers reported that 58 percent of insurers thought the SEC's Regulation Best Interest had improved protections for consumers.[380] However, as discussed above, generally only annuities that are considered securities are under the jurisdiction of the SEC and these comprised just 26 percent of retail annuity sales in 2023.[381] The remaining annuities are covered by State regulations that generally hold those selling such insurance products to a lower standard. In crafting this rulemaking, the Department strove to craft a definition that hews to both the text and purpose of ERISA.

An investor's retirement account may hold a wide range of investment products, those products may touch multiple regulatory regimes, and the Retirement Investor may not be aware of the different standards. Once the investment products are held in a plan or account covered by ERISA Title I or Title II, however, the Title I and Title II ERISA protections apply regardless of the type of investment product. This range of investment products held in these plans and accounts means that the regulatory definition of an investment advice fiduciary for purposes of Title I and Title II of ERISA takes on special importance in creating uniform standards for investment advice, particularly when a Retirement Investor may not realize the investment product is not covered by another regulatory regime such as Federal securities laws.

Need for Uniformity Concerning Rollovers

The difference between types of products, such as securities subject to regulation by the SEC and non-securities annuities subject to regulation by State insurance departments, creates problematic incentives for financial professionals to recommend certain products.

Under the Advisers Act and Regulation Best Interest, investment advisers and broker-dealers must have a reasonable basis to believe both the rollover itself and the account being recommended are in the retail investor's best interest.[382] SEC staff guidance recognizes that it would be difficult for an investment adviser or broker-dealer to have such a reasonable basis if it does ''not consider the alternative of leaving the retail investor's investments in their employer's plan, where that is an option.'' [383] Moreover, broker-dealers and investment advisers generally should consider certain factors when making rollover recommendations to retail investors, specifically and without limitation, including ''costs; level of services available; features of the existing account, including costs; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; and holdings of employer stock.'' [384] As such, the SEC's regulatory framework is likely to mitigate some of the aforementioned harms to Retirement Investors, but only in markets where it applies.

In contrast, the NAIC Model Regulation, which is the basis for much of the State regulation on insurers,[385] makes no direct reference to rollovers, and imposes a less stringent obligation on annuity recommendations than the best interest standard imposed on securities recommendations and investment advice by the SEC. Given the average rollover contribution to a traditional IRA in 2019 was $112,000,[386]

[379] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct, Stanford Law Review* 797, (2022).

[380] Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand*, Exhibit 1.06, The Cerulli Report, (2022).

[381] LIMRA, *U.S. Annuity Sales Post Another Record Year in 2023,* (January 24, 2024), *https://www.limra.com/en/newsroom/news-releases/2024/limra-u.s.-annuity-sales-post-another-record-year-in-2023/.*

[382] The SEC recognized in Regulation Best Interest that, ''as part of determining whether a broker-dealer has a reasonable basis to believe that a recommendation is in the best interest of the retail customer, a broker-dealer generally should consider reasonably available alternatives offered by the broker-dealer'' which the SEC viewed as ''an inherent aspect of making a 'best interest' recommendation.'' *See* Regulation Best Interest Adopting Release, 84 FR 33318, 33381. Investment advisers have fiduciary obligations with respect to rollover recommendations: ''An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type. Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.,* a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.,* a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.'' *See* 2019 Fiduciary Interpretation, 84 FR 33674.

[383] SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors,* (March 30, 2022), *https://www.sec.gov/tm/iabd-staff-bulletin.*

[384] *Ibid; see Regulation Best Interest Adopting Release,* 84 FR 33318, 33383.

[385] For more information, refer to the discussion in the Regulatory Baseline section on state legislation and regulation.

[386] Matched file of Forms 1040, 1099–R, and 5498 for Tax Year 2019. IRS, Statistics of Income

Continued

the variation in regulatory standards regarding rollover advice can result in widely disparate outcomes among similarly situated Retirement Investors based solely on who they sought for advice and whether that adviser was required to put the investor's interests above their own.

An update to the regulatory definition of an investment advice fiduciary, for purposes of Title I of ERISA and the Code, is necessary to enhance protections of Retirement Investors. This approach both reflects ERISA's and the Code's statutory text, which adopts a uniform approach, as well as sound public policy. Investment recommendations should be consistently governed solely by the best interest of Retirement Investors, rather than adviser perceptions that advice on one category of investment product is subject to different regulatory standards than another.

How the Final Rule Addresses the Need for Regulatory Action

The amendments to the 1975 rule contained in this final rule will better reflect the text and purposes of ERISA and address inadequacies that the Department has observed during its decades of experience in implementing the 1975 rule. These amendments will honor the broad statutory definition of fiduciary in ERISA by amending the five-part test to create a uniformly protective fiduciary standard for Retirement Investors, subject to firm-level oversight, designed to mitigate and eliminate the harmful effects of biased advice. The amendments to the 1975 rule and related exemptions will also eliminate the risk of regulatory arbitrage, in which an investment advice provider may operate in a particular market to evade more stringent regulation. For instance, under the current regulation, an Independent Producer selling an indexed annuity, a financial professional giving a Retirement Investor one-time advice to roll investments into an IRA, or a financial professional giving advice on one transaction, could portray themselves as serving the best interest of the investor while being held to a lower care standard than financial professionals subject to the Advisers Act, the SEC's Regulation Best Interest or the Department's fiduciary standard. In contrast, the amended rule will broadly align the standard of care required of all financial professionals giving retirement investment advice with Retirement Investors' reasonable expectations that those recommendations are trustworthy. This will in turn create a retirement market where all advisers compete under a uniform fiduciary standard, reducing investor exposure to harms from conflicted advice.

The fiduciary standard, as buttressed by the protective conditions of the amended PTE 2020–02 and PTE 84–24, protects investors from getting investment recommendations that are improperly biased because of an adviser's competing financial interests. The fiduciary standard requires firms and advisers to put the interests of Retirement Investors first and to take appropriate action to mitigate and control conflicts of interest. These conditions should go a long way to redressing the dangers posed by biased advice.

In addition, the exemptions also give inexpert investors important information on the scope, severity, and magnitude of conflicts of interest. Moreover, by imposing a uniform fiduciary standard on conflicted advisers in the retirement marketplace, the final rule and amended exemptions reduce investor confusion about the standards governing advice. Retail investors who rely on expert advice are unlikely to have a sound understanding of differences in standards across various categories of investments and Investment Professionals,[387] but there is nearly universal agreement among Americans who have worked with a financial professional that those professionals providing advice about retirement investments should be required to act in their client's best interest.[388] The SEC Investor Advisory Committee, when considering a uniform adoption of a standard of duty for investment advisers and broker-dealers in 2013, found that ''investors do not distinguish between broker-dealers and investment advisers, do not know that broker-dealers and investment advisers are subject to different legal standards, do not understand the difference between a suitability standard and a fiduciary duty, and expect broker-dealers and investment advisers alike to act in their best interest when giving advice and making recommendation.'' [389]

Accordingly, when the SEC adopted Regulation Best Interest, it imposed a common standard based on fiduciary principles of care and loyalty that are applicable to broker-dealers and registered investment advisers alike. As noted in recent SEC Staff Bulletins on Regulation Best Interest, ''[b]oth [Regulation Best Interest] for broker-dealers and the [Advisers Act] fiduciary standards for investment advisers are drawn from key fiduciary principles that include an obligation to act in a retail investor's best interest and not to place their own interests ahead of the investor's interest.'' [390] These standards of conduct are aligned with the Department's rulemaking, and as SEC staff has noted, ''[a]lthough the specific application of [Regulation Best Interest] and the [Advisers Act] fiduciary standard may differ in some respect and be triggered at different times, in the staff's view, they generally yield substantially similar results in terms of the ultimate responsibilities owed to retail investors.'' [391]

While these issues have been mitigated to a considerable degree by the imposition of a common ''best interest'' standard for broker-dealers governed by Regulation Best Interest and investment advisers subject to the Advisers Act or State law, significant differences remain with respect to the standards governing investments that are not securities, such as fixed indexed annuities. Investor confusion is

Division, Individual Retirement Arrangements Study, February 2022.

[387] Angela A. Hung, Noreen Clancy, Jeff Emmett Dominitz, Eric Talley, Claude Berrebi, & Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* RAND Corporation, (2008), *https://www.rand.org/pubs/technical_reports/TR556.html*.

[388] CFP Board. ''Retirement Investor Expectations form Financial Advisors Survey,'' (Mar. 2024). *https://www.cfp.net/-/media/files/cfp-board/knowledge/reports-and-research/cfp-retirement-investor-expectations-from-financial-advisors-survey.pdf?la=en&hash=D191BA975D8D4D9E03B5A02CAF029619*.

[389] SEC. ''Recommendation of the Investor as Purchaser Subcommittee Broker-Dealer Fiduciary Duty,'' November 1, 2013. *https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf*.

[390] *See* SEC, *SEC Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligations,* (2023), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.* and SEC, *SEC Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Conflicts of Interest,* (2023), *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest*.

[391] *See generally* SEC, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligations,* (2023), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

As a practical matter, the most significant difference between the standards between advisers subject to the Advisers Act fiduciary standard and broker-dealers subject to Regulation Best Interest is that advisers generally have a baseline obligation to monitor their clients' accounts on an ongoing basis. In this respect, ERISA's fiduciary obligations are closer to the standards applicable to broker-dealers because, under ERISA's functional test of fiduciary status, a person is a fiduciary only ''to the extent'' they give the requisite advice, and there is no baseline obligation to act as a fiduciary adviser on an ongoing basis. Instead, the determination of fiduciary status under the definition set forth in ERISA Section 3(21)(a)(ii) is transactional.

exacerbated by different regulatory regimes referencing a ''best interest standard'' while defining what that means and the protections that entails differently.

The amendments to PTEs 2020–02 and 84–24 will enhance disclosures of conflicts of interest, while utilizing existing disclosure requirements from the SEC and State insurance commissions in order to mitigate burden. Nevertheless, the Department stresses that disclosure alone is limited in its effectiveness at protecting investors from the dangers posed by conflicts of interest. Merely disclosing a conflict of interest does not give the investor a working model on how to determine the impact of the conflict of interest on the advice they are receiving or of how to use the disclosure to make a better investment decision. While the disclosure puts the investor on notice of the conflict, the inexpert investor remains dependent on the expert's advice and may in fact interpret the disclosure as a sign of honesty, rather than a warning that the advice they're receiving may be influenced by their adviser's self-interest.[392] By mitigating or removing conflicts, requiring the adviser to adhere to a strong conduct standard, and requiring the adviser to establish a mechanism for overseeing and enforcing compliance, the rulemaking creates a strong infrastructure for compliance addressing the problems posed by conflicted and imprudent advice.

The growing body of evidence underscores that best interest fiduciary standards play an important role in protecting Retirement Investors.[393] One of the Department's objectives in issuing this rulemaking is to abate these and similar harms in areas outside of the SEC's jurisdiction, to ensure that Retirement Investors' assets outside the securities space are also protected from conflicted advice. This rulemaking will extend the fiduciary best interest standard to additional individuals, firms, markets, and investment products, including annuities and other non-securities. This rulemaking will apply to advice given to plan fiduciaries as well as plan participants.

In addition, for Retirement Investors who already receive the protections in the Advisers Act, Regulation Best Interest, and PTE 2020–02 under the regulatory baseline, this rulemaking will provide even stronger protections. Standards for mitigating conflicts under this rulemaking will be more rigorous and well-defined.

3. Baseline

Since the Department first took on the issues of fiduciary advice and conflicts of interest, there have been numerous developments in the regulatory environment overseeing retirement investments and the financial markets in which they operate.

Market Baseline

This rulemaking will expand the fiduciary standard to individuals, firms, and markets not currently held to a fiduciary or best interest standard. This will in turn impact how advisers make recommendations to Retirement Investors and potentially the types of investments they recommend and how they are compensated. As such, it is helpful to understand the regulatory and market baselines for retirement investments, including which sectors will be most significantly impacted by this rulemaking.

The Department has, in response to a commenter, estimated the current market size of a selected set of commonly held assets and sales of financial products for retail and institutional investors, as well as for Retirement Investors, as summarized in the table below. The Department estimates the total value of these assets at over $168 trillion, of which approximately $62 trillion is attributable to retail investors.[394] As seen below, investments in securities, which are currently covered by Regulation Best Interest and the Advisers Act, account for the majority of the retail market.

This rulemaking will specifically apply to invested assets subject to ERISA, including non-securities not covered by Regulation Best Interest and the Advisers Act. Where possible, the Department has provided the amount of assets in retirement accounts. In 2022, there were $0.74 trillion of fixed and variable annuities reported invested in IRA accounts.[395] The Department does not have data on assets invested in annuities in pension accounts, nor does it have a breakdown of how many assets are invested in fixed and variable annuities in IRA accounts.

TABLE 1—MARKET DESCRIPTION OF SELECTED COMMONLY HELD ASSETS, 2022

[In USD billions]

	Securities					Non-securities		Total
	Equities [1]	Bonds [2]	Money market funds [3]	Mutual funds [3]	Variable annuities [4]	Fixed annuities [4]	Bank deposits	
Total Assets	$64,723	$53,890	$5,223	$17,333	$2,016	$1,740	$23,597	$168,522
Retail Investor	$26,505	$4,593	$3,080	$9,749	$2,016	$1,740	$14,809	$62,491
Institutional Investor	$38,218	$49,297	$2,143	$7,584	....	....	$8,788	$106,030
Private Pension Investor	$2,929	$1,688	$228	$4,386	(5)	(5)	$42	
Public Pension Investor	$3,390	$3,755	$23	$230	(5)	(5)	$33	
10-Year Asset Growth	9.20%	3.70%	5.70%	2.60%	3.00%	6.00%	6.70%	5.80%
Retail Investor	10.80%	−0.50%	5.80%	2.90%	3.00%	6.00%	6.80%	6.40%
Institutional Investor	8.20%	4.20%	5.60%	2.30%	....	....	6.60%	5.50%
Private Pension Investor	4.50%	4.50%	4.90%	5.30%	(5)	(5)	−0.60%	
Public Pension Investor	4.80%	5.20%	−8.00%	−3.50%	(5)	(5)	−0.90%	

Source: Board of Governors of the Federal Reserve System, *Financial Accounts of the United States,* December 7, 2023.

Notes: Retail investors include households and non-profits.

1 Includes shares of exchange-traded funds, closed-end funds, and real estate investment trusts.

2 Includes open market paper, treasuries, agency and GSE-backed securities, municipal securities, and corporate bonds.

3 Money market funds and mutual funds include approximately $1.66 trillion in variable annuity mutual fund assets.

4 Variable and fixed annuities of Retirement Investors include some annuities held in IRAs, totaling some $0.74 trillion.

5 The Department does not have data to indicate the total value of fixed and variable annuity assets held by Retirement Investors, only those held by retail investors or in IRAs.

392 George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest,* 101(3) American Economic Review 423–28, (May 2011).

393 For more information on the relationship of best interest fiduciary standards and the protection of Retirement Investors, refer to the Benefits section of the regulatory impact analysis.

394 EBSA tabulations based on The Board of Governors of the Federal Reserve System, *Financial Accounts of the United States,* December 7, 2023.

395 *Ibid.*

This rulemaking will affect assets owned by private pension investors shown in the table above. As noted above, the Department does not have data on how many of the assets in variable and fixed annuities are owned by private pension investors but believes it to be a significant amount.

Market Developments, the Annuity Market

Before it was vacated, the 2016 Final Rule had begun exerting substantial influence on financial advice and products in the insurance market, particularly with regard to annuities. There are three common types of annuities offered by insurance companies.

- In a variable annuity, an insurance company invests in an investment option chosen by the investor, which is often a mutual fund.[396] The return of the variable annuity reflects the return on the underlying investments. Variable annuities have often been referred to as ''mutual funds in an insurance wrapper.'' [397]
- In a fixed annuity, an insurance company agrees to pay the investor no less than a specified rate of interest during the asset accumulation phase and to pay a specified amount per dollar in the decumulation phase.[398] [399]
- In an indexed annuity, an insurance company agrees to pay the investor returns linked to the performance of a market index. However, unlike a variable annuity, the terms in the contract and the method used to calculate gains and losses may result in actualized gains or losses that differ from the gains and losses experienced by the index.[400]

Annuity regulators also vary by type. While all annuity products are subject to State regulation, variable annuities and some indexed annuities are considered securities, and therefore are also subject to SEC and FINRA regulations.[401] As the financial structure of each type of annuity varies, so does the risk of conflicted advice. Variable and fixed-indexed annuity commissions tend to be similar, while fixed rate income and immediate annuity commissions are generally lower.[402]

In recent years, the mix in demand for annuities has changed dramatically. While variable annuities accounted for 56 percent of the annuities market in 2016 (with fixed annuities accounting for the remaining 44 percent),[403] variable annuities only accounted for 26 percent in 2023 with fixed annuities now accounting for 74 percent of the market.[404] Driving much of the shift, in addition to changes in how fees are structured in the variables annuities space and recent increases in interest rates, is the growth in share of the population approaching retirement age. The population age 65 and older was 13 percent in 2010 and had risen to 17 percent by 2022.[405] Moreover, the proportion of the population over age 65 is expected to reach more than 20 percent by 2030.[406]

The aging population has shifted their demand to annuities that provide protection against market downturns as they approach retirement and the spenddown phase of their retirement planning, but purchasing such products also requires them to consider multiple sources of uncertainty (mortality, inflation, performance) when making their investment decisions. At the same time, annuity contracts are becoming increasingly complicated. Ninety-four percent of fixed indexed annuities now involve hybrid indexes which may utilize alternative or non-traditional investment strategies and complex features such as volatility or risk controls that rely on derivative instruments and algorithms that are increasingly complex and lack historical performance data.[407]

Research has shown that a person's financial decision-making ability peaks in their early 50s, thereby putting them at risk in later years as the ability of older individuals to recover from financial mistakes may be negatively impacted by declines in physical health and cognition and related difficulties reentering the labor force.[408] Angrisani and Lee (2019) demonstrated this, when analyzing data for individuals 50 and older in the Health and Retirement Survey. Angrisani and Lee (2019) observed significant declines in wealth among households whose financial decision-maker experienced cognitive decline. Households that received pension or annuity income or had assistance with their finances from children did face smaller wealth reductions, but the researchers did not distinguish between pension or annuity income, or when an annuity might have been purchased.[409] However, given that the median age of owners when they first purchase an annuity is 51, roughly half of annuity purchases would be made after an individual's financial decision-making ability has, according to research, begun to decline.[410]

These market trends suggest that, unless the Department acts, in the coming years an increasing number of retiring Americans will pursue more complex investment options in markets where advisers are held to a lower advice standard.

Regulatory Baseline

The problems of conflicted advice and supervisory structures for advice have received increased regulatory attention, resulting in action from the Department, the SEC, individual States, and the

[396] SEC, *Annuities,* (2021), *https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.*

[397] Frank Fabozzi, *The Handbook of Financial Instruments,* 596–599 (2002).

[398] SEC, *Annuities,* (2021), *https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.*

[399] The initial contract of a fixed annuity establishes an initial credited rate, a minimum guaranteed rate, and a bailout rate. The invested premiums grow at the specified credited rate and are added to the cash value of the annuity. The credited rate may be changed by the insurance company at a specified frequency. However, the interest rate is guaranteed to be no lower than the specified minimum guaranteed rate. If the credited rate falls below the bailout rate, the investor is able to withdraw all the funds without paying a surrender charge. *See* Frank Fabozzi, *The Handbook of Financial Instruments,* 599–601 (2002).

[400] SEC, *Updated Investor Bulletin: Indexed Annuities,* (July 2020), *https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-13.* See also FINRA Rule 2330.

[401] SEC, *Annuities,* (2021), *https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.*

[402] Constantijn Panis & Kathik Padmanabhan, *Literature Review of Conflicted Advice in Annuities Markets,* Internal Report for Department of Labor (February 2023).

[403] LIMRA Secure Retirement Institute, U.S, Individual Annuity Sales Survey (2016, 4th Quarter) *https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2016/q4/annuity-estimates-fourth-quarter-2016.*

[404] LIMRA, Preliminary U.S. Individual Annuity Sales Survey (2023, 4th Quarter) *https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q4/4q-annuity-sales.pdf*

[405] World Bank, Population ages 65 and above for the United States [SPPOP65UPTOZSUSA], retrieved from FRED, Federal Reserve Bank of St. Louis; *https://fred.stlouisfed.org/series/SPPOP65UPTOZSUSA,* February 17, 2024.

[406] Vespa, Jonathan, Lauren Medina, and David M. Armstrong, ''Demographic Turning Points for the United States: Population Projections for 2020 to 2060,'' Current Population Reports, P25–1144, U.S. Census Bureau, Washington, DC, 2020.

[407] John Hilton, *Kings of the Hill: Indexed products spur life, annuity sales,* InsuranceNewsNet Magazine (July 1, 2022), *https://insurancenewsnet.com/innarticle/kings-of-the-hill.*

[408] *See* Agarwal, Sumit, John C. Driscoll, Xavier Gabaix, and David Laibson. The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation,'' Brookings Papers on Economic Activity, Fall 2009. *https://www.brookings.edu/wp-content/uploads/2016/07/2009b_bpea_agarwal.pdf.*

[409] Agrisani, Marco and Jinkook Lee. ''Cognitive Decline and Household Financial Decisions at Older Ages,'' *Journal of the Economics of Ageing* (May 2019). *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6768425/.*

[410] The Committee of Annuity Insurers, *Survey of Owners of Individual Annuity Contract.* (July 2022) *https://www.annuity-insurers.org/wp-content/uploads/2023/07/Gallup-Survey-of-Owners-of-Individual-Annuity-Contracts-2022.pdf.*

NAIC. The major actions are summarized below.

Regulatory Baseline, the Department of Labor

Many Financial Institutions undertook efforts to adapt to the Department's 2016 Final Rule. As such, the intended improvements in Retirement Investor outcomes appear to have been on track prior to the Fifth Circuit's vacatur of the 2016 Final Rule.[411] Research suggests that the Department's prior efforts produced positive changes in advice markets, even without fully taking effect, which were then reinforced by the SEC's actions. For instance, several studies found that the Department's 2016 Final Rule had a positive effect on conflicts of interest and that some categories of conflicts, such as bundled share classes of mutual funds and high-expense variable annuities, were reduced even after the 2016 Final Rule was struck down.[412] The nature of the conflicts associated with bundled share classes and high-expense variable annuities are discussed later in this document.

In 2020, the Department issued a technical amendment to the CFR to reinsert the 1975 rule and published PTE 2020–02. The exemption is available to registered investment advisers, broker-dealers, banks, and insurance companies and their individual employees, agents, and representatives that provide fiduciary investment advice to Retirement Investors. However, the exemption explicitly excluded investment advice solely generated by an interactive website, referred to as ''pure robo-advice.'' [413] Under the exemption, Financial Institutions and Investment Professionals can receive a wide variety of payments that would otherwise violate the prohibited transaction rules. The exemption's relief extends to prohibited transactions arising as a result of investment advice to roll over assets from a plan to an IRA, under certain conditions.

This exemption conditions relief on the Investment Professional and Financial Institution investment advice fiduciaries providing advice in accordance with the Impartial Conduct Standards. The Impartial Conduct Standards include a best interest standard, a reasonable compensation standard, and a requirement to make no misleading statements about investment transactions and other relevant matters. The best interest standard in the exemption is broadly aligned with the Federal securities laws. In addition, the exemption requires Financial Institutions to acknowledge in writing the institution's and their Investment Professionals' fiduciary status under Title I and the Code, as applicable, when providing investment advice to the Retirement Investor, and to describe in writing the services to be provided and the Financial Institutions' and Investment Professionals' material conflicts of interest. Financial Institutions must document the reasons for a rollover recommendation and provide that documentation to the Retirement Investor.[414] Financial Institutions are required to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and conduct a retrospective review of compliance.

In order to ensure that Financial Institutions provide reasonable oversight of Investment Professionals and adopt a culture of compliance, the exemption provides that Financial Institutions and Investment Professionals will be ineligible to rely on the exemption for 10 years if they are convicted of certain crimes arising out of their provision of investment advice to Retirement Investors. They can also become ineligible if they engage in a systematic or intentional violation of the exemption's conditions or provided materially misleading information to the Department in relation to their conduct under the exemption.

At the time PTE 2020–02 was finalized, the Department left in place other administrative exemptions that could be used to provide investment advice in place of PTE 2020–02, including the other PTEs being amended in this rulemaking. Leaving the other PTEs in place allowed for significant variation in the conditions and compliance obligations of Financial Institutions when they provide investment advice for different types of assets and financial products. Those variations create opportunities for regulatory arbitrage where investment advice providers can use more favorable rules in one market to circumvent less favorable regulations elsewhere.

Regulatory Baseline, the Securities and Exchange Commission

For investment advisers subject to the Advisers Act and broker-dealers subject to Regulation Best Interest, there is substantial overlap between SEC requirements and the obligations imposed by ERISA, the Code, and this rulemaking.

The Advisers Act, ''establishes a fiduciary duty for [investment advisers] roughly analogous to the fiduciary duties of care and loyalty established by ERISA for investment advisers to plans and plan participants.'' [415] This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own.[416] The SEC's Regulation Best Interest established a standard of conduct for broker-dealers and associated persons, requiring a broker-dealer to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities.[417]

The SEC also covers robo-advice, and robo-advisers that meet the definition of ''investment adviser'' are regulated under the Advisers Act. Regulations and guidance included the need for adequate disclosure about the robo-adviser and the services it provides, the need to ensure that the robo-adviser is

[411] *See Chamber,* 885 F.3d 360 (5th Cir. 2018).

[412] Aron Szapiro & Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors,* Morningstar, (April 2017); Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?,* 6(3) The Journal of Retirement 46–59, (2019); Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest,* Morningstar, (November 2019), *https://ccl.yale.edu/sites/default/files/files/wp_Conflicts_Of_Interest_111319%20FINAL.pdf;* Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities,* 35(12) Review of Financial Studies 5334–5386 (December 2022).

[413] ''Hybrid robo-advice,'' or advice that combines combine features of robo-advice and traditional investment advice, is included under the existing PTE 2020–02. 85 FR 82798, 82830 (Dec. 18, 2020).

[414] The PTE 2020–02 preamble says: ''This requirement extends to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (*e.g.,* from a commission-based account to a fee-based account). The requirement to document the specific reasons for these recommendations is part of the required policies and procedures, in Section II(c)(3).''

[415] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 30 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[416] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019).

[417] SEC Regulation Best Interest defines retail customer to include ERISA plan participants and beneficiaries, including IRA owners, but not ERISA fiduciaries. *See* 84 FR 33343–44 (July 12, 2019). This subject is further addressed in the Affected Entities section below. The SEC's Regulation Best Interest was adopted pursuant to the express and broad grant of rulemaking in Section 913(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

providing appropriate advice to its customers, and the need to adopt and implement appropriate compliance programs tailored to the automated nature of the robo-adviser's services.[418]

Broker-dealers under Regulation Best Interest and investment advisers under the Advisers Act must consider costs, the level of services available, and features of existing accounts. This approach is consistent with this rulemaking. Regulation Best Interest applies to recommendations by broker-dealers to rollover or transfer assets from workplace retirement plan accounts to an IRA and recommendations to take a plan distribution, which are also covered by this rulemaking. In Regulation Best Interest, the SEC instructed that, when making a rollover recommendation:

> [B]roker-dealers should consider a variety of additional factors specifically salient to IRAs and workplace retirement plans, in order to compare the retail customer's existing account to the IRA offered by the broker-dealer. These factors should generally include, among other relevant factors: Fees and expenses; level of service available; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; holdings of employer stock; and any special features of the existing account.[419]

Similarly, in its 2019 Fiduciary Interpretation, the SEC clarified that for registered investment advisers:

> An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type. Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.,* a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.,* a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages. In providing advice about account type, an adviser should consider all types of accounts offered by the adviser and acknowledge to a client when the account types the adviser offers are not in the client's best interest.[420]

Further, the SEC staff issued guidance stating that "it would be difficult to form a reasonable basis to believe that a rollover recommendation is in the retail investor's best interest and does not place your or your firm's interests ahead of the retail investor's interest, if you do not consider the alternative of leaving the retail investor's investments in their employer's plan, where that is an option." [421]

With respect to these areas of overlap, the potential costs and benefits of this rulemaking are more limited, because the SEC actions and this rulemaking share many similarities and many firms have already built compliance structures based on SEC actions, PTE 2020–02 and initial compliance before vacatur of the Department's 2016 Final Rule. Outside this area of overlap, however, current standards generally are lower, so the potential costs—and benefits—of this rulemaking are likely to be more significant.

For example, this rulemaking will apply to State-licensed insurance agents and State-registered brokers, who are not uniformly regulated by the SEC, when they provide investment advice to IRA or ERISA plan investors. It will also apply to broker-dealers who give fiduciary advice to ERISA plan fiduciaries, who are not included within Regulation Best Interest's definition of a retail customer. Recommendations regarding plan and IRA investments in real estate, certain certificates of deposit, other bank products and fixed indexed annuities that are not considered securities under the Federal securities laws are also not generally regulated by the SEC.

Regulatory Baseline, State Legislative and Regulatory Developments

The appropriate baseline for this analysis is also informed by certain recent legislative and regulatory developments involving conduct standards at the State level.

TABLE 2—STATES THAT HAVE ENACTED LEGISLATION OR FINALIZED REGULATION

State	Legislation or regulation	Title of legislation or regulation	Affected entities
Alabama	Regulation	Suitability in Annuity Transactions	Insurers, Broker-Dealers, and Independent Producers.
Alaska	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Arizona	Legislation	An Act Relating to Annuity Transactions	Insurers and Independent Producers.
	Regulation	Article 2—Transaction of Insurance	Insurers and Independent Producers.
Arkansas	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
California	Legislation	An Act Relating to Annuities and Life Insurance Policies.	Insurers and Independent Producers.
Colorado	Regulation	Colorado Securities Act: Dishonest and Unethical Conduct.	Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers.
	Regulation	Concerning Best Interest Obligations and Supervision in Annuity Transactions.	Insurers and Independent Producers.
Connecticut	Legislation	Consumers Doing Business with Financial Planners.	Financial Planners.
	Legislation	An Act Requiring Administrators of Certain Retirement Plans to Disclose Conflicts of Interest.	Administrators to Municipal 403(b) Plans.
	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Delaware	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
Florida	Legislation	Consumer Protection	Insurers and Insurance Agents.
Georgia	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Hawaii	Legislation	An Act Relating to Insurance	Insurers and Independent Producers.
Idaho	Legislation	Annuity Consumer Protections Act	Insurers and Independent Producers.
Illinois	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.

[418] U.S. Securities and Exchange Commission Division of Investment Management, *Robo Advisers,* IM Guidance Update No. 2017–02, (February 2017), *https://www.sec.gov/investment/im-guidance-2017-02.pdf.*

[419] Regulation Best Interest, 84 FR 33318, 33383 (July 12, 2019).

[420] Commission Interpretation Regarding Standard of Conduct of Investment Advisers, 84 FR 33669, 33674 (July 12, 2019).

[421] SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors,* (March 30, 2022), *https://www.sec.gov/tm/iabd-staff-bulletin.*

TABLE 2—STATES THAT HAVE ENACTED LEGISLATION OR FINALIZED REGULATION—Continued

State	Legislation or regulation	Title of legislation or regulation	Affected entities
Indiana	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Iowa	Regulation	Rulemaking Related to Best Interest Standard for Insurance Professionals.	Insurers and Independent Producers.
Kansas	Regulation	Policy and Procedure on Suitability in Annuity Transactions.	Insurers and Independent Producers.
Kentucky	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
Louisiana	Legislation	Provides Relative to Venue for Direct Actions by Third Parties Against Insurers.	Insurance Commissioner.
Maine	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Maryland	Legislation	Financial Consumer Protection Act of 2018	N/A.
	Regulation	Suitability in Annuity Transaction	Insurers and Independent Producers.
Massachusetts [422]	Regulation	Suitability in Annuity Transactions	Investment Advisers, Financial Planners, Broker-Dealers, Insurers, and Independent Producers.
	Regulation	Amendments to Fiduciary Conduct Standards	Broker-Dealers and Agents.
	Regulation	Amendments to Investment Adviser Disclosure Regulations.	Investment Advisers.
Michigan	Legislation	Amendments to An Act to Revise, Consolidate, and Classify the Law Relating to the Insurance and Surety Business.	Insurers and Independent Producers.
Minnesota	Legislation	Annuity Suitability Regulation Modification	Insurers and Independent Producers.
	Regulation	Insurance Industry Trade Practices	Insurers and Independent Producers.
Mississippi	Regulation	Annuity Transactions Model	Insurers and Independent Producers.
Montana	Legislation	An Act to Revise Insurance Laws Related to Annuities.	Insurers and Independent Producers.
	Regulation	Securities Regulation	Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers.
Nebraska	Legislation	An Act relating to the Nebraska Protections in Annuity Transactions Act.	Insurers and Independent Producers.
Nevada	Legislation	An Act Relating to Financial Planners; Imposing a Fiduciary Duty on Broker-Dealers, Sales Representatives and Investment Advisers Who for Compensation Advise Other Persons Concerning the Investment of Money.	Broker-Dealers, Sales Representatives, Investment Advisers, and Investment Adviser Representatives.
New Hampshire	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
New Mexico	Regulation	Suitability and Annuity Transactions	Insurers and Independent Producers.
New York	Regulation	Suitability and Best Interests in Life Insurance and Annuity Transactions.	Insurers and Independent Producers.
North Carolina	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
North Dakota	Legislation	An Act Relating to Annuity Transaction Practices.	Insurers and Independent Producers.
Ohio	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Oklahoma	Regulation	Standards of Ethical Practices	Investment Advisers and Investment Adviser Representatives.
	Regulation	Standards of Ethical Practices for Broker-Dealers and Their Agents.	Broker-Dealers and Agents.
Oregon	Legislation	An Act Relating to Annuities	Insurers and Independent Producers.
Pennsylvania	Legislation	An Act amending the Insurance Company Law of 1921.	Insurers and Independent Producers.
Rhode Island	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
South Carolina	Regulation	Suitability in Annuity Transactions	Independent Producers, Broker-Dealers, Agents, and Plan Fiduciaries.
South Dakota	Legislation	An Act to Revise Annuity Sales Standards	Broker-Dealers, Investment Advisers, Insurers, and Independent Producers.
Tennessee	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Texas	Legislation	Relating to Disclosures and Standards Required for Certain Annuity Transactions and Benefits Under Certain Annuity Contracts.	Insurers and Agents.
Utah	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Vermont	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Virginia	Regulation	Rules Governing Suitability in Annuity Transactions.	Insurers and Independent Producers.
Washington	Legislation	Concerning the Best Interest Standard for Annuity Transactions.	Insurers and Independent Producers.
	Regulation	Suitability Standard for Annuity Transactions	Insurers and Independent Producers.
West Virginia	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Wisconsin	Legislation	An Act Relating to Best Interest in Annuity Transactions.	Insurers, Independent Producers, Investment Advisers, and Broker-Dealers.

TABLE 2—STATES THAT HAVE ENACTED LEGISLATION OR FINALIZED REGULATION—Continued

State	Legislation or regulation	Title of legislation or regulation	Affected entities
Wyoming	Regulation	Regulation Governing Suitability in Annuity Transactions.	Insurers and Independent Producers.

Summary of State Legislative and Regulatory Developments

In a list compiled in March 2024, the Department identified 47 States that have enacted legislation, finalized regulations, or both that impose conduct standards and disclosure requirements on various Financial Institutions.[423] The table below summarizes the enacted legislation and finalized regulation in each State, as well as the type of Financial Institution each regulation pertains to. This list includes States that have adopted the NAIC Model Regulation,[424] in addition to States that have adopted conduct standards and disclosure requirements outside of the NAIC Model Regulation.

In addition, two States that have not yet enacted legislation or finalized regulations have introduced legislation or proposed regulations that would impose conduct standards and disclosure requirements on various Financial Institutions.[425]

NAIC Annuity Transactions Model Regulation

As shown in the table above, much of the legislative and regulatory action among States focuses on insurers and Independent Producers. In February 2020, the NAIC membership approved revisions to its Suitability in Annuity Transactions Model Regulation to include a ''best interest'' standard of conduct. When the Department conducted its analysis of States in July 2023, 39 States had adopted the NAIC Model Regulation.[426] Since then, additional States have adopted the NAIC Model Regulation. In March 2024, the NAIC reported that 45 States had adopted it, with the recent addition of California, Indiana, New Hampshire, Oklahoma, Utah, and Vermont.[427]

The revisions were in response to both the SEC's and the Department's work in the regulatory space and reflected some movement in the direction of greater uniformity, although significant differences remain, as partially discussed below.[428] The NAIC Model Regulation includes a best interest obligation comprised of a Care Obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.[429] If these obligations are met, the producer is treated as satisfying the best interest standard. The Care Obligation states that the producer, in making a recommendation, must exercise reasonable diligence, care and skill to:

- Know the consumer's financial situation, insurance needs and financial objectives;
- Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
- Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
- Communicate the basis or bases of the recommendation.

The NAIC Model Regulation's requirements regarding mitigation of material conflicts of interest is not as stringent as either the Department's approach under ERISA or the SEC's approach. The conflict of interest obligation under the NAIC Model Regulation requires the producer to ''identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.'' However, the NAIC Model Regulation expressly carves out all ''cash compensation or non-cash compensation'' from treatment as sources of material conflicts of interest.[430] ''Cash compensation'' that is excluded from the definition of a material conflict of interest is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer,'' and ''non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.'' [431]

This limited regulation of conflicts of interest departs substantially from both ERISA's treatment of such conflicts as giving rise to prohibited transactions

[422] The Massachusetts Supreme Judicial Court recently upheld the validity of the Commonwealth's fiduciary duty rule, holding that the Secretary of the Commonwealth had authority to promulgate it, that the Secretary's authority was not an impermissible delegation of legislative power, that the rule did not override the common-law protections available to investors, and that the rule was not preempted by the SEC's imposition of the Regulation Best Interest. Robinhood Fin. LLC v. Sec'y of Commonwealth, No. SJC–13381, 2023 WL 5490571, at *1, *6–15 (Mass. Aug. 25, 2023).

[423] States that have enacted legislation include Arizona, California, Connecticut, Florida, Hawaii, Idaho, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Washington, and Wisconsin. States that have finalized regulation include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Washington, and Wyoming.

[424] For more information on the NAIC's Suitability in Annuity Transactions Model Regulation, or NAIC Model Regulation, refer to the section entitled ''NAIC Annuity Transactions Model Regulation'' in this RIA.

[425] Missouri and New Jersey have introduced legislation and/or regulation.

[426] Based on internal Department analysis, the modified NAIC Model Regulation, including a best interest standard, was adopted by Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[427] NAIC, *Implementation of 2020 Revision to Model #275: Suitability in Annuity Transaction Model Regulations,* (March 2024), *https://content.naic.org/sites/default/files/inline-files/275%20Final%20Map_2020%20Changes_March%2011%202024.pdf*.

[428] NAIC, *Suitability in Annuity Transactions Model Regulation (#275) Best Interest Standard of Conduct Revisions Frequently Asked Questions,* (May 10, 2021), *https://content.naic.org/sites/default/files/inline-files/Final%20FAQ%20July%202021.pdf*.

[429] A producer is defined in section 5.L. of the model regulation as ''a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.'' Section 5.L. further provides that the term producer includes an insurer where no producer is involved.

[430] *Id.* at section 5.I.

[431] *Id.* at section 5.B. and J.

and from the SEC's more robust regulation of conflicts of interest. For example, recent guidance from the SEC staff on broker-dealer and investment adviser conflicts of interest makes clear that conduct standards in the securities market require a ''robust, ongoing process that is tailored to each conflict.'' [432] The SEC staff guidance provides a detailed list of types of compensation that the SEC staff believes are examples of common sources of conflicts of interest, as follows:

- compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates, including fees and other charges for the services provided to retail investors (for example, compensation based on assets gathered and/or products sold, including but not limited to receipt of assets under management (''AUM'') or engagement fees, commissions, markups, payment for order flow, cash sweep programs, or other sales charges) or payments from third parties whether or not related to sales or distribution (for example, sub-accounting or administrative services fees paid by a fund or revenue sharing);
- compensation, revenue or other benefits (financial or otherwise) to financial professionals from their firm or its affiliates (for example, compensation or other rewards associated with quotas, bonuses, sales contests, special awards; differential or variable compensation based on the product sold, accounts recommended, AUM, or services provided; incentives tied to appraisals or performance reviews; forgivable loans based upon the achievement of specified performance goals related to asset accumulation, revenue benchmarks, client transfer, or client retention);
- compensation, revenue or other benefits (financial or otherwise) (including, but not limited to, gifts, entertainment, meals, travel, and related benefits, including in connection with the financial professional's attendance at third-party sponsored trainings and conferences) to the financial professionals resulting from other business or personal relationships the financial professional may have, relationships with third parties that may relate to the financial professional's association or affiliation with the firm or with another firm (whether affiliated or unaffiliated), or other relationships within the firm; and
- compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates resulting from the firm's or its financial professionals' sales or offer of proprietary products or services, or products or services of affiliates.[433]

The NAIC expressly disclaimed that its standard creates fiduciary obligations, and specifically provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA. The obligations in the NAIC Model Regulation differ in significant respects from those in Regulation Best Interest. For example, in addition to disregarding compensation as a source of conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements, do not expressly incorporate the obligation not to put the producer's interests before the customer's interests, even though compliance with their terms is treated as meeting the ''best interest'' standard. The care obligation in the NAIC Model Regulation only requires that the adviser ''[h]ave a reasonable basis to believe the recommended option *effectively addresses the consumer's financial situation.*'' [434] This is comparable to the suitability obligation imposed on broker-dealers under the federal securities laws prior to Regulation Best Interest, which the SEC replaced with more stringent and protective standards.

Here too, the Department's rulemaking is much more closely aligned with Regulation Best Interest than to the NAIC Model Regulation. In contrast to the NAIC Model Regulation, Regulation Best Interest requires that, when making a recommendation, the broker-dealer ''exercises reasonable diligence, care, and skill to . . . [h]ave a reasonable basis to believe that the *recommendation is in the best interest of a particular retail customer,*'' [435] and the exemptions, consistent with ERISA's text, require that advice reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

In recent insurance industry litigation against the Department, the plaintiffs described the differences between ''the requirements of an ERISA fiduciary and an insurance agent operating under the NAIC model regulation [as] extensive.'' [436] Among the numerous differences they identified is the fact that ''the NAIC model regulation does not define conflicts of interest or the requirements pertaining to such conflicts as broadly as ERISA.'' [437] Additionally, they asserted that ''the NAIC model regulation does not contain a 'prudence' standard'' [438] and characterized ''these best interest requirements . . . [as] a far cry from the obligations imposed on an ERISA fiduciary.'' [439]

The NAIC Model Regulation has come under additional criticism. The Certified Financial Planner Board of Standards noted in a comment that the regulation ''allows a producer to recommend products that other insurance professionals would determine effectively address a consumer's financial situation, insurance needs and financial objectives, even if a prudent professional would not recommend the product'' and ''allows a producer to recommend an annuity from a limited menu of products, without consideration of what is generally available in the marketplace.'' [440] This assessment is consistent with comments made by New York's Insurance Superintendent Lacewell during the NAIC 2020 Proceedings where she noted that while the New York standard is the ''best interest of the consumer without consideration of the producer's financial or other interest in the matter,'' that is not the standard of the NAIC Model Regulation.[441] New York voted against adopting the Model Regulation revisions, instead adopting its own rule, Regulation 187, whose standard generally aligns with this rule.

The Department is especially concerned about the proper regulation of fixed annuities, as sales totaled an estimated $286 billion in 2023, or 74 percent of the retail annuity market, an

[432] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[433] *Id.*

[434] *Id.* at § 6(A)(1)(a)(iii) (emphasis added). Members of the insurance industry have noted that ''[t]here is a world of difference'' between the NAIC model rule and ERISA's fiduciary regime. *See* Brief of Plaintiffs at 39–40, *FACC,* No. 3:22-cv-00243–K–BN (Nov. 7, 2022), ECF No.48 (comparing ERISA's best interest requirement to the NAIC Model Regulation, Sections 2.B and 6.A.(1)(d)).

[435] 84 FR 33318, 33458, 33491 (July 12, 2019) (emphasis added).

[436] Brief of Plaintiffs, *FACC,* No. 3:22–CV–00243–K–BT (Nov. 7, 2022), ECF No. 48 at 45 n.15.

[437] *Id.* at 45–46 n.15.

[438] *Id.* at 45 n. 15.

[439] *Id.* at 45.

[440] Comment letter received from the Certified Financial Planning Board of Standards on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[441] National Association of Insurance Commissioners. *Minutes of the Executive and Plenary Meetings February 13, 2020.* NAIC Proceedings, Summer 2020, pp. 3–15 to 3–17.

increase of 36 percent from 2022, as investors responded to rising interest rates.[442] This growth in fixed annuity investments has increased the share of retirement savings residing in a less secure environment with fewer protections against conflicted advice compared to direct investors in mutual funds and securities. The Department, uniquely among the regulators, can impose uniform standards for the provision of investment advice to Retirement Investors. It is neither limited to the regulation of securities, nor to insurance products, but rather can set a uniform fiduciary standard for the regulation of conflicts of interest with respect to any advice on any investment products recommended to Retirement Investors. The Department believes that Retirement Investors and the regulated community are best served by a consistent, protective, and understandable fiduciary standard.

Summary

The recent regulatory and market developments, combined with the judicial vacatur of the 2016 Final Rule, provide for a different baseline than the pre-2016 Final Rule baseline. While some reforms and improvements in the delivery of advice have endured despite the vacatur, without new regulatory action, gains made to some products and markets that are not covered by recent regulatory actions by the Department, SEC, or States, could be derailed. Other regulatory agencies have worked to reduce conflicts of interest, but this has resulted in a ''patchwork'' approach to regulating advice arrangements of retirement investments,[443] which has already resulted in the most conflicted advisers moving to markets with the least oversight.[444]

This rulemaking, in accordance with ERISA, will extend important and effective protections broadly to Retirement Investors. Specifically, the rulemaking will replace the 1975 regulation's five-part test with a new fiduciary status test, which, consistent with ERISA's text, purpose and focus on relationships of trust and confidence, will capture more retirement investment transactions in which the investor is reasonably relying on the advice individualized to the investor's financial needs and best interest. This rulemaking will also increase the number of rollover recommendations being considered as fiduciary advice in the context of a relationship of trust and confidence between the investor and adviser, which will enhance protections to Retirement Investors, particularly in regard to recommendations regarding annuities.

4. Accounting Table and Discussion

In accordance with OMB Circular A–4, Table 3 depicts an accounting statement summarizing the Departments' assessment of the benefits, costs, and transfers associated with this regulatory action. The Department is unable to quantify all benefits, costs, and transfers of the rulemaking but has sought, where possible, to describe these non-quantified impacts. The effects in Table 3 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of the rulemaking.

The quantified costs are significantly lower than costs in the 2016 regulatory impact analysis due to the narrower scope of the rulemaking relative to the 2016 Final Rule as well as compliance structures adopted by the industry to reduce conflicted advice in response to State regulations, Regulation Best Interest, existing PTE 2020–02, and the Department's 2016 Rulemaking. The methodology for estimating the costs of the amendments to the rule and PTEs is consistent with the methodology and assumptions used in the 2020 analysis for the current PTE 2020–02.

[442] LIMRA, *U.S. Annuity Sales Post Another Record Year in 2023,* (January 24, 2024), *https://www.limra.com/en/newsroom/news-releases/2024/limra-u.s.-annuity-sales-post-another-record-year-in-2023/.*

[443] Eversheds Sutherland. ''Getting the Full Picture: The Emerging Best Interest and Fiduciary Duty Patchwork.'' (August 2020), *https://www.jdsupra.com/legalnews/the-emerging-patchwork-of-fiduciary-54761/.*

[444] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., *Regulatory Arbitrage and the Persistence of Financial Misconduct,* 74 Stanford Law Review 797 (2022).

TABLE 3—ACCOUNTING STATEMENT

Benefits:
Non-Quantified (please also see the Transfers section of this table):
- Increase uniformity in the regulation of financial advice for Retirement Investors, across different market segments and market participants to ensure that this advice adheres to a stringent professional standard of care.
- Protect consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility).
- Better align investors' portfolio with their risk preferences and savings horizons as advisers provide individualized advice based on their individual circumstances.
- Facilitate Retirement Investors' trust in advisers.

Costs:	Estimate	Year dollar	Discount rate (percent)	Period covered
Annualized Monetized ($million/Year)	$359.9	2024	7	2024–2033
	356.0	2024	3	2024–2033

Quantified Costs:
The Department expects that entities will not incur additional costs from the amendments to PTE 77–4, PTE 80–83, and PTE 83–1. However, the Department expects that entities will incur costs directly from the amendments to the following PTEs:
- The annualized cost estimates in PTE 2020–02 reflect estimated costs associated with reviewing the rulemaking, preparing written disclosures for investors, reviewing and updating policies and procedures, reviewing and updating the retrospective review, and preparing rollover documentation.
- The annualized cost estimates in PTE 84–24 reflect estimated costs associated with reviewing the rulemaking, providing disclosures to Retirement Investors, establishing written policies and procedures, conducting a retrospective review, and maintaining recordkeeping.

Transfers:
Non-Quantified:
The Benefits section provides a qualitative description of the expected gains to investors; however, the available data do not allow the Department to break down those gains into component social welfare "benefits" and "transfers." Transfers identified in this analysis include:
- Lower fees and expenses for participants paid to Financial Institutions.
- Reallocation of investment capital to different asset classes, share classes, or investment products that better meet the individual Retirement Investor's goals.
- Shifts in the assets in plans and IRAs.

Implications for Retirement Savings Estimates

While the Department is confident that the savings to Retirement Investors will exceed the costs of this rulemaking, the Department acknowledges that it has limited data to assess the magnitude of savings that would result for Retirement Investors as a result of the rulemaking.

The SEC's Regulation Best Interest extended new protections to recommendations made by broker-dealers to retail customers on securities transactions. According to the SEC, the Conflict of Interest Obligation under Regulation Best Interest is "intended to reduce the agency costs that arise when a broker-dealer and its associated persons provide a recommendation to a retail customer by addressing the effect of the associated person's or broker-dealer's conflicts of interest on the recommendation." [445] In its Economic Analysis, the SEC explored the market mechanisms by which this and other provisions would benefit retail investors. The SEC estimated that the present value of potential future mutual fund fee reductions after Regulation Best Interest would be between $14 billion to $76 billion.[446] The SEC separately estimated that the potential present value of improved future mutual fund performance net of fees (which would overlap with fee reductions) would be between $7 billion to $35 billion. The SEC noted that these estimates represented only "some of the potential benefits" and that more benefits were expected. It also noted that while its estimates focused on mutual funds, it expected that "the same or similar dynamics could apply to other financial products." [447]

The preliminary evidence that is available for the mutual fund and annuity markets following the 2016 Final Rule and SEC's Regulation Best Interest reinforces the Department's view that well-designed reforms that raise advisory conduct standards and mitigate advisory conflicts of interests will benefit Retirement Investors.[448]

The Department believes that this rulemaking, by requiring advisers to provide Retirement Investors with information about the basis of their recommendations, fees, and potential conflicts, will better align incentives to ensure advisers act in the long-term interests of investors and reduce information asymmetries between advisers and investors. In doing so, Retirement Investors' assets may be invested more efficiently and consistent with investors' savings goals, while protecting them from potential costs associated with advisory conflicts.

Many commenters expressed concern that the Department did not quantify the benefits of the proposal. The Department is unable to quantify benefits and transfers of the rulemaking across all asset classes and investor types. The Department has, however, laid out evidence supporting its claims that this rulemaking will create significant benefits that justify the associated compliance costs. In response to the proposal, some commenters provided estimates of the benefits and costs. The Department has considered these estimates, many of which are discussed later in this document and in Table 4 below. These estimates provide strong additional support for the rulemaking.

Benefits and Transfers Scenario Analysis

This rulemaking fits into a complicated system of regulatory

[445] Regulation Best Interest, 84 FR 33318, 33447 (July 12, 2019).

[446] Regulation Best Interest, 84 FR 33318, 33491 (July 12, 2019).

[447] Regulation Best Interest, 84 FR 33318, 33458 (July 12, 2019).

[448] For more information, refer to the Benefits of a Fiduciary or Best Interest Standard section.

regimes, differing by the types of investment products being sold and the type of Investment Professionals selling the products. As such, the benefits, transfers, and costs from the rulemaking will be more prominent in some markets than others. While the Department believes that a uniform standard of care across investment products and investment advice professionals will benefit Retirement Investors, the magnitude of benefits and transfers will be more significant in markets not under a fiduciary or best interest standard. More specifically, the Department expects Retirement Investors investing in annuities to see the greatest benefits or transfers. The table below summarizes the estimates quantified by the Department and by commenters which expand on and confirm the Department's views of the benefits, costs and transfers of the rulemaking. It is difficult to separate the impacts into benefits or transfers. However, the benefits and transfers are both goals of the rulemaking. These impacts include transfers from Investment Advisers to Retirement Investors in the form of reduced fees and expenses and improved asset allocations.

TABLE 4—SUMMARY OF QUANTIFIED BENEFIT OR TRANSFER ESTIMATES

Market segment	Source	Average annual benefit or transfer: first 10 years (billion)	Estimate
Plan Participants	Comment Letter from Morningstar [449].	$5.5	The rule would result in participants saving $55.0 billion in plan fees in the first 10 years, with small plan participants receiving the largest benefit, estimated as $47.3 billion in the first 10 years.
Annuities	Comment Letter from Morningstar [450].	3.3	The rule would result in Retirement Investors rolling retirement funds into fixed index annuities saving $32.5 billion in the first 10 years.
	Council of Economic Advisers [451].	7.0	CEA provided an illustration of how to try to quantify the benefits and costs of a fixed index annuity, using the fair market price of the options. Using options on the S&P 500 index for a specified day in 2023, CEA estimated that investors may be paying 1.2 percent of the assets invested for the downside risk protection in fixed index annuities.[452] If total assets invested in fixed index annuities in 2021 had paid 1.2 percent of assets for the protection of an annuity, forgone returns could be as high as $7 billion. CEA noted that that this illustration demonstrates how, under the current system, a retirement saver could end up with lower returns than they would under the rule.
	Vivek Bhattacharya, Gaston Illanes, & Manisha Padi (2024) [453].	....	Bhattacharya et al. (2024) found that a common law fiduciary duty increased risk-adjusted returns by 25 basis points in annuity investments.
	Department of Labor Illustration, based on Bhattacharya et al. (2024).	5.3	If $3.8 trillion dollars are invested in annuities, 70 percent of the market is not currently subject to a fiduciary standard, and 80 percent of the market is covered by ERISA, then the rulemaking could affect 2.1 trillion in annuity assets. If, consistent with Bhattacharya et al. (2024), this segment of the market sees an increase in average returns of 25 basis points, the expansion of fiduciary duty would lead to gains for investors (a mix of societal benefits and transfers) of $5.3 billion annually.[454]

Based on these estimates, the rulemaking could result in benefits and transfers amounting to $5.5 billion annually for plan participants and amounting to between $3.3 billion and $7.0 billion annually for Retirement Investors, due to just reduced price spreads in the fixed index annuities market, with potential additional benefits stemming from reduced spreads in other fixed annuities and reductions in surrender fees paid as investors purchase. This implies that if just looking at the benefits and transfers to plan participants and to Retirement Investors investing in fixed index annuities, the rulemaking could result in estimated benefits and transfers ranging from $8.8 billion to $12.5 billion annually.

Cost Scenario Analysis

The Department estimated that the costs associated with the proposal would be $253.2 million in the first year and $216.2 million in subsequent years. In response to comments received in the proposal, the Department has increased the cost estimates to $536.8 million in the first year and $332.7 million in

[449] NPRM #290 (Morningstar).

[450] *Id.*

[451] Council of Economic Advisers, *The Retirement Security Rule—Strengthening Protections for Americans Saving for Retirement,* (October 2023), *https://www.whitehouse.gov/cea/written-materials/2023/10/31/retirement-rule/#_ftnref1.*

[452] CEA's estimate was calculated using August 1, 2023 end-of-day prices, using the historic volatility of the S&P 500 price index on Bloomberg's options pricing calculator, with the put option's strike price at the current index price, the call option's strike price at 6.75% above the index's price on August 1, and the maturity of the option at 1 year.

[453] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (February 27, 2024), *https://www.dropbox.com/scl/fi/gj5skfflsip2nhee1662c/Draft.pdf?rlkey=msd12c734n8ddrct8uzqg0qut&dl=0.* This is an updated version of the working paper cited in the proposal. (*See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (May 20, 2020), *https://www.nber.org/papers/w25861.*

[454] This is estimated as: $3.8 trillion in assets × 70% of the assets not covered by a fiduciary standard × 80% covered by ERISA × 0.25% increase in returns = $5.3 billion.

subsequent years. The largest contributions to the change in cost estimates from the proposal to the final rulemaking are an increase in time to review the rule as well as an increase in the number of Independent Producers and transactions by Independent Producers affected by the rulemaking. The justification for the change in costs is discussed in greater detail in the cost section below.

It is worth noting that in many cases the Department likely over-estimated the number of affected entities. This includes simplifying assumptions such as:

- the inclusion of non-ERISA rollovers in its count of rollovers,
- the inclusion of insurance companies that do not sell IRA or Title I Plans,
- the inclusion of insurance companies domiciled or conducting business in New York which enforces a higher standard of care on annuity sales that is comparable to the standards set forth in this rulemaking,
- the inclusion of Independent Producers that do not sell annuity products,
- inclusion of insurance companies and captive agents under PTE 84–24 that will rely instead of PTE 2020–02,
- that all eligible entities use PTE 2020–02 or PTE 84–24 for transactions instead of other existing exemptions, and
- that all affected entities incur the costs directly, rather than utilizing a third-party that is able to perform these services at a lower rate.

As a result, the Department's total costs reported in this rulemaking are likely overstated.

Moreover, it is important to note that many of the costs incurred under this rulemaking are due to the Department formalizing best practices for those providing individualized investment recommendations to investors for whom they have a relationship of trust and confidence. The requirements to describe the services provided, explain fees and disclose any conflicts as well as document the basis for an investment recommendation simply ensures that advisers are providing all necessary information that investors should have access and are entitled to. Similarly, conducting an annual review to identify potential violations and ensure that an entity is in compliance with the guiding laws and regulations should be standard practice. Given similar disclosures and reviews are already required by other financial regulators, the Department expects that many of the affected entities are already performing these actions for at least some part of their current business, and so extending the same or similar requirements to their remaining clients in practice will be less costly than the Department's estimate.

In its comment letter, the Financial Services Institute cited findings from a survey conducted by the Oxford Economics. This survey interviewed members of the Financial Services Institute and was commissioned by the Financial Services Institute. The survey estimated that the costs of the proposal imposed on broker-dealers would be approximately $2.8 billion in the first year and $2.5 billion in subsequent years, 11 and 12 times the Department's estimate in the proposal, respectively. They noted that their estimates include costs to upgrade software systems and incremental time of staff and broker-dealers.[455] The Department has revised this rulemaking, however, to make PTE 2020–02 largely consistent with the requirements of Regulation Best Interest, even more so in this final rulemaking than in the proposal. As most broker-dealers surveyed for these estimates would already be subject to Regulation Best Interest, the Department questions the magnitude of additional burden on broker-dealers for complying with the closely aligned requirements of Regulation Best Interest.

In its comment letter, the ICI stated that the Department had underestimated cost. They provided a sensitivity analysis on the first-year cost estimates for PTE 2020–02, estimating that the costs would exceed $2.9 billion. This is 12.1 times higher than the first-year cost estimates in the proposal. Notably, 98 percent of the difference between the proposal and ICI estimates is associated with costs to review the rule. Excluding this difference, the ICI estimates for disclosure, retrospective review, and policy and procedure costs are only 1.2 times higher than the estimates in the proposal.[456]

As discussed above, the Department questions the validity of some assumptions made by the commenters. However, both commenters noted that the Department's estimates in the proposal were off by a factor of 12. For illustrative purposes, if a multiplier of 12 were applied to the Department's estimate in the proposal, the rulemaking would result in an annualized cost of $2.7 billion. The Department has revised its estimates since the proposal to reflect feedback from commenters, resulting in a total cost estimate that is more than double its proposal cost estimate. This estimate is still significantly below the estimates provided from these commenters.

The table below summarizes the Department estimates calculated by the Department and by commenters.

TABLE 5—SUMMARY OF QUANTIFIED COST ESTIMATES

Focus	Source	First-year	Subsequent years	Annualized, 7% discount rate [457]
Total	Department of Labor: Final	$536.8 million	$332.7 million	$359.9 million.
	Department of Labor: NPRM	$253.2 million	$216.2 million	$316.7 million.
	Adjusted NPRM Estimate: Multiplied by 12	$3.0 billion	$2.6 billion	$2.7 billion.
Total: Broker-Dealers	Department of Labor: Final	$37.5 million	$28.9 million	$21.2million.
	Comment Letter from Financial Services Institute [458].	$2.8 billion	$2.5 billion	$2.5 billion.
PTE 2020–02	Department of Labor: Final	$248.1 million	$165.5 million	$176.5 million.
	Department of Labor: NPRM	$231.5 million	$197.3 million	$201.9 million.
	Comment Letter from Investment Company Institute [459].	$2.9 billion	N/A	N/A.
PTE 84–24	Department of Labor: Final	$288.7 million	$167.2 million	$183.4 million.

[455] NPRM #342 (Financial Services Institute).

[456] NPRM #395 (Investment Company Institute).

[457] The annualized benefits, costs, and transfers spread the effects equally over each period, taking account of the discount rate. The annualized value equals the present value divided by the sum of discount factors.

[458] Comment letter received from the Financial Services Institute on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[459] Comment letter received from the Investment Company Institute on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

TABLE 5—SUMMARY OF QUANTIFIED COST ESTIMATES—Continued

Focus	Source	First-year	Subsequent years	Annualized, 7% discount rate [457]
Mass Amendments [1]	Department of Labor: NPRM	$18.1 million	$15.3 million	$15.7 million.
	Department of Labor: Final	$0	$0	$0.
	Department of Labor: NPRM	$3.6 million	$3.6 million	$3.6 million.

[1] As finalized, the amendments to the Mass Amendment do not impose an additional burden on entities continuing to rely on those exemptions. However, the amendments will require entities to rely on PTE 84–24 and PTE 2020–02 for exemptive relief covering transactions involving the provision of fiduciary investment advice. These costs are accounted for in the cost estimates for PTE 84–24 and PTE 2020–02.

Summary

Due to data limitations, a changing regulatory environment, and the scope of the entities affected by the rulemaking, the Department is unable to calculate a comprehensive estimate for the benefits and transfers across all asset classes and account types. However, the estimates discussed above attempt to make clear the estimated benefits and transfers (particularly those from Investment Advisers to Retirement Investors in the form of reduced fees and expenses and improved asset allocation), and the total expected costs are discussed below.

5. Affected Entities

The table below summarizes the estimated number of entities that will be affected by the amendments to the Rule and each of the PTEs. These estimates are discussed in greater detail below.

TABLE 6—AFFECTED FINANCIAL ENTITIES

	Prohibited transaction exemptions					
	2020–02	75–1	77–4	80–83	86–128	84–24
Retirement Plans	765,124	765,124	277,390	6,312	1,000	1,722
Individual Retirement Account owners	67,781,000				210	500,000
Broker-Dealers	1,920	1,920				
Discretionary Fiduciaries					251	
Registered Investment Advisers	16,398					
Pure Robo-Advisers	200					
Insurance Companies	84					358
Captive Insurance Agents and Brokers	1,577					1,577
Insurance Producers						86,410
Banks		2,025		25		
Mutual Fund Companies			812			
Non-Bank Trustees	31					
Investment Company Principal Underwriters	([1])					20
Pension Consultants	([1])					1,011

[1] Pension consultants and investment company principal underwriters who were relying on PTE 84–24 for investment advice will no longer be able to rely on the exemption as amended for receipt of compensation as a result of providing investment advice. However, these pension consultants and investment company principal underwriters can rely on PTE 2020–02 when they are part of a Financial Institution, such as a registered investment adviser, broker-dealer, insurance company, or bank, which are already accounted for.

In the preamble to the proposed rulemaking, the Department requested input from commenters on its estimates of the entities affected by the proposed amendments. The Department asked commenters for information on how many entities currently rely on each of the exemptions, how many entities currently rely on each of the exemptions for investment advice, and how many entities would continue to rely on each of the exemptions, as amended. The Department also asked for information on how retirement plans, IRAs, and Retirement Investors at large would be affected by the proposed amendments. The Department has considered the comments received and revised its estimates where appropriate. These considerations are discussed more fully below.

Plans and Participants

The amendments to the rule and related PTEs will affect plans that receive investment advice from a Financial Institution. Participants may be affected by advice they receive directly and by advice that is received by their plan's administrators and fiduciaries. As of 2021, there were approximately 765,000 private sector retirement plans with 146 million participants and $13.2 trillion in assets that will be affected by these amendments. Approximately 46,000 of these plans are defined benefit plans, covering 31 million participants and $3.7 trillion in assets, and approximately 719,000 are defined contribution plans with 115 million participants and $9.5 trillion in assets.[460] The Department recognizes that some plans, such as simplified employee pension (SEP) plans and Savings Incentive Match Plan for Employees IRA (SIMPLE IRA) plans, are exempt from filing and are not included in these estimates but will typically be affected by the amendments.

The Department expects that participants, in general, will benefit from the stronger, uniform standards imposed by the amendments to the rule and PTEs. Participants who receive

[460] Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2023; forthcoming), Table A1. Table A1 reports that there were 765,124 pension plans, consisting of 46,388 defined benefit plans and 718,736 defined contribution plans. Due to a rounding discrepancy, the sum of defined benefit and defined contribution plans does not equal the aggregate of the plans. Additionally, some individuals participate in two or more plans, so the number of individuals covered is lower than the number of gross participants.

investment advice will be directly affected by the amendments, particularly participants receiving one-time advice as to whether they should roll over their retirement savings. These participants are discussed in the section on IRA owners, below.

Similarly, plans receiving fiduciary investment advice will also be directly affected by the amendments.

In the proposal, the Department requested comment on how plans would be affected. Some commenters stated that the amendment would create a significant burden on advice providers because more transactions would be fiduciary investment advice and Financial Institutions would need to satisfy an exemption. Other commenters remarked that plan and plan participants, particularly in small plans, would benefit significantly from the proposal because the advice would be held to a fiduciary standard. As discussed elsewhere, the Department has revised its estimate of compliance burden for Financial Institutions providing fiduciary investment advice accordingly. Additionally, the Department has included a discussion of the benefits plans and plan participants may experience as a result of the rulemaking.

Several commenters remarked that the proposal was unclear on whether education and ''hire me'' conversations would be considered fiduciary advice. Many of these commenters noted that this would disincentivize such communications with plans which could result in significant costs. The Department has clarified in the preamble for the final rule that such conversations would not constitute advice, absent a recommendation.

Some commenters expressed concern that by not providing a specific carve-out from fiduciary status for advice to sophisticated advice recipients, plans would have access to fewer investment opportunities. For example, one commenter suggested plans would have fewer investment opportunities in private equity and that this would decrease investment returns and diversification in plans. As discussed in greater detail in the preamble, the Department has decided not to exclude plan sponsor fiduciaries from the protections of the final rule when they receive advice from trusted advisers, with the view that it is preferable to retain a facts and circumstances test for recommendations to plan sponsor fiduciaries absent an acknowledgment of fiduciary status with respect to the recommendation. However, the Department made a number of changes and clarifications in the final rule, including a new paragraph (c)(1)(iii) that confirms how sales recommendations can occur without fiduciary status attaching.

In addition to PTE 2020–02, the Department is amending several other Prohibited Transactions Exemptions. PTE 84–24 is being amended to provide relief for compensation received for investment advice only for independent insurance producers that recommend annuities from multiple unaffiliated insurance companies to Retirement Investors, subject to conditions similar to those in PTE 2020–02. Additionally, PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 are being amended to eliminate relief for the receipt of compensation resulting from fiduciary investment advice, as defined under ERISA. As amended, PTE 86–128, PTE 84–24, PTE 77–4, and PTE 80–83 will directly affect subsets of plans, described below.

The amendments to PTE 86–128 will limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan. Using 2021 Form 5500 data, the Department estimates that 1,257 unique plans hired service providers that indicated on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 plans also reported that the discretionary trustee provided investment management services or received investment management fees paid directly or indirectly by the plan.[461] Based on the range of values (801 and 1,257), the Department assumes on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate.

The Department requested comment on how many plans have discretionary fiduciaries with full discretionary control and how many would continue to rely on PTE 86–128 under the proposed amendments and did not receive any which directly discussed plan reliance on PTE 86–128.

The Department estimates that of the 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.[462] Based on these assumptions, the Department estimates that 75 plans will be affected by the amendments to PTE 86–128.[463]

For PTE 84–24, the Department estimates that 7.5 percent of plans are new accounts or new financial advice relationships[464] and that 3 percent of plans will use the exemption for covered transactions.[465] Based on these assumptions, the Department estimates that 1,722 plans will be affected by the amendments to PTE 84–24.[466]

In response to its request for comment in the proposal, the Department received one comment noting that Financial Institutions have relied on PTE 77–4 for both investment advice and discretionary programs. This commenter did not indicate the proportion of these Financial Institutions that would continue to use PTE 77–4 as a result of the proposed amendments.

To estimate the number of plans affected by the amendments to PTE 77–4, the Department estimated the number of plans relying on a mutual fund company. The Department does not have data on what percentage of plans receive fiduciary advice through mutual fund companies. A 2013 Deloitte/ICI survey found that 37 percent of 401(k) plans have a mutual fund company as their service provider.[467] Based upon ICI analyses and Form 5500 data that examines the percentage of plans that are invested in registered investment companies, the Department estimates that 24.7 percent of defined benefit plans have mutual fund companies as money managers.[468] Applying these percentages to the universe of pension plans that filed a Form 5500 in 2021 yields a total of approximately 277,390

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[461] Estimates based on 2021 Form 5500 data.

[462] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[463] The number of new plans is estimated as: 1,000 plans × 7.5 percent of plans are new = 75 new plans. The number of new IRAs is estimated as: 10,000 IRAs × 2.1 percent of IRAs are new = 210 new IRAs.

[464] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[465] In 2020, 7 percent of traditional IRAs were held by insurance companies. *See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020,* 27(1) ICI Research Perspective (2021), *https://www.ici.org/system/files/attachments/pdf/per27-01.pdf.* This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

[466] 765,124 plans × 7.5 percent of plans are new × 3 percent of plans with relationships with insurance agents or pension consultants = 1,722 plans.

[467] The Department uses this estimate as a proxy for the percent of defined contribution plans that have service provider relationships with mutual fund companies. *See* Deloitte & Investment Company Institute, *Defined Contribution/401(k) Fee Study,* (August 2014).

[468] Based on Form 5500 Data 2000–2010, defined benefit plans are approximately 33 percent less likely than defined contribution plans to be invested in a registered investment company. *See* Sarah Holden, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses,* Investment Company Institute (September 2010).

plans with service provider relationships with mutual fund companies.[469] Thus, the Department estimates that 277,390 plans will be affected by the amendments to PTE 77–4. The Department acknowledges that this estimate likely overestimates the number of plans affected by the amendments.

The Department estimates that 6,312 plans are affected by PTE 80–83 based on the number of new plans relying on a broker-dealer.[470]

IRA Owners

In addition to the specific requests for comment discussed below, the Department requested comments on how IRAs and rollovers are likely to be affected by the amendments. The Department also welcomed comment on the number of IRAs and rollovers that might be affected by the rulemaking. Several commenters provided data, surveys, or studies on the IRA and rollover markets. The Department has considered this information and adjusted its estimates as appropriate. Some commenters stated that increased costs resulting from the rollover documentation imposed by the rulemaking would decrease the number of rollovers. In response to these concerns, the Department is narrowing the required rollover disclosure to only apply to rollovers from Title I Plans to IRAs. One commenter cautioned that the rulemaking's definition of an IRA would include health savings accounts (HSAs) and expressed concern about this inclusion. The Department has decided to include HSA owners in the definition of Retirement Investor. The data sources used below to estimate the number of IRA owners already include HSA owners.

According to Cerulli Associates, there were 67.8 million IRA owners holding $11.5 trillion in assets in 2022.[471] The amendments to the rule and PTE 2020–02 will affect Retirement Investors who roll over money from a plan into an IRA. A 2020 survey found that 46 percent of recent retirees who had at least $30,000 in retirement savings had rolled at least some of their savings into an IRA.[472]

In 2022, almost 4.5 million defined contribution plan accounts with $779 billion in assets were rolled over into an IRA. Additionally, 0.7 million defined contribution plan accounts with $66 billion in assets were rolled over to other employment-based plans.[473] The Department used IRS data from 2020 to estimate overall rollovers into IRAs and arrived at estimates of 5.7 million taxpayers and $618 billion.[474] Adding in the figures for plan-to-plan rollovers, the Department estimates the total number of rollovers at 6.4 million accounts with $684 billion in assets.[475]

As amended, PTE 2020–02 requires rollover disclosure only for rollovers from a Title I Plan and recommendation to a participant or beneficiary as to the post-rollover investment of assets currently held in a Title I Plan. According to Cerulli Associates, in 2022, financial advisers intermediated 49 percent of defined contribution rollovers.[476] The Department estimates that 2.2 million rollovers and $535 billion in assets will be affected by the rollover disclosure in the amendments to PTE 2020–02.[477] These figures are overestimates because they include some rollovers from non-ERISA plans and because they are based on the assumption that all of the advisers intermediating rollovers are ERISA fiduciaries.

As amended, PTE 86–128 and PTE 84–24 will each affect subsets of the number of IRAs discussed above. The Department's estimates of the IRAs that will be affected by the amendments to PTE 86–128 and PTE 84–24 are discussed below.

PTE 84–24, as amended, only requires rollover disclosure for recommendations to rollover from a Title I Plan. The Department requested, but did not receive, comments on the assumptions used in the proposal regarding annuity contracts affected by the rulemaking. However, in conjunction with updating its estimate of the number of independent agents the Department has revised its estimate of annual annuity transactions affected by the amendments to PTE 84–24, increasing the estimate from 52,449 to 500,000.

While there are several sources of information regarding total sales or size of the annuity market that are generally consistent, the same is not true for transaction activity, which can vary dramatically across quarters and between sources. To improve its estimate of annual annuity transactions affected by the amendments to PTE 84–24, the Department tried two approaches which both relied on LIMRA total fixed annuity sales data. LIMRA data from 2023 indicates that 34 percent of fixed annuity sales were fixed-indexed annuities.[478] Assuming sales are proportionate to transactions and using data from the Retirement Income Journal which reported roughly 109,863 fixed-indexed annuity products were sold in the fourth quarter of

[469] Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2023; forthcoming), Table A1. There are 765,124 pension plans, of which 718,736 are defined contribution plans and 46,388 are defined benefit plans. The number of plans with service provider relationships with mutual fund companies is estimated as: 718,736 defined contribution plans × 37% = 265,932; 46,388 defined benefit plans × 24.7% = 11,458.

[470] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings. Additionally, the Department estimates that 12 percent of plans have a relationship with a broker-dealer. This is a weighted average of the Department's estimates of the share of defined benefit plans and defined contribution plans with broker-dealer relationships. The Department assumes that approximately 20 percent of defined benefit plans have relationships with broker-dealers. As a proxy for the share of defined contribution plans with broker-dealer relationships, the Department uses the sum of the percent of load mutual funds in 401(k) plans (6 percent) and the percent of 401(k) stock mutual fund assets paying 12b–1 fees between >.0 to 0.25 (5 percent). Both data are published by the 2021 Investment Company e Institute report. (See *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2021,* Investment Company Institute, June 2022. *https://www.ici.org/system/files/2022-06/per28-06.pdf*). The number of plans is estimated as: 765,124 plans × 7.5 percent of plans are new × 11 percent of plans with broker-dealer relationships = 6,312 new plans.

[471] Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibits 5.03 and 5.12. The Cerulli Report.

[472] Pew Charitable Trusts. ''Pew Survey Explores Consumer Trend to Roll Over workplace Savings Into IRA Plans.'' Issue Brief. (October 2021), *https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/pew-survey-explores-consumer-trend-to-roll-over-workplace-savings-into-ira-plans.*

[473] According to Cerulli, in 2022, there were 4,485,059 defined contribution plan-to-IRA rollovers and 707,104 plan-to-plan rollovers. The Department was unable to find any data on the number of IRA to IRA or defined benefit to IRA rollovers. *See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.04. The Cerulli Report.

[474] Internal Revenue Service, *SOI Tax Stats—Accumulation and Distribution of Individual Retirement Arrangement (IRA),* Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

[475] Estimates for the number of IRAs may include some non-retirement accounts such as HSAs, Archer medical savings accounts, and Coverdell education savings accounts. See the discussion on Code section 4975 in the Background section of the preamble for more details. The final rulemaking has clarified that HSAs are covered by the amendments; however, other non-retirement accounts may not be.

[476] Rollovers from defined contribution plans are 49% adviser-mediated rollovers into IRAs, 37% self-directed rollovers into IRAs, and 14% plan-to-plan rollovers. *See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.04. The Cerulli Report.

[477] In 2022, 4,485,059 defined contribution plan accounts were rolled over into IRAs. The rollovers were mediated by a financial adviser and destined for an IRA in 49% of cases. (4,485,059 × 49%) = 2,17,679. Additionally, in 2022, $535 billion assets were advisor intermediated. *See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.04. The Cerulli Report.

[478] LIMRA, Preliminary U.S. Individual Annuity Sales Survey, Fourth Quarter 2023, (2023), *https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q4/4q-annuity-sales.pdf.*

2021,[479] annualizing this number to 439,452 the Department estimates that roughly 838,000 other fixed-rate annuity products were sold over the same period, for a total of 1.3 million fixed annuity transactions in 2021 using this approach.

The Department considered an alternative approach which estimated the number of annual transactions by dividing the total sales data from LIMRA described above by the average contract size as reported by the Retirement Income Journal, which is $147,860. Using the same proportional methodology described above, this approach yields an estimate of roughly 1.9 million transactions.

Using the average of these estimates, the Department then applied the following assumptions to arrive at its final estimate. Using McKinsey data on annuity distribution channels, the Department assumes that third-party distribution channels account for 81 percent of the annuity sales volume.[480] The Department further assumes that 80 percent of these annuities are held in ERISA-covered accounts or purchased with ERISA plan assets[481] and that 49 percent of transactions will rely on investment advice.[482] This results in an estimate of roughly 500,000 ERISA-covered fixed annuity transactions involving an Independent Producer providing advice to an investor.[483]

The amendments to PTE 86–128 will limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan, without providing investment advice. The Department lacks reliable data on the number of managed IRAs that will experience such a transaction in a given year. For the purpose of this analysis, the Department assumes that there are 10,000 managed IRAs. To err on the side of caution, the Department assumes that all managed IRAs will have a relationship with a discretionary fiduciary. As discussed above for PTE 84–24, the Department assumes 2.1 percent of IRA accounts are new each year. This results in an estimate of 210 managed IRAs that are new accounts or new financial advice relationships.[484] In the proposal, the Department requested comment on the assumption of managed IRA accounts but did not receive any comment directly addressing this estimate.

These estimates likely overestimate the number of IRA owners that will be affected by the amendments, since IRA owners will only be affected by the amendments to the rule and PTEs when they have a relationship with certain financial entities and are conducting certain financial transactions, as defined by the revised fiduciary definition and the conditions for exemptive relief of each PTE.

Summary of Affected Financial Entities

In the proposal, the Department received several comments regarding its estimate of the number of financial entities that would be affected. Commenters expressed concern about the Department's assumption that all eligible entities already rely on PTE 2020–02, as some entities did not consider their conduct to trigger fiduciary status. This commenter noted that under the amended definition of a fiduciary, these entities would consider themselves fiduciaries for the first time and incur significant costs, accordingly. In response to this comment, the Department has revised its estimate to assume that 30 percent of broker-dealers, registered investment advisers, and insurance companies were not previously complying with PTE 2020–02 and will incur the full cost under this rulemaking.

This rulemaking expands the definition of a fiduciary such that an advice provider will be a fiduciary if they make a covered investment recommendation to a Retirement Investor for a fee or compensation and either (1) or (2) is satisfied: (1) the person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the Retirement Investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the Retirement Investor's particular needs or individual circumstances, and may be relied upon by the Retirement Investor as intended to advance the Retirement Investor's best interest, or (2) the person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, with respect to the recommendation.

Registered Investment Advisers

Registered investment advisers providing investment advice to retirement plans or Retirement Investors and registered investment advisers acting as pension consultants will be directly affected by the amendments to PTE 2020–02. Generally, investment advisers must register with either the SEC or with State securities authorities, as appropriate.[485]

Investment advisers registered with the SEC are generally larger than State-registered investment advisers, both in staff and in regulatory assets under management.[486] For example, according

[479] Pechter, K., Moore, S., Fixed Indexed Annuities: What's Changed (or Not) in Ten Years, (June, 2022), *https://retirementincomejournal.com/article/fixed-indexed-annuities-a-retrospective/.*

[480] McKinsey & Company, Redefining the future of life insurance and annuities distribution, (January, 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*

[481] The Department recognized that not all annuities sold are covered by this rulemaking, however data is not available to estimate what portion are covered with any sense of precision. Examples of non-covered transactions include use of non-retirement account funds to purchase an annuity and noncovered public sector plans being rolled into an annuity. The Department views 80% as a reasonable assumption as it includes most transactions while acknowledging that not all transactions are covered under this rulemaking. As a point of reference, each percentage point this assumption is changed results in a 1.25 percentage point change in the resulting estimate of ERISA-covered transactions involving an Independent Producer providing advice to an investor.

[482] U.S. Retirement-End Investor 2023: Personalizing the 401(k) Investor Experience Fostering Comprehensive Relationships.'' The Cerulli Report, Exhibit 6.04.

[483] The final estimate is the rounded average of the two approaches described above. The calculations are as follows:

[{[(109,863 fixed-indexed contracts written × 4 quarters) ÷ 34% as the percentage of fixed-indexed to all fixed-rate contracts] × 81% sold by Independent Producers × 49% sold using investment advice × 80% ERISA-covered transactions} + {[(148,860 avg. contract size ÷ 95.6 billion in annual fixed-indexed sales) ÷ 34% as the percentage of fixed-indexed to all fixed-rate contracts] × 81% sold by Independent Producers × 49% sold using investment advice × 80% ERISA-covered transactions} ÷ 2] ≈ 501,013, rounded to 500,000.

[484] (10,000 managed IRAs × 2.1 percent of IRAs are new) ≈ 210 IRAs.

[485] Generally, a person that meets the definition of ''investment adviser'' under the Advisers Act (and is not eligible to rely on an enumerated exclusion) must register with the SEC, unless they are prohibited from registering under Section 203A of the Advisers Act or qualify for an exemption from the Advisers Act's registration requirement. An adviser precluded from registering with the SEC may be required to register with one or more state securities authorities.

[486] After the Dodd-Frank Wall Street Reform and Consumer Protection Act, an investment adviser with $110 million or more in regulatory assets under management generally registers with the SEC, while an investment adviser with less than $110 million registers with the State in which it has its principal office, subject to certain exceptions. For more details about the registration of investment advisers, *see* SEC, *General Information on the Regulation of Investment Advisers,* (March 11, 2011), *https://www.sec.gov/investment/divisionsinvestmentiaregulationmemoiahtm;* North

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to one report, 64 percent of State-registered investment advisers manage assets under $30 million while investment advisers must register with the SEC if they manage assets of $110 million or more.[487] In addition, according to one survey of SEC-registered investment advisers, about 47 percent of SEC-registered investment advisers reported 11 to 50 employees.[488] In contrast, an examination of State-registered investment advisers reveals about 80 percent reported less than two employees.[489]

As of December 2022, there were 15,289 SEC-registered investment advisers, of which 9,627 provided advice to retail investors while 5,662 provided advice only to non-retail investors. Of the 15,289 SEC-registered investment advisers, 317 were dual-registered as broker-dealers.[490] To avoid double counting when estimating compliance costs, the Department counted dually registered firms as broker-dealers and excluded them from the count of registered investment advisers.[491] Therefore, the Department estimates there to be 14,972 SEC-registered investment advisers.

Additionally, as of December 2022, there were 15,478 State-registered investment advisers, of which 139 are dually registered as a broker-dealer and 133 are also registered with the SEC.[492] To avoid double counting, the Department counted dually registered firms as broker-dealers and excluded them from the count of State-registered investment advisers. Similarly, the Department counted investment advisers registered with the SEC and a State as SEC-registered investment advisers. Accordingly, for the purposes of this analysis, the Department considers 15,206 State-registered investment advisers.

In 2023, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[493] Based on this statistic, the Department estimates there to be approximately 16,598 registered investment advisers.[494]

As discussed in the Baseline section, PTE 2020–02 historically excluded investment advisers providing pure robo-advice. The amendments will include these entities, however, pure robo-advisers will have a different baseline from registered investment advisers currently under PTE 2020–02. As discussed below, the Department estimates that there are 200 pure robo-advisers.[495] Accordingly, the Department estimates that 16,398 registered investment advisers who do not provide pure robo-advice are currently eligible for relief under PTE 2020–02.[496]

The Department does not have data on how many of these firms provide advice only to Retirement Investors that are plan participants, plan beneficiaries, or IRA owners, rather than the workplace retirement plans themselves. These firms are fiduciaries under the Advisers Act and already operate under standards broadly similar to those required by PTE 2020–02.[497]

Robo-Advisers

The changes to PTE 2020–02 make investment advice providers providing pure robo-advice eligible for relief under the exemption. In the proposal, the Department requested comment on how the number of robo-advisers in the market has evolved in recent years. The Department specifically inquired about what proportion of robo-advisers provide pure versus hybrid robo-advice, what proportion of pure robo-advisers are likely to rely on the amended PTE 2020–02, and whether robo-advisers operate as registered investment advisers or broker-dealers. Several commenters noted that they supported the inclusion of robo-advice in PTE 2020–02.

Robo-advisers offer varying services and different degrees of hands-on assistance.[498] The most basic models use computer algorithms to offer investments deemed appropriate in terms of asset allocation and diversification based on the information supplied by the client upon opening an account. These investments typically include low-cost mutual funds and exchange traded funds (ETFs), and automatically invest and rebalance funds based on a specified objective or risk tolerance. Most robo-advisers offer advice concerning taxable accounts and IRA accounts. The nature of robo-advice appeals to different investors than traditional investment advice does. While traditional advisers often target older investors with high net worth, robo-advice providers or other low-cost investment firms tend to attract young, technology-savvy investors with low balances.[499]

Robo-advisers were initially expected to revolutionize investment advice, as robo-advisers saw steep growth initially.[500] The expectation of continued rapid growth has been tempered as players in the space have struggled to find the appropriate role for robo-advice. A 2023 study by Morningstar evaluated 18 providers of robo-advice. The findings suggest that pure robo-advisers have had challenges in reaching a profitable scale. [501] In turn, many of these pure robo-advisers have been acquired by larger investment advice firms, including banks, broker-dealers, technology firms, and asset managers, adopting hybrid robo-advice systems.[502] Hybrid robo-advisers can

American Securities Administrators Association, *A Brief Overview: The Investment Adviser Industry,* (2019), *www.nasaa.org/industry-resources/investment-advisers/investment-adviser-guide/.*

[487] North American Securities Administrators Association, *2018 Investment Adviser Section Annual Report,* (May 2018), *www.nasaa.org/wp-content/uploads/2018/05/2018–NASAA–IA-Report-Online.pdf.*

[488] Investment Adviser Association, *2019 Investment Management Compliance Testing Survey,* (June 18, 2019), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/190618_IMCTS_slides_after_webcast_edits.pdf.*

[489] North American Securities Administrators Association, *NASAA 2019 Investment Adviser Section Annual Report,* (May 2019), *www.nasaa.org/wp-content/uploads/2019/06/2019–IA-Section-Report.pdf.*

[490] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[491] The Department applied this exclusion rule across all types of investment advisers, regardless of registration (SEC-registered versus State only) and retail status (retail versus nonretail).

[492] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[493] Cerulli Associates, *U.S. RIA Marketplace 2023: Resiliency in the Pursuit of Scale,* Exhibit 5.10. The Cerulli Report.

[494] The number of registered investment advisers is estimated as: [(14,972 SEC-registered investment advisers + 15,206 State-registered investment advisers) × 55%] = 16,598 registered investment advisers.

[495] For more information on this estimate, refer to the Robo-Advisers discussion in the Affected Entities section.

[496] As discussed below, the Department estimates that there are 200 pure robo-advisers. Accordingly, the Department estimates that 16,398 registered investment advisers would be affected by the amendments and are not pure robo-advisers. The number of registered investment advisers is estimated as: [(14,972 SEC-registered investment advisers + 15,206 State-registered investment advisers) × 55%] − 200 robo-advisers = 16,398 registered investment advisers.

[497] Investment Adviser Association, *SEC Standards of Conduct Rulemaking: What It Means for RIAs,* IAA Legal Staff Analysis (July 2019), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/resources/IAA-Staff-Analysis-Standards-of-Conduct-Rulemaking2.pdf.*

[498] SEC, *Investor Bulletin: Robo-Advisers,* (February 23, 2017), *https://www.sec.gov/oiea/investor-alerts-bulletins/ib_robo-advisers.*

[499] Jonathan W. Lam, *Robo-Advisors: A Portfolio Management Perspective,* (April 2016). *https://economics.yale.edu/sites/default/files/2023-01/Jonathan_Lam_Senior%20Essay%20Revised.pdf.*

[500] Deloitte. "The Expansion of Robo-Advisory in Wealth Management." (2016).

[501] Morningstar, *2023 Robo-Advisor Landscape: Our Take on the Digital Advice Industry and the Best Options for Individual Investors,* (June 2023), *https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/Robo-Advisor_Landscape_2023-Vanguard.pdf.*

[502] Morningstar, *2023 Robo-Advisor Landscape: Our Take on the Digital Advice Industry and the*

charge lower fees by automating some of the services offered, while still offering access to a human adviser if desired.[503] Among firms that have acquired robo-advice firms, integration has been a continuing challenge.[504] A 2023 article remarked that some of the challenges faced by firms offering robo-advice face include competing with traditional investment advisers on value-added services and cost efficiency and finding the correct customer base. Some firms have pulled back their robo-advice offerings in recent years.[505]

Investor preference may also be playing a role. For instance, one survey found that only 45 percent of investors were comfortable using online only advice services.[506] Since 2016, the Plan Sponsor Council of America has asked plans whether they provide a robo-adviser to participants. In 2016, 10.1 percent of all plans offered robo-advice, while 14.0 percent were considering it.[507] By 2020, 12.8 percent of plans offered robo-advice with 8.3 percent considering it, and by 2022,[508] 15.8 percent of plans offered robo-advice with 7.9 percent considering.[509] The Department does not have access to data on how many plan participants rely on the robo-advice offered in their plan. However, this gradual increase in the number of plans offering robo-advice may signal that plans see robo-advice as a valuable tool for its participants.

The Department acknowledges that robo-advice has limitations and that investors with complex situations or questions about financial planning beyond investing may be better served by a traditional investment adviser. The Department further acknowledges that the robo-advice market is evolving quickly. Nevertheless, the Department believes that service offered by robo-advisers can play a significant role in increasing access to investment advice and improving retirement security.

According to one source, there were 200 robo-advisers in the United States in 2017.[510] For the purposes of this analysis, the Department estimates that there are 200 pure robo-advisers that will be subject to the amended PTE 2020–02 that are not subject to the current PTE 2020–02.

Broker-Dealers

The amendments will modify PTE 75–1 Parts III and IV such that broker-dealers will no longer be able to rely on the exemption for investment advice. The Department does not have information about how many of these firms provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners.

Under amended PTE 75–1 Part V, broker-dealers will be able to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Any broker-dealers seeking relief for investment advice, however, will be required to rely on the amended PTE 2020–02.

According to Financial and Operational Combined Uniform Single (FOCUS) filing data, there were 3,490 registered broker-dealers as of December 2022. Of those, approximately 69 percent, or 2,399 broker-dealers, reported retail customer activities, while approximately 31 percent, or 1,091 broker-dealers, were estimated to have no retail customers.[511]

Not all broker-dealers perform services for employee benefit plans. In 2023, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[512] Assuming the percentage of broker-dealers providing advice to retirement plans is the same as the percent of registered investment advisers providing services to plans, the Department assumes 55 percent, or 1,920 broker-dealers, will be affected by the amendments.[513]

Discretionary Fiduciaries

The amendments to PTEs 75–1 Parts III & IV, 77–4, 80–83, 83–1, and 86–128 will exclude the receipt of compensation from transactions that result from the provision of investment advice. Therefore, fiduciaries will have to rely on another exemption to receive compensation for investment advice, such as PTE 2020–02. Fiduciaries that exercise full discretionary authority or control could continue to rely on these exemptions as long as they comply with all of the applicable exemption's conditions.

The Department lacks reliable data on the number of fiduciaries of employee benefits plans that affect or execute securities transactions (''transacting fiduciaries'') and the independent plan fiduciaries authorizing the plan or IRA to engage in the transactions with an authorizing fiduciary (''authorizing fiduciaries'') that will rely on the amended exemption. In the proposal, the Department assumed that the number of transacting and authorizing fiduciaries relying on the exemption would be no larger than the number of broker-dealers estimated to be affected by the amendments to PTE 2020–02, or 1,919 fiduciaries. The Department acknowledged that this was likely a significant overestimate[514] and requested comments or data on what types of entities would be likely to rely on the amended exemption. The Department did not receive any comments.

Upon further review, the Department believes that in trying to capture financial entities engaging in cross trades with discretionary control, the number of dual-registered broker-dealers that provide services to

Best Options for Individual Investors, (June 2023), *https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/Robo-Advisor_Landscape_2023-Vanguard.pdf.* & Jill E. Fisch, Marion Laboure, & John A. Turner, *The Emergence of the Robo-Advisor,* Wharton Pension Research Council Working Papers (2018). & Andrew Welsch, *Robo-Advisors Changed Investing. But Can They Survive Independently,* Barron's (February 2022), *https://www.barrons.com/articles/robo-advisors-changed-investing-but-can-they-survive-independently-51645172100.*

[503] Jill E. Fisch, Marion Laboure, & John A. Turner, *The Emergence of the Robo-advisor,* Wharton Pension Research Council Working Papers (2018).

[504] Morningstar, *2023 Robo-Advisor Landscape: Our Take on the Digital Advice Industry and the Best Options for Individual Investors,* (June 2023), *https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/Robo-Advisor_Landscape_2023-Vanguard.pdf.*

[505] FinTech Global, *Is the Era of Robo-Advisors Over?* (May 2023), https://fintech.global/2023/05/16/is-the-era-of-robo-advisors-over/. Nearl, Ryan, *Robo-advisers Struggling to Retain Investors in 2022, Research Finds,* InvestmentNews (October 2022), *https://www.investmentnews.com/fintech/news/robo-advisers-struggling-retain-investors-in-2022-research-finds-227476.*

[506] Cerulli Associates, *U.S. Retail Investor Advice Relationships 2022: Rethinking the Advice Continuum,* Exhibit 3.02. The Cerulli Report.

[507] Plan Sponsor Council of America, *60th Annual Survey of Profit Sharing and 401(k) Plans,* (2018).

[508] Plan Sponsor Council of America, *64th Annual Survey of Profit Sharing and 401(k) Plans,* (2021).

[509] Plan Sponsor Council of America, *66th Annual Survey of Profit Sharing and 401(k) Plans,* (2023).

[510] Facundo Abraham, Sergio L. Schmukler, & Jose Tessada, *Robo-advisors: Investing Through Machines,* World Bank Research and Policy Briefs 134881 (2019).

[511] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[512] Cerulli Associates, *U.S. RIA Marketplace 2023: Expanding Opportunities to Support Independence,* Exhibit 5.10. The Cerulli Report.

[513] The estimated of retail broker-dealers affected by this exemption is estimated as: (2,399 retail broker-dealers × 55%) = 1,319 retail broker-dealers. The estimated number of non-retail broker-dealers affected by this exemption is estimated as: (1,091 non-retail broker-dealers × 55%) = 600 non-retail broker-dealers. The estimated number of total broker-dealers is 1,919 (1,319 + 600).

[514] SEC Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser, 84 FR 33681, 33685–86 (July 12, 2019).

retirement plans is a more accurate estimate. As of December 2022, there were 456 broker-dealers registered as SEC- or State-registered investment advisers.[515] Consistent with the assumptions made about broker-dealers affected by the amendments to PTE 2020–02, the Department estimates that 55 percent, or 251 broker-dealers will be affected by the amendments to PTE 86–128.[516]

Insurance Companies and Non-Independent Agents

The amendments to PTE 2020–02 and PTE 84–24 will affect insurance companies and non-independent agents. The Department requested comments on the extent to which entities relying on PTE 84–24 would continue to rely on the exemption if amended as proposed. The Department also requested comments on how many insurance companies sell annuities through independent distribution channels and whether insurance companies rely on both independent and non-independent methods of distribution. The Department did not receive any comments responsive to these inquiries.

The existing version of PTE 84–24 granted relief for all insurance agents, including insurance agents who are overseen by a single insurance company; however, the amendments exclude insurance companies and agents that are not selling through an independent distribution method (''captive agents'') that are currently relying on the exemption for investment advice. These entities will be required to comply with the requirements of PTE 2020–02 for relief involving investment advice. As a result, the estimates for PTE 84–24 discussed below likely overestimate the reliance on the exemption.

Insurance companies are primarily regulated by States and no single regulator records a nationwide count of insurance companies. Although State regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual State totals, because individual insurance companies often operate in multiple States. In the Department's 2016 regulatory impact analysis, it estimated that 398 insurance companies wrote annuities.[517] The Department also relied on this estimate in the proposal, acknowledging that the number may have changed during the intervening years. Furthermore, this may be an overestimate because some of these insurance companies may not sell annuity contracts in the IRA or Title I retirement plan markets. The Department requested information on the number of insurance companies underwriting annuities that would be affected by the rulemaking. While one commenter expressed concern that the Department was using a number from 2016 without considering changes in the annuity market since, the Department did not receive any data or information from other commenters.

To form a basis for its assumption of insurance companies affected by the rule, the Department looked at the estimate of 398 insurance companies writing annuities used in the 2016 regulatory impact analysis. This assumption was based on data of insurance companies that reported receiving either individual or group annuity considerations in 2014.[518] Comparatively, there were 710 firms in the direct life insurance carrier industry in 2014.[519] By these measures, in 2014, insurance companies writing annuities accounted for 56 percent of the direct life insurance carrier industry.

To gain more insight into annuity underwriting, as it pertains to the life insurance industry, the Department looked to the evolution of premiums. In 2014, annuity premiums accounted for 55 percent of life and annuity insurance premiums.[520] By 2020, annuities had fallen to 48 percent of life and annuity insurance premiums. Between 2020 and 2022, the percentage remained constant around 48 percent.[521]

While premiums are not directly related to the number of firms, the Department thinks it is reasonable to assume that the percent of life insurance companies underwriting annuities may have declined slightly since 2014. For the purposes of this analysis, the Department assumed that approximately half of life insurance companies underwrite annuities. According to the 2021 Statistics of U.S. Businesses release, the most recent data available, there were 883 firms in the direct life insurance carrier industry.[522] The Department estimates that 442 life insurance companies underwrite annuities and will be affected by the amendments.

Recent legislative developments may lead to an expansion in this market. A 2021 survey asked insurers what impacts they expected to see from the SECURE Act. It found that 58 percent of insurers thought the SECURE Act would result in a significant increase in the number of plan sponsors offering in-plan annuities, and 63 percent of insurers thought the SECURE Act would lead to a significant increase in the number of plan participants allocating a portion of their plan balances to an annuity option.[523] With increasing usage of annuities in plans, the future impact on plans, participants, assets, and insurance companies will be greater. It also increases the need for plan fiduciaries to receive advice that is subject to a best interest standard.

Insurance companies primarily sell insurance products through (1) their employees or captive insurance agents, and/or (2) independent agents that sell multiple insurance companies' products. In recent years, the market has seen a shift away from captive distribution towards independent distribution.[524]

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[515] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[516] In 2023, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting. (*See* Cerulli Associates, *U.S. RIA Marketplace 2023: Expanding Opportunities to Support Independence,* Exhibit 5.10. The Cerulli Report.) The Department assumes the percentage of broker-dealers provide advice to retirement plans is the same as the percent of investment advisers providing services to plans. This is calculated as 456 hybrid broker-dealers × 55% = 251 affected entities.

[517] This estimate is based on 2014 data from SNL Financial on life insurance companies reported receiving either individual or group annuity considerations. *See* EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[518] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 108–109 & 136–137, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[519] United States Census Bureau, *2014 SUSB Annual Data Tables by Establishment Industry,* (December 2016).

[520] Insurance Information Institute, *Life/Annuity Insurance Income Statement, 2014–2018, https://www.iii.org/table-archive/222464/file.*

[521] Insurance Information Institute, *Facts + Statistics: Life Insurance,* (2024), *https://www.iii.org/fact-statistic/facts-statistics-life-insurance#Direct%20Premiums%20Written%20By%20Line,%20Life/Annuity%20Insurance,%202020-2022.*

[522] United States Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry,* (December 2023).

[523] Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand,* Exhibit 1.06. The Cerulli Report.

[524] *See* Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage,* McKinsey & Company (June 2022), *https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage;* Sheryl Moore, *The Annuity Model Is Broken,* Wink Intel (June 2022), *https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/;* Ramnath Balasubramanian, Christian Boldan, Matt Leo,

The Department does not have strong data on the number of insurance companies using captive agents or Independent Producers. In the proposal, the Department assumed that the number of companies selling annuities through captive or independent distribution channels would be proportionate to the sales completed by each respective channel. The Department requested comments on this assumption but did not receive any directly addressing it. In the proposal, the Department based its estimate on the percent of sales completed by independent agents and career agents in the individual annuity distribution channel. This resulted in an estimate that approximately 46 percent of sales are done through captive distribution channels and 54 percent of sales are done through independent distribution channels.

One recent source stated that 81 percent of individual annuities sales are conducted through an independent distribution channel.[525] The Department uses this statistic to update its estimate of the number of sales through the independent distribution channel. The Department assumes that the percent of companies selling annuities through an independent distribution channel is proportionate to the percent of sales conducted through an independent distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel.

Also, the Department recognizes that some insurance companies use multiple distribution channels, though the Department did not receive any comment on how common the use of multiple distribution channels is. Looking at the 10 insurance companies with highest annuity sales in 2022, one relied on captive distribution channels, seven relied on independent distribution channels, and two relied on both.[526] Accordingly, most insurance companies appear to primarily use either captive distribution or independent distribution. However, any entity using a captive insurance channel, or using both captive and independent channels, likely has already incurred most of the costs of this rulemaking under PTE 2020–02. Costs are estimated by assuming that entities using a third-party distribution system, even if they also use captive agents, will incur costs for the first time under amended PTE 84–24. This assumption leads to an overestimation of the cost incurred by insurance companies.

Following from the revised assumption that 81 percent of activity being associated with independent, or third party, channels, the Department estimates that 84 insurance companies distribute annuities through captive channels and will rely on PTE 2020–02 for transactions involving investment advice. Further, the Department estimates that 358 insurance companies distribute annuities through independent channels and will rely on PTE 84–24 for transactions involving investment advice.[527]

The Department estimates that 70 of the 442 insurance companies are large entities.[528] In the proposal, the Department requested data on how distribution channels differed by size of insurance company but did not receive any comments. In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 19 percent of large insurance companies (13 insurance companies) sell annuities through captive distribution channels, while the remaining 71 of the 84 insurance companies that distribute annuities through captive channels are assumed to be small.[529] Additionally, 81 percent of large insurance companies (57 insurance companies) sell annuities through independent distribution channels, while the remaining 301 of the 358 insurance companies that sell annuities through independent distribution channels are assumed to be small.[530]

Independent Producers

The amendments will also affect independent insurance producers that recommend annuities and other covered products from unaffiliated Financial Institutions to Retirement Investors, as well as the Financial Institutions whose products are recommended.[531] While captive insurance agents are generally treated as employees of an insurance company, other insurance agents are ''independent'' and work with multiple insurance companies. Though these independent insurance producers may rely on PTE 2020–02, the Department believes they are more likely to rely on PTE 84–24, which is tailored to the insurance industry. For this reason, the Department only considers captive insurance agents in the analysis for PTE 2020–02.

The Department estimates that the independent agent distribution channel has sales of about $69 billion since this channel is 18 percent of individual annuity sales and total U.S. annuity sales reached $385.0 billion in 2023.[532]

In the proposal, the Department estimated 4,000 Independent Producers sold annuities and requested comments on this assumption as well as how captive insurance agents and independent insurance producers would be affected by the proposed

David Schiff, & Yves Vontobel, *Redefining the Future of Life Insurance and Annuities Distribution,* McKinsey & Company (January 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*

[525] This study considers sales by independent agents, independent broker-dealers, national broker-dealers, and banks to be sales in the independent distribution channel, while sales by career agents and direct means are considered to be in the captive distribution channel. (*See* Ramnath Balasubramanian, Christian Boldan, Matt Leo, David Schiff, & Yves Vontobel, *Redefining the Future of Life Insurance and Annuities Distribution,* McKinsey & Company (January 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*)

[526] Annuity sales are based on LIMRA, *U.S. Individual Fixed Annuity Sales Breakouts, 2022, https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2022/q4/2022-ye---fixed-breakout-results.pdf.* Information on distribution channels is based on review of insurance company websites, SEC filings of publicly held firms, and other publicly available sources.

[527] The number of insurance companies using captive distribution channels is estimated as 442 × 81% = 358 insurance companies. The number of insurance companies using independent distribution channels is estimated as 442 − 358 = 84 insurance companies.

[528] LIMRA estimates that, in 2016, 70 insurers had more than $38.5 million in sales. *See* LIMRA Secure Retirement Institute, *U.S. Individual Annuity Yearbook: 2016 Data,* (2017).

[529] The number of large insurance companies using a captive distribution channel is estimate as: 70 large insurance companies × 19% = 13 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 84 insurance companies − 13 large insurance companies = 71 small insurance companies.

[530] The number of large insurance companies using an independent distribution channel is estimate as: 70 large insurance companies × 81% = 57 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 358 insurance companies − 57 large insurance companies = 301 small insurance companies.

[531] The Department does not have an estimate of the number of plans purchasing certain life insurance policies. However, the Department's estimates of affected independent producers and insurance companies likely include many independent producers and insurance companies selling affected life insurance policies as they also sell annuities. Therefore, many of the costs of compliance for these independent producers and insurance companies are included in the regulatory impact analysis cost estimates.

[532] Insurance Information Institute, *Facts + Statistics: Distribution Channels—Sales of Individual Annuities By Distribution Channels, 2018 and 2022, https://www.iii.org/fact-statistic/facts-statistics-distribution-channels. LIMRA: U.S. Annuity Sales Post Another Record Year in 2023,* (January 24, 2024). *https://www.limra.com/en/newsroom/news-releases/2024/limra-u.s.-annuity-sales-post-another-record-year-in-2023/.*

amendments to PTE 2020–02 and PTE 84–24. The Department received several comments suggesting that its estimate for the number of Independent Producers was too low. While commenters provided significantly larger estimates, between 80,000 and 100,000, they did not provide data to support their estimate nor clarify whether their number was limited to Independent Producers selling annuity products. In response, the Department analyzed employment data from the March 2023 Current Population Survey to identify the number of self-employed workers in the ''Finance and Insurance'' industry whose occupation was listed as ''Insurance Sales Agents.'' This identified 86,410 self-employed insurance sales agents in the Finance and Insurance industry which the Department uses as the assumed number of Independent Producers for the analyses presented.[533] This data point likely contains a substantial number of workers who do not sell annuities or would otherwise not be impacted by the rulemaking; therefore, the Department believes this results in an overestimate of costs associated with Independent Producers.[534]

The amendments will not impose any conditions on insurance intermediaries, such as Independent Marketing Organizations (IMOs), Field Marketing Organizations (FMOs), or Brokerage General Agencies (BGAs). These entities do not have supervisory obligations over independent insurance producers under State or Federal law that are comparable to those of the other entities, such as insurance companies, banks, and broker-dealers, nor do they have a history of exercising such supervision in practice. They are generally described as wholesaling and marketing and support organizations that are not tasked with ensuring compliance with regulatory standards. In addition, they are not subject to the sort of capital and solvency requirements imposed on State-regulated insurance companies and banks.

Pension Consultants

The Department expects that pension consultants will continue to rely on the existing PTE 84–24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.[535]

The amendments will exclude compensation received by pension consultants as a result of providing investment advice from relief under the existing PTE 84–24. As such, any pension consultants relying on the existing exemption for investment advice will be required to work with a Financial Institution under PTE 2020–02 to receive compensation for fiduciary investment advice. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84–24 and as a part of registered investment advisers for the amended PTE 2020–02. The Department acknowledges that by doing so it may overestimate the entities and related costs to complying with the exemptions. In the proposal, the Department requested comment on whether pension consultants would continue to rely on the existing provisions of PTE 84–24 or would rely on the amended PTE 2020–02 but did not receive any comments.

Principal Company Underwriter

The Department expects that some investment company principal underwriters for plans and IRAs rely on the existing PTE 84–24 for advice. The Department does not have data allowing it to estimate how many investment company principal underwriters will choose to rely on the exemption, however the Department expects investment company principal underwriters relying on PTE 84–24 to be rare. A few commenters on the proposal noted that entities, such as principal company underwriters, do currently rely on Section III(f) of the PTE 84–24. None of these commenters remarked on the Department's estimate of the number of principal company underwriters. For the purposes of this analysis, the Department continues to assume that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs will use PTE 84–24 once with one client plan.

The amendments will exclude compensation received by investment company principal underwriters as a result of providing investment advice from relief under existing PTE 84–24. As such, any principal company underwriter relying on the existing exemption for investment advice will be required to work with a Financial Institution under amended PTE 2020–02 to receive compensation for fiduciary investment advice.

The Department acknowledges that this approach likely overestimates the entities and related costs to complying with the exemptions. The Department requested comment on whether principal company underwriters would continue to rely on the existing provisions of PTE 84–24 or would rely on the amended PTE 2020–02 but did not receive any comments on this topic.

Banks and Credit Unions

The amendments to PTE 75–1, PTE 80–83, and PTE 2020–02 may affect banks and credit unions. There are 4,614 federally insured depository institutions in the United States, consisting of 4,049 commercial banks and 565 savings institutions.[536] Additionally, there are 4,645 federally insured credit unions.[537] In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.[538] Based on this estimate, the Department estimates that there are approximately 95 credit unions with private deposit insurance and 4,740 credit unions in total.[539]

In the proposal, the Department requested comment on how many banks and credit unions currently rely on PTE 2020–02, PTE 75–1, and PTE 80–83 for

[533] EBSA Tabulations based on the March 2023 Current Population Survey. Note that this number includes insurance agents that do not sell annuity products and therefore overestimates the number of Independent Producers.

[534] When revising its estimate of Independent Producers for the final rulemaking, the Department considered using the proportion of premiums attributable to life insurance activity as a proxy for the share of insurance agents that sell annuities. Data from the U.S. Department of the Treasury, Federal Insurance Office, ''Annual Report on the Insurance Industry,'' indicates that roughly 23 percent of insurance premiums in 2023 were from life insurance activity. Assuming that this translates into 23 percent of insurance agents selling life insurance products would reduce the number of estimated independent life insurance producers affected from 86,410 to 20,185. Using this level of Independent Producers would result in a lower total estimated cost associated with the PTE 84–24 rulemaking of $144.1 million in the first year and $111.3 million in subsequent years. By not adjusting for the share of insurance agents that sell annuities, the Department believes that it significantly overstates the number of Independent Producers affected by this rulemaking.

[535] Internal Department calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C. This could be an underestimate as only plans with 100 or more participants need to file a Schedule C and then only for service providers paid more than $5,000 during the plan year. To the extent small plans use different pension consultants the number would be underestimated.

[536] Federal Insurance Deposit Corporation, *Statistics at a Glance—as of September 30, 2023, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.*

[537] National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q3, https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q3.pdf.*

[538] GAO, *Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, But Rules Should be Clarified,* (March 29, 2017), *https://www.gao.gov/products/gao-17-259.*

[539] The total number of credit unions is calculated as: 4,645 federally insured credit unions/(100% − 2% of credit unions that are privately insured) = 4,740 total credit unions. The number of private credit unions is estimated as: 4,740 total credit unions − 4,645 federally insured credit unions = 95 credit unions with private deposit insurance.

investment advice and also on what proportion of credit unions offer IRAs or sell share certificate products. The Department did not receive any comments on these questions.

The amendments will exclude entities currently relying on the existing PTE 75–1 and PTE 80–83 for investment advice. The Department does not have a reliable data source on how many banks or credit unions currently rely on these exemptions for investment advice. PTE 75–1 allows banks to engage in certain classes of transactions with employee benefit plans and IRAs. The Department assumes that half of the 4,049 commercial banks, or 2,025 banks, will use PTE 75–1.

As amended, PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department assumes that 25 fiduciary-banks with public offering services will rely annually on the amended PTE 80–83.

The Department acknowledges that some credit unions may rely on PTE 75–1 and PTE 80–83 as amended. However, the Department does not have data, and did not receive any comment on the proposal, to suggest how many credit unions current rely on these exemptions or will continue to rely on these exemptions as amended.

Banks and credit unions relying on the existing exemptions for investment advice will be required to comply with PTE 2020–02 for prohibited transaction relief for investment advice. Banks and credit unions will be permitted to act as Financial Institutions under PTE 2020–02 if they or their employees are investment advice fiduciaries with respect to Retirement Investors.

The Department understands that banks most commonly use ''networking arrangements'' to sell retail non-deposit investment products, including equities, fixed-income securities, exchange-traded funds, and variable annuities.[540] Under such arrangements, bank employees are limited to performing only clerical or ministerial functions in connection with brokerage transactions. However, bank employees may forward customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and broker-dealer under the arrangement. Similar restrictions on bank employees' referrals of insurance products and State-registered investment advisers exist. The Department believes that, in most cases, such referrals will not constitute fiduciary investment advice.

In the proposal, the Department estimated that no banks or credit unions would be impacted by the amendments to PTE 2020–02 but requested comment on what other types of activities banks or credit unions may engage in that would require reliance on PTE 2020–02. The Department did not receive any comments on this topic. However, the Department revisited a comment it received on PTE 2020–02 in 2020. This comment suggested that banks may be providing investment advice outside of networking arrangements, such as recommendations to roll over assets from a plan or IRA or advice to invest in deposit products.[541] The Department agrees that, if the recommendation meets the facts and circumstances test for individualized best interest advice, or the adviser acknowledges ERISA fiduciary status, and the remaining provisions of the final rule are satisfied, such transactions will require banks to comply with PTE 2020–02 for relief from the prohibited transactions provisions.

Banks may act as investment advisers to registered investment companies, often through a separately identifiable department or division within the bank. In such cases, the banks, or their separately identifiable department or division, would be registered investment advisers and already included in our estimate of affected entities. The Department acknowledges that some banks may provide investment advice outside such arrangements and requested comments in the proposal on the frequency with which bank employees recommend their products to Retirement Investors and how they currently ensure such recommendations are prudent to the extent required by ERISA. The Department also requested comments on the magnitude of any such costs and data that would facilitate their quantification. The Department did not receive any comments in response. The Department does not know how frequently these entities use their own employees to perform activities that will otherwise be covered by the prohibited transaction provisions of ERISA and the Code. Similarly, the Department does not know how often credit unions engage in such activities.

The Department acknowledges that some banks and credit unions may need to comply with PTE 2020–02. However, the Department believes that in such cases, the banks, or their separately identifiable department or division, would be registered investment advisers and already included in the estimate of affected entities.

Mutual Fund Companies

The amendments will modify PTE 77–4 such that mutual fund companies providing services to plans can no longer rely on the exemption when giving investment advice. Under the amendments, these mutual funds will need to rely on PTE 2020–02 for relief concerning investment advice.

According to the ICI, in 2022, there were 812 mutual fund companies.[542] The Department assumes that all of these companies are service providers to pension plans, providing investment management services.

Non-Bank Trustees

In the proposal, the Department received several comments concerning how the rulemaking would affect IRS-approved non-bank trustees and custodians and HSAs. These comments are discussed in greater detail in the preamble. The Department has decided not to exclude HSAs as Retirement Investors under the final rule and to include IRS-approved non-bank trustees and custodians as Financial Institutions in the final amendment to PTE 2020–02, but only to the extent they are serving in these capacities with respect to HSAs. In 2022, there were 70 approved non-bank trustees.[543] Many of these entities are already covered by other affected Financial Institution categories under PTE 2020–02. The Department considered the entities on the approved non-bank trustee list. The Department estimates that there are 31 entities that are not captured in other categories of Financial Institutions under PTE 2020–02.

[540] For more details about ''networking arrangements,'' see Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* (April 2016). *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.* Financial Institutions that are broker-dealers, investment advisers, or insurance companies that participate in networking arrangements and provide fiduciary investment advice would be included in the counts in their respective sections.

[541] Comment letter received from the American Bankers Association on the *Notification of Proposed Class Exemption: Improving Advice for Workers & Retirees,* (August 2020).

[542] Investment Company Institute, *2023 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry,* (2023), *https://www.ici.org/system/files/2023-05/2023-factbook.pdf.*

[543] Internal Revenue Service, *Nonbank Trustees Approved as of October 1, 2022,* (October 2022), *https://www.irs.gov/pub/irs-tege/nonbank-trustee-list.pdf.*

Mortgage Pool Sponsors

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates. The amendments will modify PTE 83–1 to exclude exemptive relief for investment advice. As amended, mortgage pool sponsors operating as or under a Financial Institution will be able to rely on PTE 2020–02 for relief concerning investment advice. In the proposal, the Department requested comment on how many of these entities currently rely on PTE 83–1 and how many of these entities rely on PTE 83–1 for investment advice. The Department did not receive any comments.

6. Benefits and Transfers

The Department believes that, as a result of this rulemaking, Retirement Investors will achieve greater retirement security by selecting investments that are more appropriate for their retirement goals and that reflect an appropriate level of risk for their situation. Additionally, the Department expects that Retirement Investors will avoid losses resulting from advisory conflicts of interest. More specifically, this rulemaking will generate economic gains for Retirement Investors by:

• increasing uniformity in the regulation of financial advice for Retirement Investors, across different market segments and market participants,
• protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility),
• ensuring that advice for Retirement Investors adheres to a stringent professional standard of care (*i.e.,* is prudent),
• giving Retirement Investors increased trust and confidence in their advisers and in the reliability of their advice, and
• better aligning investors' portfolio with their risk preferences and savings horizons as advisers provide individualized advice based on their individual circumstances.

These represent gains to investors, which may manifest as pure social welfare ''benefits,'' as some resources that were previously inefficiently used to acquire financial products and services are now available for more valuable uses. Other improvements may take the form of ''transfers'' of social welfare to Retirement Investors from other entities in society. The available data do not allow the Department to quantify the gains to investors or the components of social welfare ''benefits'' and ''transfers.'' These transfers represent a gain to Retirement Investors and are one of the primary objectives of the final rule and amended PTEs.

If some transactions have increased net returns for certain parties and decreased returns of equal magnitude for other parties, that would represent a transfer. If the increase in net returns for the first group is larger than the corresponding decrease for the second group, then only the equivalent portion would be transfers and the amount of the additional net returns would represent benefits. For example, non-Retirement Investors may have previously experienced lower prices and higher returns resulting from timing errors of Retirement Investors due to conflicted advice. As those conflicts are removed, those transactions may not occur, leading to a transfer from non-Retirement Investors to Retirement Investors. Moreover, it is possible that the financial industry would forgo profits (*e.g.,* as a result of conflicted advisers charging Retirement Investors lower fees), resulting in a transfer from investment advisers and associated service providers to Retirement Investors.

As detailed later in this regulatory impact analysis, the magnitude of the gains to Retirement Investors is uncertain. As noted earlier, advisory conflicts—which this rulemaking, in harmony with Federal securities laws, will mitigate—are very costly for Retirement Investors. The cost is high both on aggregate and for individual Retirement Investors, such as when a new retiree adheres to conflicted advice to transfer a career's-worth of 401(k) savings into an imprudent or over-priced annuity or other investment.

Investors stand to gain much from the mitigation of advisory conflicts. In the proposal, the Department invited comments and data related to how it might quantify these benefits as part of the regulatory impact analysis of any final rule. The Department received multiple comments that quantified benefits of the rulemaking, and the Department has considered those analyses and discussed them in the section titled Implications for Retirement Savings Estimates.

Benefits of a Fiduciary or Best Interest Standard

In response to the proposal, several commenters asserted that parts of the economic analysis relied on outdated studies that do not reflect recent regulatory changes and their impact on the behavior of market actors. These commenters focused specifically on the Department's discussion of mutual fund load fees and variable annuities, suggesting that they were irrelevant to this rulemaking. While the Department acknowledges that some of the conflicts of interest it discussed in its 2016 regulatory impact analysis have been addressed by actions of other regulatory bodies, it believes that the experience following its 2016 rulemaking and SEC's Regulation Best Interest is instructive in identifying harm caused by conflicted advice, how a fiduciary or best interest standard can reduce those harms, and the potential benefit to Retirement Investors of this rulemaking. The discussion below highlights studies concerning market segments that have benefited from the imposition of higher standards of care. This discussion does not attribute these benefits to this rulemaking, but rather illustrates why the Department expects that extending a higher standard of conduct to other sectors will benefit Retirement Investors.

Evidence in Mutual Funds

The 2016 Rule and recent SEC actions highlighted inherent conflicts of interest in how broker-dealers or registered investment advisers are compensated for recommending certain share classes of mutual funds. In the 2016 regulatory impact analysis, the Department estimated that, at that time, broker-sold mutual funds underperformed direct-sold mutual funds by approximately 50 basis points per year.[544] In response to this estimate, Morningstar opined that transparency improvements associated with such shares ''should encourage advisors to provide high quality advice to remain competitive'' and that ''50 basis points is a reasonable estimate of savings to investors from reducing conflicted advice.'' [545] Their support of the Department's estimate was based on a study looking at mutual fund T shares. However, this share class has faded following the revocation of the 2016 Final Rule.[546] As a result, it is largely

[544] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 162, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[545] Aron Szapiro & Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors,* Morningstar Policy Research (April 2017).

[546] Greg Iacurci, *T Shares Are Dead,* InvestmentNews (December 20, 2018), *https://www.investmentnews.com/t-shares-are-dead-77482.*

uncertain how many Retirement Investors would have adopted the new share class had it been permitted to go fully into effect.

Despite the decline of T shares following the revocation of the 2016 Final Rule, mutual fund sales continued to shift away from more conflicted share classes. Sethi, Spiegel, and Szapiro (2019) found that the Department's 2016 Final Rule reduced flows into funds with excess loads or loads that were higher than would otherwise be expected based on the fund's characteristics.[547] Mitchell, Sethi, and Szapiro (2019) found while mutual funds with excess loads have historically received greater inflows, since 2010 the correlation between excess loads and inflows has been lower. The authors attribute this change to an ''increased focus on broker practices'' and ''a culture of accountability.'' [548] Additionally, Christoffersen, Evans, and Musto (2013) found that as the size of the load-share increased, mutual fund returns decreased. This suggests that the greater the adviser's conflict of interest, the worse off the IRA investor can expect to be.[549] [550]

Meanwhile, other types of share classes have emerged and grown more prevalent, including unbundled and semi-bundled share classes. The different compensation arrangements for each of the types of share classes create different types and magnitudes of conflicts for financial professionals. In a traditional, bundled share class, the investor pays the mutual fund a load or 12b-1 fee, and the mutual fund pays a portion back to an intermediary, such as the intermediary that sold the fund to the investor. Semi-bundled share classes use revenue sharing or sub-accounting fees. In an unbundled or ''clean'' share class, the investor pays any intermediaries directly, while in a semi-bundled share class, the fund pays sub-accounting fees for recordkeeping services and uses revenue sharing for other services, such as distribution.[551]

Adoption of these new share classes has spread quickly. Mitchell, Sethi, and Szapiro (2019) found that between July 2018 to August 2019, relatively few bundled share classes were launched into the market and that more bundled share classes closed in that time frame than semi-bundled and unbundled combined. Additionally, they found that unbundled share classes received almost five times as much new money as semi-bundled share classes. While flows to semi-bundled share classes fluctuated, they received net positive flows overall during this period.[552]

This trend is confirmed by other data sources. For instance, data published by the ICI in 2023 show that no-load mutual funds, or mutual funds without commissions, accounted for 46 percent of long-term mutual fund gross sales in 2000, 79 percent in 2015, and 91 percent in 2022. ICI attributed the increase in no-load funds to two growing trends: investors paying intermediaries for advice through direct fees rather than indirectly through funds, and the popularity of retirement accounts that invest in institutional, no-load share classes.[553] Morningstar similarly finds that unbundled and semi-bundled shares accounted for 58 percent of fund assets in 2003 but had grown to 86 percent by the end of 2022.[554] This trend is also observable in 401(k) plans. In 2021, 95 percent of 401(k) mutual fund assets were invested in no-load funds, compared to 66 percent in 2000.[555]

These trends were highlighted by commenters. One commenter remarked that fees paid by plans and IRA owners had started to decline independent of the rule and would likely continue to decline absent the amendments in the proposal. This commenter also argued that the results from Sethi, Spiegel, and Szapiro (2019) could not have accounted for the effects of the 2016 Final Rule because the study only analyzed data through 2017. While data does indicate that load sharing began to decline in 2010 after the passage of the Dodd-Frank Act and that it is difficult to detangle the changes directly attributable to the 2016 Final Rule from changes attributable to existing trends, there is reason to believe that the 2016 Final Rule did play a significant role.

As written by Sethi, Spiegel, and Szapiro (2019), ''flows into mutual funds paying unusually high excess loads declined after the DOL proposed its fiduciary rule in 2015, and this shift was statistically significant. This reduction in the distortionary effect of conflicted payments suggests that firms put in place effective policies and procedures to mitigate conflicts of interest in response to the DOL rule.'' [556]

Bullard, Friesen, and Sapp (2008) found that the difference in performance between load and no-load funds has two components: the difference in prospectus returns across share classes and the difference in investor returns resulting from differences in investor timing.[557] In the 2016 regulatory impact analysis, the Department had also considered how conflicts of interest in compensation structures may incentivize excessive trading. Good advice can help investors avoid timing errors when trading by reducing panic-selling during large and abrupt downturns. However, conflicted advice providers may profit by encouraging investors' natural inclination to trade more and ''chase returns,'' an activity that tends to produce harmful timing errors.[558]

The Department sponsored research studies by Padmanabhan et al. (2017) and Panis and Padmanabhan (2023) to analyze recent trends in how investors timed the purchase and sale of mutual funds.[559] Padmanabhan et al. (2017) found that during the decade from 2007 to 2016, investors in load funds had

[547] This study updated the analysis performed by Christoffersen, Evans, and Musto (2013) and examined the period from 1993 to 2017 in order to look at the impact of the Department's Final Rule, taking into consideration preexisting marketplace trends, anticipatory effects, the April 2015 Proposal, and the April 2016 Final Rule. The study calculates the excess load as ''the difference between loads predicted by a regression and actual load, given a number of other control variables.'' *See* Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?,* 6(3) The Journal of Retirement 46–59 (Winter 2019).

[548] Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest,* Morningstar (November 2019).

[549] Susan Christoffersen, Richard Evans, & David Musto, *What Do Consumers' Fund Flows Maximize? Evidence From Their Broker's Incentives,* 68 Journal of Finance 201–235 (2013), *https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2012.01798.x.*

[550] The performance reduction presented in Christoffersen, Evans and Musto (2013) does not include loads paid by investors in front-end-load funds.

[551] *Ibid.*

[552] *Ibid.*

[553] Investment Company Institute, *Trends in the Expenses and Fees of Funds, 2022,* 29(3) ICI Research Perspective (March 2023).

[554] Morningstar, *2022 U.S. Fund Fee Study,* Exhibit 15 (2022), *https://www.morningstar.com/lp/annual-us-fund-fee-study.*

[555] Investment Company Institute, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2022,* 29(6) ICI Research Perspective Figure 5. (June 2023), *https://www.ici.org/system/files/2023-07/per29-06.pdf.*

[556] Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?,* 6(3) The Journal of Retirement 46–59 (Winter 2019).

[556] Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest,* Morningstar (November 2019).

[557] Mercer Bullard, Geoffrey C. Friesen, & Travis Sapp, *Investor Timing and Fund Distribution Channels,* Social Science Research Network (2008).

[558] YiLi Chien, *The Cost of Chasing Returns, 18 Economic Synopses* (2014), *https://doi.org/10.20955/es.2014.18.*

[559] Constantijn W.A. Panis & Karthik Padmanabhan, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds,* Intensity, LLC. (August 14, 2023). *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/analysis/retirement/buy-low-sell-high-the-ability-of-investors-to-time-purchases-and-sales-of-mutual-funds.pdf.*

worse timing than investors in no-load funds, with an excess performance gap, comparing measures of the impact of purchase and sales timing, of 1.12 percent per year for U.S. equity funds and 0.63 percent for all funds.[560]

After Regulation Best Interest took effect, there appears to have been a dramatic improvement in the timing of trades. Panis and Padmanabhan (2023) found that between July of 2020 and June of 2023, the excess performance gap was only 0.13 percent for U.S. equity funds and was negative, −0.11 percent, overall.[561] This means that in the later period, looking across all funds in the aggregate, investors in load funds timed their transactions slightly better than investors in no-load funds. While brokers in the earlier period were associated with customers making more timing errors, in the later period brokers were apparently persuading customers to chase returns a little bit less. It is not certain what factors underlie the reduction in timing errors, but it is consistent with an interpretation that Regulation Best Interest enhanced the standard of conduct for broker-dealers to act in the best interest of retail customers.

Evidence in Variable Annuities

The 2016 Final Rule and the SEC's Regulation Best Interest also addressed conflicts of interests in variable annuities. Similar to mutual funds, insurance agents and brokers are often compensated through load fees for selling variable annuities.[562] The commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent.[563] This creates a strong incentive for brokers to sell some variable annuities over others. Egan, Ge, and Tang (2022) showed that variable annuity sales were four times more sensitive to brokers' financial interests than to investors' financial interests.[564]

The 2016 Final Rule discouraged sales of the typical load funds. Between 2016 and 2018, the sale of fee-based variable annuities, or I-share class variable annuities, increased by 52 percent.[565] Following the vacatur of the 2016 Final Rule in 2018, fee-based variable annuity sales decreased, falling by 28 percent between 2018 and 2020. More recently, sales have rebounded, increasing 76 percent between 2020 and 2021.[566] The significant increases in I-share class variable annuities have been driven by demand for fee-based products among fee-based advisers. They have been the second most popular variable annuity contract type since 2016, though they still only comprised 9.5 percent of retail variable annuity sales in 2021.[567]

According to Egan, Ge, and Tang (2022), after the Department issued its 2016 Final Rule, total variable annuity sales fell significantly—primarily driven by a 52 percent decrease in annuities with expenses in the highest quartile, suggesting that broker-dealers responded to the 2016 Final Rule by placing greater weight on investor interests. In fact, the authors stated that the ''regulatory change improved the distribution of products available to investors along the extensive margin, in terms of the annuities available for sale, as well as the intensive margin, in terms of the actual annuities sold by brokers.'' Thus, the authors concluded, the 2016 Final Rule resulted in improved investor welfare, increasing risk-adjusted returns of investors by up to 30 basis points per year, with two-thirds of the effect associated with investors moving into lower-expense products and the remainder from sales of annuities with more desirable investment options and characteristics.[568]

It is uncertain what the long-run effects of the 2016 Final Rule on variable annuities would have been because it was vacated. One approach the Department can use to illustrate the possible long-run impact of such a regulation is to apply the 30 basis point figure to the assets held in variable annuities in 2018, which was $2.2 trillion, yielding a total annual increase in risk-adjusted returns of approximately $6.6 billion.[569]

Critics of the Department's 2016 Final Rule often refer to a decline in variable annuity sales as evidence of the 2016 Final Rule having negative effects. Egan, Ge, and Tang (2022) conclude, however, that investors on average experienced a net benefit from the Rule, even taking into account the fact that some investors were no longer participating in the annuity market.[570] A few commenters argued that the Egan, Ge, and Tang (2022) study does not account fully for the benefits annuities may provide or give context for why some annuities may be more expensive than others. The Department agrees that annuities are an important investment option for Retirement Investors, which is why it is important to ensure that the products being sold are in the best interests of Retirement Investors. It is possible that a reduction in investors' access to certain products or services occurred because those products and services were high cost or low quality. While it is challenging for a research study to capture all aspects of a complex market during a changing policy environment, Egan, Ge, and Tang (2022) have performed a rigorous analysis that the Department can incorporate into its assessment of the likely impact and magnitude of how a fiduciary standard will affect the types of products sold and how these products are sold.

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[560] Karthik Padmanabhan, Constantijn W.A. Panis & Timothy J. Tardiff, *The Ability of Investors to Time Purchases and Sales of Mutual Funds,* Advanced Analytical Consulting Group, Inc. (November 1, 2017). *https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/the-ability-of-investors-to-time-purchases-and-sales-of-mutual-funds.pdf.*

[561] Panis & Padmanabhan, *Buy Low, Sell High,* 2023.

[562] Frank Fabozzi, *The Handbook of Financial Instruments* 596–599 (2002).

[563] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities,* 35(12) The Review of Financial Studies 5334–5486 (December 2022), *https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.*

[564] *Id.*

[565] Cerulli Associates, *U.S. Annuity Markets 2022: Acclimating to Industry Trends and Changing Demand,* Exhibit 4.09. The Cerulli Report.

[566] *Ibid.* Data excludes sales of fee-only independent RIAs.

[567] Cerulli Associates, *U.S. Annuity Markets 2022: Acclimating to Industry Trends and Changing Demand,* Exhibit 2.07. The Cerulli Report.

[568] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities,* 35(12) *The Review of Financial Studies* 5346 (December 2022), *https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.*

[569] This estimate is based on variable annuity assets in 2018 of $2.2 trillion, as reported in the referenced study. *See* Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities,* 35(12) *The Review of Financial Studies* 5346 (December 2022), *https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.*

[570] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities,* 35(12) The Review of Financial Studies 5334–5486 (December 2022), *https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.*

Another study, examining the variation in fiduciary duties between broker-dealers and registered investment advisers as well as the variation between States as to whether broker-dealers are subject to a common-law fiduciary duty, similarly found that fiduciary protections in the annuity markets lead to better outcomes for investors. By analyzing deferred annuity sales at a large financial services provider during 2013 to 2015, Bhattacharya et al. (2024) found that fiduciary duty increased risk-adjusted returns by 25 basis points.[571]

Summary

When the Department first started looking at conflicts of interest, compensation practices with mutual funds and variable annuities were a source of measurable harm. As evidenced above, many of those harms abated in these asset classes once they were subject to a higher standard of care. This evidence supports the belief that Retirement Investors benefit from imposing a higher standard of care on advisers.

Further, it underscores the premise of this rulemaking, that Retirement Investors will benefit from the expansion of a higher standard of care to other asset classes. The benefits for Retirement Investors of a fiduciary or best interest standard in the mutual fund and variable annuity space have been well established. As discussed in the Baseline section of this analysis, there are significant segments of the investment advice market for Retirement Investors that do not have such protections. In these markets, many of the practices identified as sources of conflicts of interest in mutual funds and variable annuities continue to be common business practice. With the expansion of a higher standard of care to these markets, namely non-security annuities, the Department expects that there will be significant benefits to Retirement Investors and that the findings discussed above provide insight into the magnitude of these benefits.

Regulatory Uniformity

This rulemaking will make the rules that govern fiduciary advice to plan and IRA investors across all markets more consistent with Federal securities laws, and thereby promote clarity and efficiency. Under the current regulatory regime, bad actors are drawn to those markets with the least regulated products, where they are not required to prioritize Retirement Investors' interest over their own when they make investment recommendations. By harmonizing advice regulations across all markets that are used by Retirement Investors, the Department can ensure that advisers all face the same regulatory standard. It will also remove incentives for advisers to steer recommendations in ways that customers cannot monitor and that run counter to the customers' best interest.

The Department received several comments supporting the Department's approach to creating broader regulatory uniformity for Retirement Investors. Some commenters expressed concern that limitations in other regulators' approaches leave Retirement Investors at risk. These commenters confirmed concerns expressed by the Department with respect to uneven regulatory standards across products and types of investors. One commenter noted that IRA agreements are sometimes used to specify that advice is not being provided on a regular basis or that the advice is not the primary basis for investment decisions.

The Department also received comments suggesting that the proposal would further complicate the regulatory environment. Another commenter suggested that the Department's analysis did not identify the extent of the regulatory gap and remaining conflicts. But, as detailed by another commenter,

> [T]he applicable regulations governing the investment advice will vary based on the role of the individual providing advice and the type of investment recommended. For example, an investment adviser who gives advice in connection with an IRA may be subject to the Investment Advisers Act of 1940. A broker giving securities investment advice in connection with an IRA may be subject to Regulation Best Interest. An insurance broker who recommends that a Retirement Investor rollover their 401(k) into an IRA and then invest in an indexed annuity may be subject to the NAIC's Suitability in Annuity Transactions Model Regulation, if their state has adopted the regulation. A professional who gives advice to invest in a bank CD or real estate may not be subject to any of these regulations.'' [572]

In describing the limitations of the NAIC's Model Regulation for ensuring that brokers and insurance producers act in a Retirement Investor's best interest, acknowledging that the Regulation Best Interest only applies to retail investments in securities, and highlighting that Regulation Best Interest rules do not cover an Investment Professional's recommendations made to plan fiduciaries regarding the investment of plan assets, the Department has, in fact, identified those remaining regulatory gaps that this rulemaking addresses.

When contemplating a potential ''Financial Adviser Reform Act'' that would ''be uniform in its application of the fiduciary duties of loyalty and care across all financial advisers,'' Smith (2017) noted that, ''this uniformity would eliminate the 'false distinction' between investment service providers by recognizing the overlapping services they offer.'' [573] Smith argued that creating a uniform standard ''would both reduce consumer confusion as to what constitutes advice or recommendations and ensure that the uniform fiduciary duty is consistently applied in the investor's favor by taking a broad approach to what constitutes investment advice and recommendations.'' [574] Simply put, requiring that only some professionals advising Retirement Investors adhere to an ERISA fiduciary standard promotes recommendations that are driven by differences in the regulatory regime rather than by the products or investors' interests.

Research suggests that the problems resulting from differing regulatory regimes are not unique to the United States. For instance, Anagol et al. (2017) found that when agents selling life insurance in India were required to disclose commissions for one particular product, they were much less likely to recommend it to clients. Instead, the agents recommended products that did not have this requirement, but which had higher and opaque commissions.[575] The authors conclude, ''These results suggest that the disclosure requirements for financial products need to be consistent across the menu of substitutable products.'' This

[571] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, at 2 (February 27, 2024), *https://www.dropbox.com/scl/fi/gj5skfflsip2nhee1662c/Draft.pdf?rlkey=msd12c734n8ddrct8uzqg0qut&dl=0.* This is an updated version of the working paper cited in the proposal. (*See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (May 20, 2020), *https://www.nber.org/papers/w25861.*

[572] Comment letter received from St. John's University on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[573] Alec Smith, *Advisers, Brokers, and Online Platforms: How a Uniform Fiduciary Duty Will Better Serve Investors,* 2017(3) Colum. Bus. L. Rev. 1200–1243, at 1233–34 (2017), *https://doi.org/10.7916/cblr.v2017i3.1730.*

[574] *Ibid.*

[575] Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market,* 99(1) The Review of Economics and Statistics 1–15, (2015), *https://doi.org/10.1162/REST_a_00625.*

underscores that regulatory regimes that are not uniform allow advisers to engage in regulatory arbitrage, leaving their clients vulnerable to conflicts of interest.

This rulemaking will help create a uniform standard, as it will apply to all retirement investment advice. This will address concerns the Department has about lower standards for advice related to insurance products and other investments that are not securities, advice that broker-dealers render to ERISA plan fiduciaries, and robo-advice.[576] The rulemaking's broad application to all retirement investment advice will help different market participants and different financial products compete on similar terms for IRA and plan business. This will reduce the risk to Retirement Investors. Uniform, well-designed rules can make markets fairer for competitors and friendlier for customers, leading to more efficient market outcomes. They can also promote efficiency by allowing firms that offer multiple products or make recommendations in both the retail and non-retail market to utilize a common compliance structure.

Financial services firms are already moving toward new approaches in how they offer advice, including more fee-based advice models, flatter compensation models, and integrating technology. The rulemaking will help ensure that these new approaches evolve toward less conflicted and more innately impartial business models. The Department expects that these types of technology-enhanced models—whether pure robo-adviser or hybrid models—will contain the overall costs associated with providing investment advice and strategies and will help low-balance account holders obtain investment advice at an affordable cost.

This rulemaking will generate additional economic benefits and transfers by extending important and effective protections broadly to cover all advice given to Retirement Investors. In this analysis, the Department identifies three specific areas in which Retirement Investors will benefit from an extension of protections: one-time advice regarding the rollover of assets, advice on non-security annuity products, and advice given to ERISA plan fiduciaries. These types of advice are discussed in the following sections.

[576] The Department identifies these areas as areas of concern because non-security investments and investment advice from broker-dealers to ERISA plan fiduciaries are not covered by recent SEC actions and pure robo-advice, while included in the SEC's actions was excluded from the current PTE 2020–02. For more information, refer to the Baseline discussion.

Protections Concerning Rollover Investment Advice

The rulemaking will generate benefits for, and transfers to, Retirement Investors by reducing conflicts related to one-time advice concerning rollovers. Frequently, participants are better off leaving their 401(k) account in the retirement plan rather than rolling it over to an IRA, particularly if the 401(k) plan has low fees and high-quality investment options. The final rule and amended PTEs will require those providing advice to consider the higher fees along with other benefits and costs when determining whether a rollover is in a Retirement Investor's best interest and making a recommendation.

Large 401(k) plans often have lower fees than IRAs, though smaller 401(k) plans sometimes find it difficult to keep fees low.[577] However, one commenter argued that this rulemaking would result in plan fiduciaries examining their investment lineups and the fees that plans pay, resulting in average costs for small plan participants decreasing from 93 basis points down to 75 basis points, while there would be minimal changes for most other plans. IRAs often utilize retail shares in mutual funds with substantially higher fees than the institutional share classes that employer-sponsored plans typically utilize. A 2022 Pew Charitable Trusts study analyzed the difference between median institutional and retail share class expense ratios across all mutual funds that offered at least one institutional share and one retail share in 2019. They found that the median retail shares of equity funds had annual expenses that were 37 percent higher than institutional shares. Over the course of saving for retirement, the impact of even small differences in fees was significant.[578]

Some commenters suggested that under the amendments, fewer rollovers would occur due to higher burdens associated with making rollover recommendations. These commenters expressed concerns that fewer rollovers from employment-based retirement plans would prevent the consolidation of individual retirement accounts, making it difficult for individuals to keep track of their retirement savings. The Department agrees that account consolidation is an important consideration for retirement savers but disagrees that this rulemaking will prevent rollovers that are in a retirement saver's best interest.

[577] BrightScope and Washington, DC: Investment Company Institute. *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2019* (San Diego, CA: 2022). Available at *www.ici.org/files/2022/22-ppr-dcplan-profile-401k.pdf.*

[578] Pew Charitable Trusts, *Small Differences in Mutual Fund Fees Can Cut Billions from Americans' Retirement Savings,* Pew Charitable Trusts Issue Brief, at 4–9 (June 2022), *https://www.pewtrusts.org/-/media/assets/2022/05/smalldifferenceinmutualfunds_brief_v1.pdf.*

SECURE 2.0 codified the option for recordkeepers to offer an automatic portability feature to employer-sponsored plans they service, which allows for automatic consolidation of certain IRA accounts with modest balances into the saver's new employer-sponsored retirement plan. Significant growth in low-cost automatic portability transactions is expected which will result in the retention of retirement savings in retirement plans.[579] For a broader discussion related to the burden to provide advice for rollover transactions, see the Costs Associated with Rollover Documentation and Disclosure for Financial Institutions section.

The investment fiduciaries of 401(k) plans have responsibilities under ERISA to act in the best interests of, and solely for the benefit of, the plan participants, whereas IRA providers have not had such responsibilities under ERISA.[580] Turner and Klein (2014) suggested that the services and investment performance associated with higher fees paid in an IRA are not necessarily justified,[581] meaning a plan participant would be able to obtain similar investment performance and services in a lower cost 401(k) plan.

If fewer participants roll over their 401(k) plan account balances into IRAs, and instead keep their account balances in plans sponsored by former or new employers, this will result in transfers between different segments of the market. To consider one example, there may be a transfer from service providers who specialize in serving IRAs to service providers who specialize in serving defined contribution plans. As a second example, Retirement Investors often pay lower fees in plans where they can access institutional share classes than they do in IRAs where they use retail share classes. This represents a transfer from actors in the financial industry to Retirement Investors.

Protections Concerning Annuity Investment Advice

The rulemaking will generate additional benefits by extending

[579] 89 FR 5624.

[580] *Ibid.*

[581] John Turner & Bruce W. Klein, *Retirement Savings Flows and Financial Advice: Should You Roll Over Your 401(k) Plan?,* 30(4) Benefits Quarterly 42–54 (2014), *https://www.iscebs.org/Documents/PDF/bqpublic/bq414f.pdf.*

protections to investment advice from insurance agents or Independent Producers to IRA investors.

In response to the proposal, the Department received several comments on how annuities are sold. One commenter remarked that it takes sales agents a significant amount of time to learn about the annuities they recommend and how to explain these products to investors. This commenter stated that fee-based advisers would not be incentivized to spend as much time learning about products as those earning a commission and that fee-based advisers may face conflicts of interest to maintain their assets under management. Another commenter stated that fee-based advice models serve more affluent individuals, while commission-based models work better for ''average Americans'' though this was countered by another commenter that specifically provides fiduciary advice, primarily with moderate income clients, using either a fixed fee or hourly rate.

In response to concerns by commenters that this rulemaking will require that advisers change their payment model, the Department notes that it does not require the elimination of sales commissions or other payment methods; rather, it requires that when presenting an individualized financial recommendation to a Retirement Investor who is expected to act on that recommendation, the adviser must uphold their duty of care and loyalty and place the investor's interest before their own. Similarly, it requires that Insurers adopt and oversee protective policies and procedures to ensure that adviser's recommendations adhere to these stringent fiduciary standards.

The Department also received comments that annuities, as an insurance product, are essentially different from investment products and thus comparisons between annuities and investments otherwise held in retirement accounts are not appropriate. These commenters stressed that the insurance element of annuities provide a guarantee to investors and protect investors from risk. Many of these commenters remarked that the guarantees of risk mitigation come at an expense, particularly with regard to solvency rules that require insurance companies to meet reserve and capital requirements. Another commenter noted that expense ratios and commissions of annuities are linked to the type of benefit offered and that the products with more benefits to investors have higher costs. The Department agrees that there are important differences in the nature of annuities and investments and that annuities serve an important role in preparing for retirement for many.

However, when Retirement Investors are considering what products to put their savings in, they must evaluate how much to invest in traditional investments and how much to put into products, such as annuities. One commenter expressed support for the Department's rulemaking, in light of significant increases in annuity sales in recent years. The increase in sales coupled with the increasing complexity of annuity products described later in this section, makes it imperative that a Retirement Investor can trust an Investment Professional to be offering advice in their best interest.

The annuity products offered by insurance companies are notoriously complex, leaving Retirement Investors reliant on advice from the insurance agent, broker, or Independent Producer selling the annuity. The fees and adviser incentives are similarly complex, often in a way that can conceal the full magnitude of the fees, and the fact that investors can face high surrender fees when attempting to leave inappropriate annuity contracts early. Other regulators have highlighted the complexity of many annuity products. For example, FINRA stated:

> Annuities are often products investors consider when they plan for retirement—so it pays to understand them. They also are often marketed as tax-deferred savings products. Annuities come with a variety of fees and expenses, such as surrender charges, mortality and expense risk charges and administrative fees. Annuities also can have high commissions, reaching seven percent or more.[582]

Given their current complexity and the likelihood that investors may end up with annuities that are inconsistent with their individual circumstances, one commenter posited that if the rulemaking results in products sold being more consistent with the needs of Retirement Investors, there would be a decline in surrender fees.

As discussed above, fixed annuities, variable annuities, and indexed annuities differ significantly in risk. For instance, while the insurer carries the investment risk for fixed annuities, the investor carries the investment risk for variable annuities and indexed annuities.[583] Additionally, they differ in regulatory standards and the required protections owed to customers. While variable annuities and some indexed annuities are considered securities, such that their sale is subject to SEC and FINRA regulation,[584] the standard of care owed to a customer for other types of annuities depends on the State regulation.

Further, the compensation structures used by financial entities selling annuities can encourage investment advice professionals to recommend annuities that are not in the Retirement Investor's best interest. According to the 2015 Warren Report, which examined 15 of the largest annuity companies in the United States, 87 percent of the annuity companies offered ''kickbacks''—luxurious, all expenses-paid vacations, golf outings, iPads and other electronics, expensive dinners, theatre or professional sports tickets, and sports memorabilia—to their agents in exchange for sales to retirees.[585]

Insurance agents, brokers, and Independent Producers are often compensated through commissions for selling variable and fixed annuities. As discussed earlier in this analysis, research has found load fees create a conflict of interest in investment advice, leading to decreased returns.[586] While the conflicts, including load fees, previously identified in variable annuities have improved, the industry's practices relating to commissions in other product lines remain a concern. The insurance industry has started to increase their focus on-fee-based annuities; however, they still constitute a small portion of annuity sales.[587] Though fee-based annuities do not have transaction-based conflicts of interest often associated with commissions, the products themselves are not conflict free. Retirement Investors invested in fee-based annuities are not protected from other conflicts of interest, so a duty of care and loyalty on the Investment Professional would be necessary.

The Department also has concerns about sales tactics of insurance agents, brokers, and Independent Producers for

[582] Financial Industry Regulatory Authority, *Annuities,* Financial Industry Regulatory Authority, *https://www.finra.org/investors/investing/investment-products/annuities.*

[583] Frank Fabozzi, *The Handbook of Financial Instruments* 579, (2002), *https://seekingworldlywisdom.files.wordpress.com/2011/08/the-handbook-of-financial-instruments-fabozzi.pdf.*

[584] Securities and Exchange Commission, *Annuities,* Securities and Exchange Commission, *https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.*

[585] Office of Senator Elizabeth Warren, *Villas, Castles, and Vacations: Americans' New Protections from Financial Adviser Kickbacks, High Fees, & Commissions are at Risk* (2017), *https://www.warren.senate.gov/files/documents/2017-2-3_Warren_DOL_Rule_Report.pdf.*

[586] Susan Christoffersen, Richard Evans & David Musto, *What Do Consumers' Fund Flows Maximize? Evidence from Their Broker's Incentives,* 68(1) Journal of Finance 201–235 (February 2013), *https://doi.org/10.1111/j.1540-6261.2012.01798.x.*

[587] Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand,* The Cerulli Report, (2022).

annuity products. This concern was echoed by several commenters, remarking that sales tactics are used to scare investors into buying complex products with features that even experienced investors may have difficulty comprehending. Additionally, commenters noted that marketing materials often suggest a relationship of trust and confidence. One commenter remarked that when faced with legal action for imprudent recommendations or mismanaged accounts, firms will argue that ''non-security investment products, such as equity indexed and fixed annuities, are not securities and therefore the brokers were 'merely' acting as an insurance agent with a minimal duty of care, not even subject to the suitability rule.'' [588]

A number of State regulators have issued website alerts regarding deceptive sales practices to sell annuities to seniors, including ''high-pressure sales pitch[es]'' and ''quick-change tactics'' in which an agent tries to convince an investor to change coverage quickly without time for adequate research. State regulators also warned that a licensed agent will be more than willing to show credentials and to question an agent's ''[unwillingness or inability] to prove credibility'' to prospective customers.[589]

One regulator noted, ''With billions of dollars in sales to be made, insurance companies may offer commissions as high as 10 percent to agents to sell products like long-term deferred annuities to senior citizens.'' [590] As described by the regulator:

> Some unscrupulous sellers use high-pressure sales pitches, seminars, and telemarketing. Beware of agents who ''cold call'' you, contact you repeatedly, offer ''limited time offers,'' show up without an appointment, or won't meet with you if your family is present. Beware of estate planning ''seminars'' that are actually designed to sell annuities. Beware of seminars that offer free meals or gifts. In the end, they are rarely free. Beware of agents who give themselves fake titles to enhance their credibility.[591]

Supporting this call for caution, Egan et al. (2019) found substantial amounts of misconduct disputes in the sales of annuities between 2005 and 2015.[592] In another example of conflicted advice, the SEC barred an adviser for fraudulently ''[persuading] hundreds of current and former Federal employees to liquidate their Thrift Savings Plan accounts in order to purchase high-fee variable annuities that netted Cooke and three other defendants in the case nearly $2 million in commissions.'' [593]

Barbu (2022) strengthens these findings with their analysis of ''1035 Exchanges,'' which allow an annuity owner to transfer funds from one annuity contract to another on a tax-free basis.[594] These transactions can involve any annuity, but they frequently involve policies originated before the financial reforms and low interest rate environment of the late 2000s and early 2010s, which tended to have more generous benefits, particularly regarding minimum benefit guarantees.[595] Following the Great Financial Crisis of 2008, annuity providers sought to encourage consumers to forfeit these generous contracts and exchange them for newer, less generous contracts and often offered additional, discretionary compensation to brokers to encourage such transactions. Barbu found that for each one percent increase in discretionary compensation from annuity providers, there is a corresponding 0.85 percent increase in the intensity of these exchanges.[596]

Barbu (2022) also found that customers initiating these 1035 Exchanges are often poorer and more likely to report an established relationship with their broker than new annuity buyers, with 37 percent stating that broker recommendation was the main reason for the purchase. The author concluded that the combination of high trust and compensation-based conflicts caused tangible harms to consumers. In an analysis of FINRA disciplinary actions against four large annuity firms, the author found material omissions or misrepresentations which undervalued the contracts in 50 to 77 percent of the investigated annuity exchanges.[597]

Research shows that fiduciary protections in the annuity markets lead to better outcomes for investors. By analyzing deferred annuity sales at a large financial services provider during 2013 to 2015, Bhattacharya et al. (2024) found that fiduciary duty increases risk-adjusted returns of deferred annuities by 25 basis points, though it was accompanied by a 16 percent decline in the entry of affected firms.[598] Barbu (2022) strengthens these findings with his analysis of the effects of New York's Best Interest Regulation 187. Barbu finds that, immediately after New York implemented its rule, 1035 annuity exchange transactions in New York fell 60 percent from their baseline values in comparison with the rest of the country.[599] It is unclear how those effects would persist in the long-term,

588 Comment letter received from the Public Investors Advocate Bar Association on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

589 *See e.g.,* California Department of Insurance, *Deceptive Sales Practices When Purchasing Annuities,* California Department of Insurance, *http://www.insurance.ca.gov/0150-seniors/0100alerts/DeceptiveSales.cfm;* North Carolina Department of Insurance, *Annuities and Senior Citizens,* North Carolina Department of Insurance, *https://www.ncdoi.gov/consumers/annuities/annuities-and-senior-citizens;* Mississippi Insurance Department, *Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities,* Mississippi Insurance Department, *https://www.mid.ms.gov/consumers/annuities-senior-citizens.aspx;* Kentucky Department of Insurance, *Annuities and Senior Citizens Consumer Alert: Senior Citizens Should Be Aware of Deceptive Sales Practices When Purchasing Annuities,* Kentucky Department of Insurance, *https://insurance.ky.gov/ppc/Documents/AnnuitiesandSenior.pdf;* Massachusetts Division of Insurance, *Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities,* Massachusetts Division of Insurance, *https://www.mass.gov/service-details/annuities-and-senior-citizens;* Georgia Office of the Commissioner of Insurance and Safety Fire, *Annuity Tips,* Georgia Office of the Commissioner of Insurance and Safety Fire, *https://oci.georgia.gov/insurance-resources/annuity/annuity-tips;* South Dakota Division of Insurance, *Consumer Alert: Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities,* South Dakota Division of Insurance, *https://dlr.sd.gov/insurance/publications/alerts/documents/annuities_senior_citizens.pdf.*

590 Minnesota Attorney General, *Annuities: Unsuitable Investments for Seniors,* Minnesota Attorney General, *https://www.ag.state.mn.us/consumer/Publications/AnnuitiesUnsuitableInvforSeniors.asp.*

591 *Ibid.*

592 Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct,* 127(1) Journal of Political Economy (February 2019), *https://www.journals.uchicago.edu/doi/10.1086/700735.*

593 Brian Anderson, *SEC Bars Advisor for Federal Retirement Plan Rollover Fraud https://401kspecialistmag.com/sec-bars-advisor-for-federal-retirement-plan-rollover-fraud/* (September 2, 2022) accessed February 13, 2024.

594 Barbu, A., *Ex-Post Loss Sharing in Consumer Financial Markets.* Tech. rep.,INSEAD. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4079524*

595 Barbu finds that 70% of 1035 exchanges come from policies originating before the financial crisis. Barbu at 10. Minimum benefit guarantees guarantee consumers certain benefits regardless of market conditions.

596 The definition of 1035 exchange intensity, according to Barbu, is the total amount of 1035 exchanges divided by total assets.

597 Barbu, A., *Ex-Post Loss Sharing in Consumer Financial Markets* at 61 (Table X). Tech. rep.,INSEAD. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4079524.*

598 Vivek Bhattacharya, Gaston Illanes, & Manisha Padi at 2, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (February 27, 2024), *https://www.dropbox.com/scl/fi/gj5skffl sip2nhee1662c/Draft.pdf?rlkey=msd12c734n8ddrct 8uzqg0qut&dl=0.* This is an updated version of the working paper cited in the proposal. (*See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (January 13, 2020), *https://www.nber.org/papers/w25861.*

599 Barbu, A., *Ex-Post Loss Sharing in Consumer Financial Markets* at 28. Tech. rep.,INSEAD. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4079524*

though these results suggest that the rulemaking will improve the quality of advice in the investment market and protect the welfare of investors and retirees.

Approximately $3.8 trillion in pension entitlements are held in annuities at life insurance companies, including those within IRAs.[600] Advice associated with many of these assets are already subject to a best interest standard, such as variable annuities and registered index-link annuities that are covered by Regulation Best Interest or annuities that are sold in States with a fiduciary standard. LIMRA estimates that variable annuities and registered index-linked annuities account for $98.8 billion, or 26 percent of total annuity sales in 2023.[601] In addition, the State of New York, which enforces a higher standard of care on annuity sales,[602] accounted for 2.6 percent of fixed annuity sales in 2016.[603] Accordingly, the Department estimates that approximately 30 percent of annuity sales are subject to the SEC's Regulation Best Interest or a similar standard while the remaining 70 percent of the annuity market is not subject to a material conflicts of interest standard as stringent as either the Department's approach under ERISA or the SEC's approach. Additionally, the Department has assumed in this rulemaking that 80 percent of annuity sales are covered by ERISA, suggesting that $2.1 trillion in ERISA-covered pension entitlements held in annuities are not covered by a best interest standard.[604] If, consistent with Bhattacharya et al. (2024), the rulemaking results in a 25-basis point increase in risk-adjusted returns, the expansion of fiduciary duty would lead to annual gains for investors (a mix of societal benefits and transfers) of $5.3 billion.[605]

The benefits of this rulemaking's application of fiduciary status to investment advice from insurance agents, brokers, and Independent Producers include eliminating the incentives for regulatory arbitrage by those agents. Without this rulemaking, insurers and insurance intermediaries can secure excess profits at investors' expense by rewarding investment advice providers for giving biased advice in ways that broker-dealers or investment advisers operating under Regulation Best Interest or the Advisers Act fiduciary duty, respectively, cannot.

Case Study: Indexed Annuities

The Department is particularly concerned about vulnerable Retirement Investors who lack a basic understanding of investment fundamentals and the complexities associated with indexed annuities. FINRA cautions that, "indexed annuities are complex financial instruments, and retirement experts warn that such annuities include a number of features that may result in lower returns than an investor may expect." [606] While indexed annuities have a minimum guaranteed rate of return tied to an underlying index, the guarantee rate does not cover all of a premium.[607] Additionally, the sheer number of indexes has increased from a dozen in 2005 to at least 150 in 2022, and their complexity has expanded, with 94 percent including a mix of one or more indexes plus a cash or bond component.[608] Moreover, while the rate of return of the indexed annuity is linked to performance of the index, indexed annuity returns are subject to contractual limitations which effectively cap returns. FINRA identified the following contractual limitations observed in indexed annuities:

- Participation rates explicitly set the percentage of index returns that are credited to the annuity;
- Spread, margin, or asset fees are subtracted from the index returns; and
- Interest caps limit the returns if the underlying index sees large returns.[609]

FINRA also warns that indexed annuities may be able to change these contractual limitations, depending on the terms of the contract.[610]

In a 2020 investor alert, the SEC warned, "*You can lose money buying an indexed annuity.* Read your contract carefully to understand how your annuity works." [611] The SEC listed several ways that investors in these products can lose money, including through surrender charges and withdrawals during a specified time period. The SEC further cautioned:

- "Indexed annuity contracts describe both how the amount of return is calculated and what indexing method they use. Based on the contract terms and features, an insurance company may credit your indexed annuity with a lower return than the actual index's gain."
- "Indexed annuity contracts commonly allow the insurance company to change some of these features periodically, such as the rate cap. Changes can affect your return. Read your contract carefully to determine what changes the insurance company may make to your annuity." [612]

Early versions of fixed index annuities were fairly straightforward, with a guaranteed minimum value based on a share of premium payments with a potential for additional interest returns based on the performance of an underlying equity index. Over time, additional features and enhancements were added, including alternative crediting strategies such as multi-year and monthly index averaging; the introduction of new and increasingly complex indices; and optional riders, including long-term care, death, and guaranteed lifetime withdrawal benefit (GLWB) riders.[613] The structure of fixed index annuities created added complexity on both the product level from multiple formulas required to calculate interest to be credited to an account within a stated period, and the investment decision level given the number of potential, both standard and engineered, indexes.

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[600] Board of Governors of the Federal Reserve System, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts: First Quarter 2023,* Table L.227 Federal Reserve Statistical Release Z.1. (June 8, 2023), *https://www.federalreserve.gov/releases/z1/20230608/html/l227.htm.*

[601] LIMRA, Preliminary U.S. Individual Annuity Sales Survey (2023, 4th Quarter).

[602] N.Y. Comp. Codes R. & Regs. Tit. 11 § 224.4.

[603] National Association for Fixed Annuities, *2016 State-by-State Fixed Annuity Sales Study,* (2017), *https://nafa.com/online/library/2016-NAFA-Annual-Sales-Study.pdf.*

[604] For more information on this assumption, refer to the Affected Entities section.

[605] $3.8 trillion in assets × 70% of the assets not covered by a fiduciary standard × 80% covered by ERISA × 0.25% increase in returns = $5.3 billion.

[606] Financial Industry Regulatory Authority, *The Complicated Risks and Rewards of Indexed Annuities,* Financial Industry Regulatory Authority, (July 2022), *https://www.finra.org/investors/insights/complicated-risks-and-rewards-indexed-annuities.*

[607] Coryanne Hicks & Phillip Moeller, *17 Things You Need to Know About Annuities,* U.S. News and World Report, (May 3, 2021), *https://money.usnews.com/investing/investing-101/articles/things-you-need-to-know-now-about-annuities.*

[608] John Hilton, *Kings of the Hill: Indexed products spur life, annuity sales,* InsuranceNewsNet Magazine (July 1, 2022), *https://insurancenewsnet.com/innarticle/kings-of-the-hill.*

[609] Financial Industry Regulatory Authority, *The Complicated Risks and Rewards of Indexed Annuities,* Financial Industry Regulatory Authority, (July 2022), *https://www.finra.org/investors/insights/complicated-risks-and-rewards-indexed-annuities.*

[610] *Id.*

[611] Securities and Exchange Commission, *Updated Investor Bulletin: Indexed Annuities,* Securities and Exchange Commission, (July 2020), *https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-13.*

[612] *Id.*

[613] Low, Zi Xiang, Manabu Shoji, and David Wang. "Fixed Index Annuity Overview in the U.S. and Japan," Miliman White Paper (November 2023). *https://www.milliman.com/-/media/milliman/pdfs/2023-articles/11-15-23_fixed-indexed-annuity-japan-vs-us-markets.ashx.*

The complexity of some index options allows insurance companies to reduce volatility by adjusting the index's exposure to risk based on market conditions. These include volatility-targeting indexes, which are designed to maintain a consistent level of volatility over time by automatically adjusting exposure to riskier assets, and minimum variance indexes, which select stocks with the lowest historical volatility and adjust the weights of each stock to achieve a target level of risk.[614] Some indexes incorporate an ''excess return'' component, where a benchmark return is subtracted from the gross return to determine the amount of ''excess'' return that contract owner will earn. Depending on market conditions, it is possible that the excess return feature will materially erode the return on the annuity, which may create confusion and disappointment for owners who do not fully understand the complexity and potential impact of this feature.[615]

In 2023, CEA examined the proposed rule and analyzed publicly available data to provide an example of how retirement savers investing in fixed index annuities could end up with lower returns than they would if they had the rule in place. CEA provided an illustration of how to try to quantify the benefits and costs of a fixed index annuity, using the fair market price of the options. In this example, CEA used the S&P 500 price index on Bloomberg's options pricing calculator for a specified day in 2023. Based on those calculations, CEA estimated that investors on that date could be paying 1.2% of the assets they invested, as the downside protection and loss of upside potential at the time of investment.[616] CEA noted that this 1.2% cost did not include the additional explicit sales charges or fees, or any transaction costs or operational costs. CEA also observed that a risk-averse investor might be willing to pay more than fair value, to insure against the possibility of loss, which would add further to the cost. All of this highlights the lopsided fair value of the contract for a fixed index annuity, CEA opined. This is consistent with the Department's analysis on the benefit of this rulemaking to plan participants and Retirement Investors purchasing annuities. Indeed, as CEA noted elsewhere in its analysis, if total assets invested in fixed index annuities in 2021 had paid 1.2 percent of assets[617] for the protection of an annuity, forgone returns could be as high as $7 billion. In its comment letter on the proposal to the Department, Morningstar evaluated the impact of the rule on Retirement Investors rolling funds into fixed indexed annuities. To capture how commissions might decline, Morningstar compared pricing spread for fixed index annuities and fixed-rate annuities, where the pricing spread is defined as ''the yield that the insurance company takes from the earned rate of the supporting general account portfolio for overhead costs and profit.'' Based on the annual premium volume of total fixed index annuities sales in 2023, they estimated that retirement savers rolling funds into fixed index annuities would save $3.25 billion per year in fees under this rulemaking, and this is without considering other benefits, such as the reduction in surrender fees due to more appropriate annuity contracts.[618]

Protections Concerning Advice Given to Plan Fiduciaries

This rulemaking will also yield economic benefits by extending protections to advice given to ERISA plan fiduciaries. Accordingly, the rulemaking will ensure that investors and the Secretary could enforce the fiduciary protections by pursuing claims for fiduciary misconduct involving ERISA-covered plans. When a broker-dealer currently provides advice to plan fiduciaries, the advice generally is not covered by Regulation Best Interest because the plan fiduciaries are typically not retail customers.[619] Pool et al. (2016) offered evidence that mutual fund companies acting as service providers to 401(k) plans display favoritism toward their own affiliated funds, even when their performance is worse, generating ''significant subsequent negative abnormal returns for participants investing in those funds.''[620] The rulemaking aims to reduce or eliminate such harmful favoritism.

Pool et al. (2022) demonstrated that funds that offer defined contribution plan recordkeepers revenue-sharing payments are more likely to be added as investment options on plan menus and are also more likely to be retained. Additionally, plans whose menus include funds that share revenue had higher expense ratios resulting in significantly higher fees.[621] Pool states that this is ''consistent with the notion that . . . less transparent indirect payments allow record keepers to extract additional rents from plan participants.''[622] Fiduciaries can negotiate the specific formula and methodology under which revenue sharing will be credited to the plan or plan service providers, indirectly reducing the fees the plan pays which could in turn mitigate the conflict, but this requires a sophisticated understanding of the underlying agreement.[623]

In its comment letter regarding the proposal, Morningstar argued that under this rulemaking, Retirement Investors would save $55 billion in fees over the next 10 years as workplace retirement plan seek cheaper investment options.[624] Given the proliferation of fee arrangements for investment advice that are increasingly less transparent to clients and regulators as well as the variation in standards and safeguards across advice markets, the Department believes it is critical to extend protections associated with fiduciary status under ERISA, to protect Retirement Investors' savings.

Plan fiduciaries receive advice on many important topics. For defined contribution plans, these topics can include plan design provisions such as investment alternatives, whether the plan should have automatic enrollment, default contribution rates, and default

[614] Bhauwala, Nikhil. *What Are Volatility Control Indexes? What Does It Mean For You As An Annuity Holder and Advisor?,* AdvisorWorld (Feb. 25, 2023), *https://advisorworld.com/annuities/annuity-faqs/what-are-volatility-control-indexes-what-does-it-mean-for-you-as-an-annuity-holder-and-advisor/#What%20Are%20Risk-Controlled%20Indexes.*

[615] *Ibid.*

[616] CEA's estimate was calculated using August 1, 2023 end-of-day prices, using the historic volatility of the S&P 500 price index on Bloomberg's options pricing calculator, with the put option's strike price at the current index price, the call option's strike price at 6.75% above the index's price on August 1, and the maturity of the option at 1 year.

[617] 1.2 is the percent of assets paid for a fixed indexed annuity on Aug. 1, 2023, as noted in the Appendix to CEA's analysis.

[618] Comment letter received from Morningstar on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024). This estimate is a result of a forecast of mean account balances for fixed annuities after seven years. The estimate assumes that 55 percent of annuities sales would be affected by the final rule.

[619] Advice provided by an investment adviser to a plan fiduciary is subject to the Advisers Act fiduciary duty.

[620] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options In 401(K) Plans,* 71(4) The Journal of Finance 1779–1812 (August 2016), *https://onlinelibrary.wiley.com/doi/abs/10.1111/jofi.12411.*

[621] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *Mutual Fund Revenue Sharing in 401(k) Plans,* Vanderbilt Owen Graduate School of Management Research Paper at 30–31 (November 8, 2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752296.*

[622] *Ibid.* at 36.

[623] *See* Employee Benefits Security Administration, *2013–03A,* Advisory Opinions, (2013), *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2013-03a.*

[624] Comment letter received from Morningstar on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

investments. For defined benefit plans, it can include selection of investments and investment strategies as well as distribution options. Given the large number of participants in ERISA plans and the huge asset holdings of such plans, the benefits of protecting the advice received by plan fiduciaries is likely to be substantial.

Increased Confidence in Advisers and in the Reliability of Their Advice

The market for financial advice generally works best when investors trust investment advice providers and their trust is well-placed. Both conditions are necessary for optimal results. If investors distrust investment advice providers, they will incur higher costs to select a provider and monitor their conduct. Their provider may also incur higher costs to counter prospective and existing customers' distrust. Distrustful investors may be less likely to obtain beneficial advice and more likely not to follow beneficial advice.[625]

Likewise, if investors trust investment advice providers more than is warranted, they may reduce their monitoring of the adviser's actions and accept less transparency in policies, procedures and fees, making them more vulnerable to harm from advice that is biased by advisory conflicts.[626] A 2019 survey regarding the Australian financial advice industry reported that the biggest barriers for consumers in accessing financial advice are cost (35 percent), limited financial circumstances in which it is ''not worth getting financial advice'' (29 percent), the desire to manage an individual's own finances (26 percent), a lack of trust (19 percent), or a lack of perceived value in paying for financial advice (18 percent).[627]

By ensuring that, when advisers hold themselves out as occupying a position of trust and confidence, they are actually held to that standard, this rulemaking will ensure that legitimate investor expectations of advice that is in their best interest are upheld, rather than dishonored. Relatedly, persons who are not in fact, willing to adhere to a fiduciary standard when making recommendations to Retirement Investors will need to be candid about that fact. Accordingly, this rulemaking will facilitate efficient, trust-based relationships between Retirement Investors and investment advice providers of all types, so investors will be more likely to obtain and follow beneficial advice that is consistent with their retirement goals.

In response to the proposal, several commenters weighed in on the benefits of advice to investors, such as better asset allocation, diversification, tax strategies, and investment strategies. Some of these commenters suggested investors will lose access to education and advice and that these benefits of having access to this type of advice may outweigh the risks of conflicted advice, and as a result, the Department overestimates the benefits of the proposal. This argument, however, assumes, in large part, that as a result of the rulemaking, investors will no longer have access to basic information and education regarding such matters as asset allocation, diversification, as well as tax and investment strategies, which the Department has expressly carved out from the scope of fiduciary advice. Moreover, the rule has carefully limited its treatment of investment recommendations as fiduciary recommendations to those circumstances where a reasonable investor would believe that the adviser occupies a position of trust and confidence. And, in those circumstances, the obligations imposed by the rulemaking are clearly aligned with the obligations imposed by Regulation Best Interest. The Department does not believe that requiring trusted advisers to act with care and loyalty, or avoid misleading statements or overcharges—the core obligations of the rulemaking—will result in the loss of access to the wide range of investment products and advisory services available today in the financial marketplaces. In substantial part, the rulemaking simply requires advisers to adhere to standards consistent with the way they hold themselves out to their customers. Moreover, many other commenters shared the Department's concern for conflicted advice, particularly with one-time advice, referencing the magnitude of potential losses.

There is extensive evidence that investors are often subject to behavioral biases that lead to costly systematic investment errors. There is evidence that good advice can improve saving and investing decisions. Accordingly, the rulemaking may result in a beneficial reallocation of investment capital. Montmarquette and Viennot-Briot (2015) provided evidence that ''having a financial advisor for at least four years has a positive and significant impact on financial assets'' and that ''the positive effect of advice on wealth creation cannot be explained by asset performance alone: the greater savings discipline acquired through advice plays the major role.''[628]

Fisch et al. (2016) also provided evidence that ''highlight[s] the potential value of professional advice in mitigating the effects of financial illiteracy in retirement planning.''[629] Fisch et al. recruited Amazon Mechanical Turk users (MTurk sample), a crowdsourcing marketplace, to allocate a hypothetical ten thousand dollars among ten investments options as part of a 401(k) plan. Separately, professional advisers—registered investment advisers, broker-dealers or dual registrants—were asked to allocate ten thousand dollars on behalf of a hypothetical 30-year-old, single client, with no children, a lower middle-class income and no substantial outside savings or investments. They found that professional advisers, on average, selected portfolios with higher returns, allocated more money to cheaper index funds, paid lower fees, and accessed more information in connection with the allocation decision than the MTurk sample. For example, professional advisers were ''uniformly sensitive to the fact that the equity risk premium and the 30-year time horizon of the allocation decision warranted substantial equity exposure-facts that the low-literacy investors seemed to be unaware.''[630] Overall, professional advisers had a higher level of financial knowledge, which enabled them to make better retirement investing decisions from which unsophisticated investors could benefit.

Enforcement

Under the rulemaking, the full range of covered investment advice interactions with Title I Plans will be subject to enforcement by the Department, as well as to private claims

[625] Paul Gerrans & Douglas A. Hershey, *Financial Adviser Anxiety, Financial Literacy, and Financial Advice Seeking,* 51(1) Journal of Consumer Affairs 54–90 (2017), *https://www.jstor.org/stable/44154765.*

[626] Winchester, Danielle & Sandra Huston, *Trust Reduces Costs Associated with Consumer-Financial Planner Relationship,* 71(4) Journal of Financial Service Professionals 80–91 (2017), *https://web.p.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=0&sid=1ca603cd-53ca-4cbb-99b1-5fd43782b0c4%40redis.*

[627] Australian Securities and Investments Commission, *Report 627—Financial Advice: What Consumers Really Think,* Australian Securities and Investments Commission, (August 2019), *https://download.asic.gov.au/media/5243978/rep627-published-26-august-2019.pdf.*

[628] Claude Montmarquette & Nathalie Viennot-Briot, *The Value of Financial Advice,* 16(1) Annals of Economics and Finance 69–94 (2015), *http://aeconf.com/articles/may2015/aef160104.pdf.*

[629] Jill E. Fisch, Tess Wilkinson-Ryan, & Kristin Firth, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors,* 66(3) Duke Law Journal (2016), *https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3875&context=dlj.*

[630] *Id.*

by Retirement Investors. In general, participants and beneficiaries have the right to bring suit under ERISA 502(a) against fiduciaries who breach their duties and obligations to the plan, including engaging in non-exempt prohibited transactions. This private right of action, which ensures participants and beneficiaries have ready access to the Federal courts, provides critical protection of tax-advantaged retirement plans. For advice interactions not currently covered by relevant standards of conduct, such as much advice provided to plan fiduciaries, these enforcement measures will help to ensure the rulemaking is implemented effectively. For advice interactions that are subject to State regulation, under the rulemaking they will have stronger oversight, which will provide greater protections to investors.

Charoenwong et al. (2019) showed that regulatory oversight has an important impact on investment advice.[631] They studied a policy reform that did not affect the laws or rules that registered investment advisers were operating under; instead, it changed the regulatory oversight. The reform shifted some advisers from a Federal regulator, the SEC, to State-securities regulators. Registered investment advisers who shifted to the State-securities regulators received 30–40 percent more complaints from customers, relative to the unconditional complaint rate. This effect mainly resulted from fiduciary violations. Furthermore, the vigor of the enforcement program mattered; the more resources a State-securities regulator had, the fewer complaints there tended to be. Consequently, the addition of ERISA's remedial provisions and enforcement can be expected to enhance compliance with the obligation to give advice that is prudent and loyal, even under the SEC's closely aligned conduct standards.

The rulemaking will also ensure the imposition of appropriate excise taxes for prohibited transactions involving both ERISA-covered plans and IRAs. As part of their retrospective review, Financial Institutions will be required to report to the Department of the Treasury any non-exempt prohibited transactions in connection with fiduciary investment advice, correct those transactions, and pay any resulting excise taxes. Failure to report, correct, and pay an excise tax, in addition to existing factors, will make a Financial Institution ineligible to rely on PTE 2020–02 and PTE 84–24, provided that a finding of ineligibility satisfies the timing and scope of ineligibility provisions under the amendments to PTE 2020–02 and/or PTE 84–24, as applicable. The Department believes these additional conditions will provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02 and PTE 84–24.

7. Impact of the Rulemaking on Small Account Retirement Investors

Some observers have argued that some small savers—individuals, or households with low account balances or of modest means—will lose access to investment advice under this regulatory action and become worse off. The Department has considered in detail the overall impact of this rulemaking on small savers and, after careful review, disagrees.

The Department recognizes that investment advice is often very valuable for small savers. There is ample evidence and broad consensus that many U.S. consumers struggle to make and implement good retirement saving and investment decisions without effective help. Many lack the skills, motivation, or discipline to accumulate adequate savings, optimize their investment strategies, and thereby realize financial security in retirement.[632] In particular, less sophisticated investors may benefit from additional guidance to make sure they are taking basic steps such as saving adequately and allocating their investments with an appropriate amount of risk.

However, small savers are especially vulnerable to the detrimental effects of conflicted advice as they cannot afford to lose any of their retirement savings, and therefore stand to benefit significantly from this rule. Advisory conflicts have historically distorted the market in ways that have prevented consumers from accessing less conflicted investment alternatives. With fewer economic resources, small savers are particularly susceptible to any practices that diminish their resources by extracting unnecessary fees or by yielding lower returns. Less sophisticated investors frequently do not know how much they are paying for advice and are not equipped to effectively monitor the quality of the advice they receive.[633] This is supported by research illustrating that consumers have difficulty observing fees and accounting for them in their financial decisions.[634] Moreover, limited transparency in what can be complex compensation arrangements of potentially conflicted adviser relationships impedes the ability of even knowledgeable investors to fully understand the cost and impact of conflicts of interest on their investments.[635] Indeed, Agnew et al. (2021) found in an experimental setting that younger, less financially literate, and less numerate participants were more likely to hire a low-quality adviser.[636] Moreover, it is possible that these small savers do not understand the potential effects of their advisers' conflicts and that disclosure directly to these consumers is unlikely to change this without other protections in place.[637] Cain, Loewenstein, and Moore find just that, observing that while investors do not sufficiently discount advice when conflicts are disclosed, advisers that disclose a conflict ''feel morally licensed'' to provide biased advice, potentially exacerbating the conflict at the expense of investors.[638]

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[631] Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation,* 109(10) *American Economic Review* (October 2019), *https://www.aeaweb.org/articles?id=10.1257/aer.20180412.*

[632] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 108, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.* (''many IRA investors lack sophistication''); 136 (older individuals often ''lack even a rudimentary understanding of stock and bond prices, risk diversification, portfolio choice, and investment fees''); and 137 (''only one-half of individuals aged 50 and older in the United States can correctly answer two simple financial questions that involve calculations. Many respondents failed to correctly conclude that $100 would grow to more than $102 after five years if interest accrues at 2 percent per year, while others were unable to determine that an account earning interest at 1 percent while inflation was 2 percent would lose buying power'').

[633] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 136–40, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[634] Edelen, Roger M., Evans, Richard B. and Kadlec, Gregory B., ''Disclosure and agency conflict: Evidence from mutual fund commission bundling,'' Journal of Financial Economics, Elsevier, vol. 103(2), pp. 308–326 (2012).

[635] Beh, Hazel, and Amanda M. Willis. ''Insurance Intermediaries.'' Connecticut Insurance Law Journal 15, no. 2 (2009): 571–98.

[636] Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, and Susan Thorp. *Who Pays the Price for Bad Advice?: The Role of Financial Vulnerability, Learning and Confirmation Bias,''* ARC Centre of Excellence in Population Ageing Research, Working Paper 2021/19, (July 1, 2021).

[637] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 268–271, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[638] Cain, Daylian M., George Loewenstein, and Don A. Moore. ''The Dirt on Coming Clean: Perverse

The Department also believes that having a common, high standard of conduct associated with retirement investment advice will increase trust in advisers and Financial Institutions, and make it more likely that small savers will seek advice.

Small investors often save using an ERISA plan, with roughly 38 percent of U.S. households having one or more defined contribution retirement plans with a non-zero balance and of those, more than one-third having a balance with less than $25,000.[639] Frequently this is the main vehicle they use to save for retirement; in fact, approximately two-thirds of households participating in a pension plan do not own an IRA.[640] This rulemaking will require advice given to the plan fiduciaries to meet a fiduciary standard, resulting in improvements in plan design and selection of investments on the menu that will benefit small savers as the vast majority of small savers choose investments from their plan's platform rather than investing through a brokerage account, if their plan even offers a brokerage account option.[641] Moreover, because research shows that lower-income participants tend to be more influenced by default options than high income participants, small savers will benefit from plan fiduciaries choosing default options that are well selected and well monitored.[642]

The Department received comments to its proposal arguing that extending the fiduciary definition would result in advisers exiting smaller account markets such as small employer-based plans and lower balance IRAs which would cause small investors to have less access to professional financial advice. These comments largely relied on a survey of broker-dealers and other financial advisory firms conducted after the Department's 2016 Rulemaking, which theorized that ''in order for investors to retain access to advice on retirement accounts from the study participants, who eliminated or limited advised brokerage access, 10.2 million accounts would have to move to a fee-based option.'' It is important to note, however, that the survey was commissioned by a party that sued to block the Department's 2016 Rulemaking, that participants were self-selected, responses were not verified, and the Department is not aware of any follow-up study having been conducted to determine how many of those accounts actually lost access to advice as the survey did not account for customers' ability to move to different firms or the availability of a full range of investment choices and advisory arrangements in the market as a whole.[643] In particular, the same survey cited by commenters stated that while firms may eliminate or limit advised brokerage platforms, they generally also acknowledged they would still give Retirement Investors other options such as a fee-based program, a self-directed brokerage account, robo-advice, or a call-center.[644] Moreover, the analysis was not based on the current rulemaking, which is more narrow in scope.

Because the 2016 rulemaking was vacated prior to full implementation, it is not possible to ascertain precisely what impact the rule would have had if it had been permitted to move forward. Irrespective of one's views on that question, however, this rulemaking is not the equivalent of the 2016 rule, as discussed above, but rather is much more aligned with the SEC's Regulation Best Interest. It is worth noting that there has not been a decline in access to advice associated with the implementation of Regulation Best Interest. In fact, analysis of the Survey of Consumer Finances found that the use of brokers as a source of advice for savings and investing among households under 65 with below median incomes *increased* modestly between 2019 and 2022.[645]

Moreover, in a 2024 random survey of its members, the Certified Financial Planner (CFP) Board found that most members' ability and willingness to serve their client was not impacted by the adoption of SEC's Regulation Best Interest, with 82 percent not raising the required investable asset minimum for clients and 86 percent not terminating client services following the rule.[646] Given these responses to similar regulatory changes, the Department is skeptical that the market will react to this rulemaking and its requirement that entities provide advice that is prudent and loyal, by ceasing to offer the full range of investment and advice models. Rather, the Department anticipates that by requiring advisers to accurately represent the nature of their relationship and advice, retirement investment advice markets will work more efficiently and result in innovations and cost-efficient delivery models to provide prudent and loyal advice to small investors. While individual firms may adjust their offerings, and investors may respond by switching firms, there is still every reason to expect that after a transitional period there will be a wide range of products and services available across the market.

The Department also received several comments that argued this rulemaking would exacerbate the racial wealth gap, citing a study conducted in 2021, two years prior to the proposal, that cannot address the contours of this more targeted rulemaking. Additionally, the cited 2021 study does not account for changes to the regulatory and legal environment since the 2016 Final Rule, including the SEC imposing a Best Interest standard on financial advice provided to retail investors for securities by brokers and dealers, and the SECURE and SECURE 2.0 Acts' provisions which promote access to retirement plans and portability within the retirement system. Furthermore, the cited study does not account for the share of Black and Hispanic households that used financial advisers to estimate how those population would be impacted by either the 2016 Final Rule or the current rulemaking. Moreover, as pointed out by another commenter, the study ''cites a 2019 Vanguard study by Kinniry Jr., et. al. that estimates that Vanguard's Personal Advisor Services could add 3 percent to annual net returns. However,

Effects of Disclosing Conflicts of Interest.'' Journal of Legal Studies 34 (2005): 1–25.

[639] EBSA tabulations based on the 2019 and 2022 Federal Reserve Board, Survey of Consumer Finances.

[640] Constantijn W.A. Panis & Michael J. Brien, *Savers With and Without a Pension* (2015), *https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/savers-with-and-without-a-pension.pdf.*

[641] In 2022, participants with annual income between $15,000 and $150,000 invested less than 0.5% of their defined contribution plan assets through a brokerage account. *See* Vanguard, *How America Saves,* (2023). *https://institutional.vanguard.com/content/dam/inst/iig-transformation/has/2023/pdf/has-insights/how-america-saves-report-2023.pdf.*

[642] John Beshears, Ruofei Guo, David Laibson, Brigitte C. Madrian, & James J. Choi, *Automatic Enrollment with a 12% Default Contribution Rate* (August 18, 2023), *https://spinup-000d1a-wp-offload-media.s3.amazonaws.com/faculty/wp-content/uploads/sites/27/2023/08/JPEF-20230802.pdf.* James Choi, David Laibson, Brigette Madrian, & Andrew Metrick, *For Better or For Worse: Default Effects and 401(k) Savings Behavior,* In Wise DA (ed.), Perspectives on the Economics of Aging. Chicago: University of Chicago Press, pp. 81–121.

[643] *See* Deloitte, *The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors,* (August 9, 2017) (Deloitte 2017 study). The Deloitte 2017 study explains that the study participants were ''invited'' by SIFMA and notes that Deloitte ''was not asked to and did not independently verify, validate or audit the information presented by the study participants.'' *Id.* at 4–5, 5 fn. 5.

[644] Deloitte, *The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors,* (August 9, 2017).

[645] Tabulations from the 2019 and 2022 Survey of Consumer Finances.

[646] CFP Board of Standards, *Access to Financial Advice Survey,* (Mar. 2024). *2024-access-to-financial-advice-report.pdf* (*cfp.net*).

Vanguard advisers are fiduciaries who do not offer conflicted advice and so would not be affected by the proposed rule.'' As such, the Department does not consider critiques arguing that this rulemaking will exacerbate the wealth gap to be valid.

Another commenter stated that for fixed and fixed indexed annuities, fee-based advice models serve more affluent individuals, while salespeople compensated using commissions tend to serve the needs of ''average Americans,'' suggesting that this rulemaking will negatively impact access to these types of annuities for smaller savers. However, this argument is premised on two false assumptions: that this rulemaking eliminates the use of commissions, and that commission-based annuities are largely marketed to lower-income savers. As noted above, the Department does not require the elimination of sales commissions or other payment methods; rather, it requires that when presenting an individualized financial recommendation to a Retirement Investor who is expected to act on that recommendation, the adviser must uphold their duty of care and loyalty and place the investor's interest before their own.

In addition, when making this argument the commenter referenced a survey from the Committee of Annuity Insurers that reported the median household income of annuity holders is $79,000 and argued that this is significantly below that of the median income for a middle-class household.[647] However, the survey also indicates that 78 percent of annuity owners are retired and that the median age of annuity owners is 74. Given that the majority of annuity holders are retired and therefore do not earn a wage or salary, which significantly impacts household income, comparing the median annuity holder's household income to that of all households, including those still in the workforce, is inappropriate. A more appropriate comparison is that of median household incomes for ages 65 to 74 (below the median age of annuity holders), which in 2022 was $61,000, suggesting that annuity holders are actually substantially wealthier than their peers.[648]

In contrast, other commenters disputed the claim that this rulemaking will reduce small savers' access to investment advice. The CFP Board noted that after it ''adopted a broad fiduciary standard, the CFP Board saw no evidence that CFP professionals stopped providing advice to moderate-income clients. The CFP Board also has seen no evidence to suggest that the proposed rule would restrict access to advice, particularly for moderate-income Americans.'' [649] In fact, the CFP Board reported that after its new standards were adopted, only 10 percent of their members raised required asset minimums and only 6 percent terminated client services.[650] The new standards also did not discourage entry of new financial professionals with a record number of new CFP certificants in 2023—also the most diverse class in the Board's history.[651] Another commenter noted that they disagreed with the assertion that the rulemaking would result in reduced access to advice, noting that they ''provide financial planning services and retirement advice to clients from all backgrounds and income levels. Rather than limiting access, adoption of the Proposed Rule will likely lead to increased marketplace innovation and to the development of improved financial products and services benefitting all retirement savers.''

Moreover, the preliminary market reactions to the 2016 Rule differed from what the industry anticipated at the time and reiterated in response to the 2023 proposal. In a survey conducted in September 2017, 82 percent of broker-dealers had not made changes to their handling of smaller, retail retirement accounts, although about 18 percent had raised their minimum account threshold and closed smaller accounts.[652] In examining the effects of the 2016 Final Rule, Egan, Ge, and Tang (2022) found that while variable annuity sales had decreased, there is no evidence that the change affected investors with less wealth more than others. They concluded that variable annuity sales had become more sensitive to expenses and that insurers had increased the relative availability of low-expense products. Therefore, the study concluded that investor welfare had improved overall because of the 2016 Rulemaking, despite the fact that it was vacated.[653]

Further, as discussed in the Benefits and Transfers section, one notable response from the industry to the 2016 Rulemaking was the creation of two new share classes of mutual funds: clean shares and T shares (or transactional shares). Clean shares provide greater transparency for investors and are sold ''without any front-end load, deferred sales charge, or other asset-based fee for sales or distribution.'' [654] While T shares have front-end loads, they have ''a standard, maximum sales charge across all fund categories of 2.5 percent and a 0.25 percent 12b–1 fee.'' [655] According to a 2017 report from Morningstar, T shares would ''help financial advisors maintain their traditional business model—selling mutual funds on commission—while complying with new rules. Further, these T shares would feature uniform commissions, reducing or eliminating financial advisors' conflicts of interest in making recommendations to clients.[656]

Following the revocation of the 2016 Rulemaking, the industry has moved away from offering T shares,[657] while the offering of clean shares has increased in recent years.[658] This response suggests that, rather than choosing to stop offering services to smaller investors, the industry is likely to find alternative means to provide services to this segment of the market.

[647] The Committee of Annuity Insurers, *Survey of Owners of Individual Annuity Contract.* (July 2022) *https://www.annuity-insurers.org/wp-content/uploads/2023/07/Gallup-Survey-of-Owners-of-Individual-Annuity-Contracts-2022.pdf.*

[648] Federal Reserve Board 2022 Survey of Consumer Finances. *https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Before_Tax_Income;demographic:agecl;population:5,6;units:median;range:1989,2022.*

[649] Comment letter received from the Certified Financial Planner Board of Standards on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[650] CFP Board of Standards, *Access to Financial Advice Survey,* (Mar. 2024), *https://www.cfp.net/-/media/files/cfp-board/Knowledge/Reports-and-Research/2024-Access-to-Financial-Advice-Report.pdf.*

[651] *CFP Board Approaches 100,000 CFP Professionals, with the Most Ever Exam-takers in a Single Year,* (January 11, 2023), *www.cfp.net/news/2024/01/cfp-board-approaches-100000-cfp-professionals-with-most-ever-exam-takers-in-a-single-year.* Last accessed 3/7/2023.

[652] John Crabb, *The Fiduciary Rule Poll, International Financial Law Review,* International Finance Law Review (October 2017), *https://media2.mofo.com/documents/171000-fiduciary-rule-poll.pdf.*

[653] Egan, Mark, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities,* 35(12) The Review of Financial Studies 5334–5486. (December 2022).

[654] SEC, *Introduction to Investing: Glossary, https://www.investor.gov/introduction-investing/investing-basics/glossary/clean-shares.*

[655] Morningstar, *Descriptions of Share Class Types, https://morningstardirect.morningstar.com/clientcomm/Share_Class_Types.pdf.*

[656] Aron Szapiro and Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors,* Morningstar Policy Research, (April 2017).

[657] Greg Iacurci, *T Shares Are Dead,* InvestmentNews (December 20, 2018), *https://www.investmentnews.com/t-shares-are-dead-77482.*

[658] Rebecca Moore, *Clean Shares' Popularity,* Plan Adviser, (October 2023), *https://www.planadviser.com/print-page/?url=https://www.planadviser.com/magazine/clean-shares-popularity/&cid=46591.*

As in 2016, the Department expects that industry's response to this rulemaking will be to offer alternative, less conflicted, products and services to small investors.

The surveys, papers, and predictions described above do not support a finding that small investors would lose access to personalized advice as a result of fiduciary protections, even under the 2016 Rulemaking, which imposed more onerous conditions—and liability—on firms and advisers than is true of the final rule and exemptions. This rulemaking broadly comports with Regulation Best Interest, and the Department is not aware of any substantial, documented reductions in access to advice as a result of Regulation Best Interest.

The rulemaking accommodates different types of business models. It is possible that, as the market evolves, small investors and the firms that serve them will increasingly move away from commission-based full-service or ''advised'' brokerage accounts or commission-compensated advice from insurance agents. Instead, they may use one or more of the following: target date funds (which adjusts risk allocation over time based on the target date); receiving advice directly from investment firms (which allows for interaction with a live adviser though the advice tends to focus on in-house funds and investments); hourly engagement or subscription-based firms (which are particularly useful for financial planning); and robo-advice (which generally provides a customized investment mix based on information about the investor's financial circumstances and existing investment assets).[659]

The Department expects the final rule and exemptions will not significantly impact the overall availability of affordable investment advice, but rather improve the quality of this advice as conflicts are removed. This will apply as well to small investors who continue to have access to advice. Furthermore, increasing the quality of advice provided to retirement plan fiduciaries will benefit many workers who are participating in a defined contribution or defined benefit pension plan.

This is supported by the experience in the United Kingdom, which adopted a far more aggressive stance in addressing conflicted advice than the Department proposed in the 2016 Rulemaking or the current rulemaking. When the United Kingdom initially banned commissions for investment advice and required more stringent qualifications for advisers under its Retail Distribution Review (RDR) in 2013, the advice rate fell both in the lead up to the regulatory change and in the years immediately following its implementation. However, more recent research has found evidence of improvements in the market since 2017, including a 38 percent increase in the number of United Kingdom adults that received regulated financial advice in the past year and a 12-percentage point increase in consumer awareness of automated advice,[660] which suggested a greater focus on digital advice as a potential solution to provide low-cost investment advice with specifically tailored outcomes to individual investors at scale.[661] Moreover, while the total number of firms fell, the number of staff advising on retail investment products increased by 5 percent between 2018 and 2022.[662]

The Department has reason to believe that such alternative forms of advice have become more available in the United States and, as in the United Kingdom, are beneficial to small investors. In recent years, the investment advice market has seen an increase in financial technology and robo-advice service providers, which cater to small savers. In 2017, Morningstar noted that advances in financial technology could increase personal advisers' productivity and streamline compliance, enabling them to offer higher service levels affordably to small investors even as they adapt business practices to mitigate conflicts of interest.[663] Because the core portfolio management functions are performed by computer algorithm, robo-adviser services generally can be expanded more easily than traditional advisory services. The marginal cost incurred by a robo-adviser to serve additional customers is very small relative to that incurred by traditional advisers. Robo-advisers are often willing to serve investors with assets under $500,[664] and some robo-advisers do not require a minimum investment at all.[665] The financial needs of small investors can often be met by the degree of customization offered by robo-advice and do not justify a more expensive, extremely personalized strategy.

Many robo-advice providers claim to offer relatively conflict-free services, claiming no commission, no performance fees, and no compensation from third parties. Others claim to serve investors as fiduciaries. Robo-adviser offerings are typically comprised of ETFs that, in comparison to mutual funds, offer little room for revenue streams and payment shares that would create the traditional conflicts of interest for advisers discussed elsewhere in this analysis (*e.g.,* 12b–1 fees or subtransfer agent fees).[666]

The Department did receive some comments voicing concerns with regard to robo-advice, particularly in regard to market downturns with one commenter noting, ''the use of model portfolios—a hallmark of 'robo-advice'—can lead to herd like behavior, thus putting participants at risk of disaster when their models do the same thing for all investors at the same time.'' However, the use of model portfolios is not unique to robo-advice and has grown more prevalent in recent years. Many traditional investment advisers rely on model portfolios to outsource investment management and free up Investment Professionals' time to provide other services. In 2023, approximately $424 billion were invested in model portfolios, a 48 percent increase from 2021.[667]

A recent study by Liu et al. (2021) looked specifically at the impact of using robo-advisers on investment

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[659] Christine Benz & Jeremy Glaser, *The Best Ways for Small Investors to Get Advice,* Morningstar (February 21, 2017), *https://www.morningstar.com/articles/794212/the-best-ways-for-smaller-investors-to-get-advice.*

[660] The United Kingdom Financial Conduct Authority, Financial Lives 2022 Survey: Consumer Investment and Financial Advice, *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review,* (July 2023), *https://www.fca.org.uk/publication/financial-lives/fls-2022-consumer-investments-financial-advice.pdf.*

[661] The United Kingdom Financial Conduct Authority (FCA) has highlighted that digital advice can be more convenient for consumers and can offer efficiency and cost benefits to providers. *See* FCA, *Feedback Statement on Call for Input: Regulatory Barriers to Innovation in Digital and Mobile Solutions* (March 2016), *http://www.fca.org.uk/static/fca/article-type/feedback%20statement/fs16-02.pdf*).

[662] The United Kingdom Financial Conduct Authority, *Data from the Retail Mediation Activities Return (RMAR),* 2018–2022 (August, 2023), *https://www.fca.org.uk/data/retail-intermediary-market/previous-editions-retail-intermediary-market-data.*

[663] Michael Wong, *Financial Services: Weighing the Strategic Tradeoffs of the Fiduciary Rule,* Morningstar (February 2017), *https://www.morningstar.com/articles/798573/financial-services-weighing-the-strategic-tradeoffs-of-the-fiduciary-rule.*

[664] Wealthfront, *Account Minimums to Invest with Wealthfront,* Wealthfront, *https://support.wealthfront.com/hc/en-us/articles/210994423--Account-minimums-to-invest-with-Wealthfront.*

[665] One example is Betterment. *See* Betterment, *Pricing at Betterment,* Betterment, *https://www.betterment.com/pricing/.*

[666] Jennifer Klass & Eric Perelman, *Chapter 3: The Transformation of Investment Advice: Digital Investment Advisors as Fiduciaries, The Disruptive Impact of FinTech on Retirement Systems,* Oxford University Press 38 (2019).

[667] Millson, Adam, *U.S. Model Portfolio Landscape: 2023 in Review,* Morningstar Manager Research (February 2024).

performance during the 2020 financial crisis caused by the COVID–19 global pandemic.[668] Using portfolio and transaction data from investors at a Taiwanese mutual fund online investment platform, Liu et al. (2021) found that robo-advice significantly reduced the losses experienced by investors during the crisis and that investors using robo-advice adjusted risk levels and trading to adapt to changes in the market while other investors did not.

Similarly, a study by D'Acunto et al. (2018) looked at how the introduction of robo-advice changed investor behavior in India. The study found that following the introduction of robo-advice, investors that had been under-diversified improved their diversification and experienced better portfolio performance through robo-advice. On the other hand, investors that had been well-diversified prior to the introduction of robo-advice did not change their diversification, but did increase their trading activity, which did not translate into better performance.[669]

While the Department does recognize that robo-advice is not a completely conflict-free solution to providing low-cost, investment advice, based on these findings, the Department believes that robo-advice can still play a vital role in the investment advice landscape for Retirement Investors, particularly for younger, lower-balance investors. Additionally, while the rate of adoption of pure robo-advice has slowed, firms have begun adding hybrid financial advice offerings that blend access to a human adviser with automated advice.[670] These hybrid robo-advice alternatives may mitigate some of the concerns expressed regarding pure robo-advice.[671] With the same fiduciary standard applying to all of these types of advice, this Rulemaking ensures that different business models will be treated in a consistent manner and that different types of customers, including small investors, will be protected.

8. Reform in the United Kingdom

As regulators in several countries have identified failures in their investment advice markets, they have undertaken a range of regulatory and legislative initiatives that directly address conflicted investment advice. One of the most studied initiatives occurred in the developed pension markets of the United Kingdom, where the Financial Conduct Authority (FCA) issued new regulations effective January 1, 2013, called the Retail Distribution Review (RDR). The United Kingdom focused its new regulatory regime on more transparent fee-for-service compensation structures. The United Kingdom enacted an aggressive reform that banned commissions on all retail investment products, not just those related to retirement savings;[672] required that customers in the United Kingdom be charged directly for advice; and raised qualification standards for advisers.

In marked contrast to these reforms, the Department's rulemaking does not ban commissions or eliminate conflicted compensation structures, but rather relies upon conduct standards and oversight structures designed to minimize the harmful impact of conflicts of interest, while permitting a wide range of business practices and models. The Department's rulemaking represents a middle ground between no reform and the outright bans on conflicted payments, allowing businesses to use a range of compensation practices while minimizing the harmful impact of conflicts of interest on the quality of advice.

Moreover, the Department's regulatory action is narrower than the rules passed by the United Kingdom as it does not prescribe additional qualification standards for existing financial advisers or broadly ban commissions. Those rules also sought to overhaul the entire financial advice market, while this rule focuses on advice to Retirement Investors and seeks to harmonize all advice to Retirement Investors under a uniform standard and oversight structure including disclosure requirements, rather than the existing patchwork of regulatory standards. Still, an important aim of all these interventions is to reduce incentives for financial advisers to recommend investments that are not in their client's best interest and thereby increase investor confidence in financial advice.

The experience of the United Kingdom suggests that while there are transitional costs of overhauling the incentive structure and qualifications of the financial advisers, the changes have resulted in a modest increase in the number of adults accessing financial advice as well as their satisfaction with the advice they are receiving, though there remains a large number of adults with substantial holdings in cash outside the investment space.[673] In general, the United Kingdom experience, which was more broadly applied, indicates that these reforms will not result in a significant reduction of advice.

9. Cost

To estimate compliance costs associated with the rulemaking, the Department considers the marginal cost associated with the rulemaking. The Department estimates that the rulemaking will impose total costs of $536.8 million in the first year and $332.7 million in each subsequent year. The estimated compliance costs associated with the amendments in the final rule and PTEs are summarized in the table below. Over 10 years, the costs associated with the final rule and associated amendments to the PTEs will total approximately $2.5 billion, annualized to $359.9 million per year (using a 7 percent discount rate).[674]

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[668] Che-Wei Liu, Mochen Yang, & Ming-Hui Wen, *Judge Me on My Losers: Does Adaptive Robo-Advisors Outperform Human Investors During the COVID–19 Financial Market Crash?* Production and Operations Management Forthcoming, (Accessed Aug. 31, 2023), *https://doi.org/10.1111/poms.14029.*

[669] Francesco D'Acunto, Nagpurnanand Prabhala, & Alberto G. Rossi, *The Promises and Pitfalls of Robo-Advising,* 32(5) The Review of Financial Studies 1983–2020, (April 2019), *https://doi.org/10.1093/rfs/hhz014.*

[670] Purcell, Kylie. ''Are Robo-Advisers Still the Answer to Costly Advice or a Dying Breed?'' Nasdaq (November 24, 2023). *https://www.nasdaq.com/articles/are-robo-advisors-still-the-answer-to-costly-advice-or-a-dying-breed.*

[671] Morningstar, ''2023 Robo-Advice Landscape.'' (August 2023). *https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/Robo-Advisor_Landscape_2023-Vanguard.pdf.*

[672] Non-advised'' services, or execution-only sales, where no advice or recommendation is given, fall outside of the RDR. Thus, a commission is still permitted for non-advised annuity sales. The FCA is currently examining the risks that exist with the purchase of ''non-advised'' annuities. Please see: *http://www.fca.org.uk/static/documents/consultation-papers/cp15-30.pdf.*

[673] The U.K. Financial Conduct Authority, Financial Lives 2022 Survey: Consumer Investment and Financial Advice, *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review,* (July 2023), *https://www.fca.org.uk/publication/financial-lives/fls-2022-consumer-investments-financial-advice.pdf.*

[674] The costs would be $3.0 billion over 10-year period, annualized to $356.0 million per year if a 3 percent discount rate were applied.

TABLE 7—SUMMARY OF MARGINAL COST AND PER-ENTITY COST BY EXEMPTION

	Total cost	
	First year	Subsequent years
3(21)(A)(ii) of ERISA:		
PTE 2020–02	$248,063,209	$165,502,919
PTE 84–24	288,737,197	167,239,823
Mass Amendment [1]	0	0
Total	536,800,406	332,742,741

[1] As finalized, the amendments to the Mass Amendment do not impose an additional burden on entities continuing to rely on those exemptions. However, the amendments will require entities to rely on PTE 84–24 and PTE 2020–02 for exemptive relief covering transactions involving the provision of fiduciary investment advice. These costs are accounted for in the cost estimates for PTE 84–24 and PTE 2020–02.

The estimated costs associated with the amendments to each of the PTEs are broken down and explained below. More detail can be found in the Paperwork Reduction Act sections of each respective exemption, also published in today's **Federal Register**.[675]

The quantified costs are significantly lower than the corresponding costs in the 2016 regulatory impact analysis, due to the smaller scope of this rulemaking relative to the 2016 Final Rule, as well as compliance structures adopted by the industry to reduce conflicted advice in response to State regulations, Regulation Best Interest, the NAIC model rule, PTE 2020–02, and changes made in response to the Department's 2016 Rulemaking before it was vacated. The methodology for estimating the costs of the final rule and amendments to the PTEs is consistent with the methodology and assumptions used in the 2020 analysis for the current PTE 2020–02.

Comment Summary

In the proposal, many of commenters expressed concern that the Department had underestimated the costs of the proposal. Some commenters criticized that the Department underestimated the cost of implementation and ongoing compliance with the exemptions. Some of these commenters criticized that the Department did not include certain types of costs, such as technology or training costs. Other commenters criticized that the Department's estimate of the time required to comply with the requirements were too low. Some commenters expressed concern that the proposal would cause significant changes to the market for investment advice and that this restructuring of the market would create large costs. Additionally, some commenters expressed concern that the rulemaking would increase uncertainty and that such uncertainty would be costly.

Some commenters provided estimates of the cost of the proposal. Some of these commenters provided general estimates of the likely magnitudes of the cost—most of the estimates provided stated that the actual cost of the proposal would be between 10 and 20 times the cost estimated in the proposal. One commenter remarked that the actual cost would be 100 times the cost estimated in the proposal.

A few commenters gave more specific information on how they would estimate the costs of the proposal. The Financial Service Institute, based on a survey conducted by Oxford Economics, estimated that the costs of the proposal imposed on broker-dealers would be approximately $2.8 billion in the first year and $2.5 billion in subsequent years, 11 and 12 times the Department's estimate in the proposal, respectively. They noted that their estimates include costs to upgrade software systems and incremental time of staff and broker-dealers.[676] Additionally, the ICI estimated that the first-year cost estimates for PTE 2020–02 would exceed $2.9 billion. This is 12.1 times higher than the first-year cost estimates in the proposal.[677]

Some commenters provided literature and data regarding the total costs of the regulation, but these reports lacked the specific information needed to separate out the costs of fiduciary status from other costs. Additionally, many of these reports were based on surveys of expected costs from a small sample of firms. The reports did not include information that would allow the Department to fully assess the report's findings, such as including survey questions or representativeness of respondents. With these limitations in mind, the results were used to inform the analysis, where possible. However, they were not used as primary estimates.

Other commenters expressed concern about the Department's assessment of costs relative to other regulatory requirements. Some commenters noted that the Department underestimated the costs relative to the requirements under the existing PTE 2020–02, SEC regulations, and the NAIC Model Regulation. Other commenters noted that the Department was correct to consider the existing requirements in its baseline for cost estimates.

Some commenters addressed specific concerns about the Department's estimates. Many of the commenters expressed concern that the estimated costs to draft or update disclosures were too low. Other commenters noted that task of drafting and updating policies and procedures would take a team of professionals several iterations, noting that the Department's estimate did not consider the complexity of the requirement. One commenter remarked that recordkeeping services often contractually exclude fiduciary activities, and the proposal would either result in plans losing the recordkeeping

[675] As noted above, the Department is amending the following exemptions: PTE 2020–02 (*Improving Investment Advice for Workers & Retirees*), PTE 84–24 (*Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters*), PTE 75–1 (*Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*), PTE 80–83 (*Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans*), PTE 80–83 (*Class Exemption for Certain Transactions involving Purchase of Securities where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties In Interest*), PTE 83–1 (*Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts*) and PTE 86–128 (*Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers*).

[676] Comment letter received from the Financial Services Institute on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[677] Comment letter received from the Investment Company Institute on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

services they rely upon or significant costs to renegotiate contracts. Another commenter expressed concern that the certification requirement of the retrospective review would be particularly burdensome to entities making digital rollover recommendations.

Some commenters criticized that the proposal would increase costs for Retirement Investors, as Financial Institutions would pass on costs their clients. Others predicted that Retirement Investors would lose access to advice or certain products, particularly small savers. Other commenters remarked that there is no evidence that a fiduciary status would increase costs to investors. For a larger discussion on the current situation and how the Department approached small savers in this rulemaking, refer to the Impact of the Rulemaking on Small Savers section above.

In preparing for the final rulemaking, the Department has considered these comments and has clarified its language and reevaluated its estimates as appropriate. In response, the Department has increased the estimated costs to comply with PTE 2020–02 and PTE 84–24 and made changes to the requirements to further harmonize this rulemaking with other requirements faced by the industry. The specific adjustments to the estimates are discussed in greater detail below.

Preliminary Assumptions and Cost Estimate Inputs

The final rulemaking requires the use of amended PTE 2020–02 or PTE 84–24 for compensation resulting from fiduciary investment advice related to retirement savings. For the purposes of this analysis, the Department assumes that the percent of Retirement Investors who are in employment-based plans receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2002 and 2020 electronic disclosure safe harbors.[678] Accordingly, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically, and the remaining 3.9 percent will be sent by mail.[679]

One commenter suggested that this assumption overstates the use of electronic disclosures for IRA owners and that 60 percent would be more appropriate. The Department is not able to substantiate that suggestion but understands that IRA owners may be different than plan participants with regards to electronic delivery of documents. In response, the Department reevaluated its estimate. In this analysis, the Department assumes that approximately 72 percent of IRA owners will receive disclosures electronically.[680]

Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one Financial Institution to another) will be 100 percent electronic.

For disclosures sent by mail, the Department estimates that entities will incur a cost of $0.68 [681] for postage and $0.05 per page for material and printing costs.

Additionally, the Department assumes that several types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $65.99 for clerical personnel, $133.24 for a top executive, $165.29 for an insurance sales agent, $165.71 for a legal professional, $198.25 for a financial manager, and $228.00 for a financial adviser.[682]

The Department received several comments on the Department's labor cost estimate in the proposal, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.[683]

Finally, the Department assumes affected entities will likely incur only incremental costs if they were already subject to rules or requirements from the Department or another regulator related to investment advice.

Costs Associated With Amendments to Section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 and Section 4975(e)(3)(B) of the Code

The final rule changes the definition of a fiduciary such that some Financial Institutions previously not considered fiduciaries will be so under the final rule. Additionally, some Financial Institutions, who already provide fiduciary services for some clients or types of services, will be required to act as a fiduciary for more services under the final rule.

Entities may incur costs associated with the amendments to regulations under section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code. While most of the cost incurred will be associated with the amendments to related PTEs, entities who did not previously identify as a fiduciary may also incur transition costs. These costs will likely differ significantly by type of Financial Institution. For instance, retail broker-dealers subject to Regulation Best Interest or investment advisers subject to the Advisers Act will be closer to satisfying the requirements of a fiduciary under ERISA than an insurance company or Independent Producer selling annuity products.

The Department requested comment on the costs these entities would incur by becoming fiduciaries under this rule, as well as the underlying data to

[678] 67 FR 17263 (Apr. 9, 2002); 85 FR 31884 (May 27, 2020).

[679] The Department estimates that 58.3 percent of Retirement Investors receive electronic disclosures under the 2002 electronic disclosure safe harbor and that an additional 37.8 percent of Retirement Investors receive electronic disclosures under the 2020 electronic disclosure safe harbor. In total, the Department estimates 96.1 percent (58.3 percent + 37.8 percent) of Retirement Investors receive disclosures electronically.

[680] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration Internet Use Survey which indicated that 86 percent of adults 65 and over use email on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) × (86% are internet fluent) = 72% are internet fluent and find electronic delivery acceptable.

[681] United States Postal Service, *First-Class Mail,* United States Postal Service (2023), *https://www.usps.com/ship/first-class-mail.htm.*

[682] Internal Department calculation based on 2023 labor cost data and adjusted for inflation to reflect 2024 wages. For a description of the Department's methodology for calculating wage rates*, see:* EBSA, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* EBSA, *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[683] For a description of the Department's methodology for calculating wage rates*, see:* EBSA, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* EBSA*, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

estimate these costs. The Department was particularly interested in costs that would be incurred in satisfying the requirements to the PTEs, such as legal costs, fiduciary insurance costs, technology costs, human capital costs, or other costs of this nature.

The Department received several comments regarding the costs of transitioning to fiduciary status. Several commenters noted that the change in definition would significantly increase the costs and risks associated with providing investment advice, and a few commenters specifically mentioned the increased costs associated with the rulemaking's inclusion of Title I Plans. The commenters did not provide data to estimate these costs. Some commenters provided literature and data regarding the total costs of the regulation, but these reports lacked the specific information needed to separate out the costs of fiduciary status from other costs. Additionally, these reports were primarily based on surveys of expected costs from a small sample of firms. The reports did not include information that would allow the Department to fully assess the report's findings, such as including survey questions or representativeness of respondents. With these limitations in mind, the results were used to inform the analysis, where possible. However, they were not used as primary estimates.

The Department also received several comments concerning the increased legal liability or cost of insurance that Financial Institutions would incur. The Department has clarified that this rulemaking does not create a new private right of action. These comments did not provide specific information on the additional cost of insurance premiums. However, firms or individuals providing financial advice may choose to purchase insurance, or purchase additional insurance, to protect against the cost of errors, omissions, fiduciary breaches, and other liabilities arising from their work. The Department expects that insurance premiums for some firms could increase as a result of the change in fiduciary status resulting from this rulemaking. Much of the additional premiums would consist of transfers from service providers to harmed investors as compensation for breaches of fiduciary duty. There would also be transfers among insured service providers between providers who have claims versus those who do not. In both cases, the net recipients of the transfers are investors who are harmed and now compensated. Part of the price of insurance does reflect a cost due to payment of profits to insurers and costs. The commenters did not provide specific information on the additional cost of insurance premiums, and the Department does not have sufficient data to estimate the size of these transfers or costs.

The Department believes that most costs incurred by entities that will now be considered ERISA fiduciaries under this rulemaking are attributable to compliance with the PTEs. These costs are discussed in greater detail below. In consideration of the comments on the costs imposed by the definition change, the Department has significantly increased its cost estimate to review and implement the amendments for all entities. It has also reevaluated the assumption that all entities eligible to rely on PTE 2020–02 were doing so. As, discussed below, the estimates now reflect an assumption that 30 percent of broker-dealers, registered investment advisers, and insurance companies would be newly reliant on PTE 2020–02.

Costs Associated With PTE 2020–02

The Department is amending PTE 2020–02 to cover more transactions and revising some of the specific obligations to emphasize the existing core conditions of the exemption. This amendment is intended to align with other regulators' rules and standards of conduct. As such, the Department expects that satisfying the amendment will not be unduly burdensome.

Summary of Affected Entities

The entities that the Department expects to be affected by the amendments to the PTE are also affected by the existing PTE 2020–02. The Department estimates that 18,632 Financial Institutions, composed of 1,920 broker-dealers, 16,398 registered investment advisers,[684] 84 insurers, 200 pure robo-advisers, and 31 non-bank trustees.[685]

The Department recognizes that the rulemaking may change the number of Financial Institutions who choose to rely on PTE 2020–02. Consistent with its initial analysis in 2020, the proposal assumed that all entities eligible to rely on the existing PTE 2020–02 were relying on it. However, one commenter indicated that some entities eligible to use PTE 2020–02 had determined that their business practices did not trigger fiduciary status or had modified their business practices to avoid relying upon it. The definitional changes in this rulemaking may now require these entities to rely on PTE 2020–02. As a result, these entities will now incur the full compliance costs of PTE 2020–02. In response to this concern, this analysis assumes that 30 percent of currently eligible entities would begin to rely on PTE 2020–02 in response to the rulemaking.[686]

The analysis below considers the cost to comply to the amendments by entity type, given existing compliance requirements of other regulators, such as the SEC and State regulators where applicable. The Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data on what proportion of entities are subject to the requirements in the NAIC Model regulation, or subject to regulation by the SEC or State insurance departments.

Costs To Review the Rule

The Department estimates that all 18,632 Financial Institutions affected by the amendments to PTE 2020–02 will need to review the rule. The Department acknowledges that the review process will vary significantly by institution. Some organizations may use in-house teams to review the rule and devise an implementation plan, others may outsource review to a third party, and still others may choose a hybrid approach. Outsourcing the review process can lead to efficiencies as one organization reviews the rule and then provides information to many others. These efficiencies may be particularly beneficial to small entities, which make up the majority of entities.

In the proposal, the Department estimated that it would take an average of nine hours for a legal professional to review the rule. The Department received several comments indicating that this was a significant underestimate with some commenters suggesting that the review would take a team of professionals. In response to these comments and in further consideration of what review processes affected Financial Institutions may employ, the

[684] The Department estimates that 16,264 registered investment advisers do not provide pure robo-advice.

[685] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

[686] The Department is not aware of any source to determine the percentage of firms currently eligible for, but not using PTE 2020–02, but which now need to rely on the exemption. In response to the lack of information, the Department selected a meaningful percentage of firms that would be in this category, in order to provide an estimate of the cost to comply with PTE 2020–02. As a point of reference, each percentage point change to this assumption (the share of currently eligible newly reliant entities) results in a 0.28 percentage point change in the estimated total cost of compliance for PTE 2020–02.

Department has updated its estimate. The Department estimates that, on average, it will take a Financial Institution 20 hours to review the rule and develop an implementation plan, resulting in a total hour burden of 372,646 hours and an estimated cost of $61.8 million in the first year.[687]

Costs Associated With General Disclosures for Investors

In the proposal, the Department received several comments indicating that its estimates of the hourly burden associated with preparing and updating disclosures underestimated the burden of the proposed amendments. In response, the Department has reviewed and updated its assumptions. The Department's considerations for each requirement are discussed in more detail below. Additionally, the Department has made changes to harmonize the disclosure requirements of PTE 2020–02 with the disclosure requirements of other regulators.

Costs Associated With Modifications of Existing Disclosure Requirements

Section II(b) of the existing exemption, finalized in 2020, requires Financial Institutions to provide the following disclosures to Retirement Investors before engaging in or at the time of a transaction pursuant to the exemption:

(1) a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries;

(2) a written description of the services to be provided and any conflicts of interest of the Investment Professional and Financial Institution; and

(3) documentation of the Financial Institution and its Investment Professional's conclusions as to whether a rollover meets the Care Obligation and Loyalty Obligation, before engaging in a rollover or offering recommendations on post-rollover investments.

The Department is finalizing the disclosure conditions from the proposal with some modifications. The Department proposed requiring a written statement informing the investor of their right to obtain a written description of the Financial Institution's policies and procedures and information regarding costs, fees, and compensation. The Department received several comments regarding its estimate of the number of annual requests per firm, and the cost burdens associated with the proposed Provision of Disclosures. After reviewing the comments and existing disclosures associated with the rulemaking, the Department has removed this requirement. The modifications to the disclosure requirements included in the final rulemaking are described below.

Costs Associated With the Written Acknowledgement of Fiduciary Status

Financial Institutions will be required to provide a written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making investment recommendations. This condition would not be met if the fiduciary acknowledgement states that the Financial Institution and its Investment Professionals ''may'' be fiduciaries or will become fiduciaries only ''if'' or ''when'' providing fiduciary investment advice as defined under the applicable regulation.

The amendment makes minor changes to the existing requirement for a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries. The Department does not have data on how many Financial Institutions will need to modify their disclosures in response to these amendments; however, the Department expects that the disclosures required under the existing form of PTE 2020–02 likely satisfy this requirement for most Financial Institutions covered under the existing exemption. As discussed above, the Department also assumes that 30 percent of broker-dealers, registered investment advisers, and insurance companies will be newly reliant on the exemption and will incur the full costs to comply.

Additionally, of the 70 percent of the broker-dealers, registered investment advisers, and insurance companies currently assumed to be reliant on the existing exemption, the Department assumes that 10 percent will need to update their disclosures and that it will take a legal professional at a Financial Institution, on average, 10 minutes to update existing disclosures.

Robo-advisers, non-bank trustees, and newly reliant broker-dealers, registered investment advisers, and insurance companies will need to draft the acknowledgement. The Department estimates that it will take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in a cost of approximately $0.5 million in the first year.[688]

Costs Associated With the Relationship and Conflict of Interest Disclosure

The rulemaking also expands on the existing requirement for a written description of the services provided to also require a statement on whether the Retirement Investor would pay for such services, directly or indirectly, including through third-party payments. This disclosure is consistent with the disclosure requirements under Regulation Best Interest. Accordingly, the Department expects that retail broker-dealers will not incur a cost to satisfy this requirement.

For all other Financial Institutions which relied on the existing exemption (*i.e.,* 70 percent of non-retail broker-dealers, registered investment advisers, and insurance companies), the Department assumes it will take a legal professional 30 minutes to update existing disclosures to include this information. Robo-advisers, non-bank trustees and newly reliant broker-dealers, registered investment advisers, and insurance companies will need to draft the Relationship and Conflict of Interest disclosure, which the Department estimates will take a legal professional at a large institution five hours and a legal professional at a small institution one hour, on average, to prepare such a draft.[689] This results in an estimated cost of approximately $4.8 million in the first year.[690]

[687] The burden for rule review and planning is estimated as: (18,632 entities × 20 hours) ≈ 372,646 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (18,632 entities × 20 hours) × $165.71 ≈ $61,751,119.

[688] The number of financial entities needing to update their written acknowledgement is estimated as: (1,920 broker-dealers × 10% × (100% − 30%)) + (8,035 SEC-registered investment advisers × 10% × (100% − 30%)) + (8,363 State-registered investment advisers × 10% × (100% − 30%)) + (84 insurers × 10% × (100% − 30%)) ≈ 1,288 Financial Institutions updating existing disclosures. The number of financial entities needing to draft their written acknowledgement is estimated as: 200 robo-advisers + 31 non-bank trustees + (1,920 broker-dealers × 30%) + (8,035 SEC-registered investment advisers × 30%) + (8,363 State-registered investment advisers × 30%) + (84 insurers × 30%) ≈ 5,751 Financial Institutions drafting new disclosures. The burden is estimated as: (1,288 Financial Institutions × (10 minutes ÷ 60 minutes)) + (5,751 Financial Institutions × (30 minutes ÷ 60 minutes) ≈ 3,090 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 3,090 burden hours × $165.71 ≈ $512,106. Note: Due to rounding values may not sum.

[689] As discussed in the Regulatory Flexibility Act analysis, the Department estimates that 10 robo-advisers and 31 non-bank trustees are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document.

[690] The number of financial entities needing to update their written description of services to comply with the Relationship and Conflict of Interest disclosure is estimated as: 84 insurers + ((600 non-retail broker-dealers + 8,035 SEC-registered investment advisers + 8,363 State-

Costs Associated With New Disclosure Requirements

As amended, PTE 2020–02 requires Financial Institutions to provide investors with a Written Statement of the Care Obligation and Loyalty Obligation disclosure. As presented in more detail in the preamble, this disclosure defines the Care and Loyalty Obligations as related to the investor's relationship with the financial professional.

Cost Associated With the Written Statement of Care Obligation and Loyalty Obligation Disclosure

Under the Advisers Act, the SEC's Regulation Best Interest, and Form CRS, most registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects will satisfy these requirements.[691]

The Department expects that the written statement of Care Obligation and Loyalty Obligation will not take a significant amount of time to prepare[692] and will be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment advisers, on average, will take 30 minutes to modify existing disclosures and that it will take insurers, robo-advisers, and non-bank trustees, on average, one hour to prepare the statement. This results in a cost estimate of approximately $1.6 million in the first year.[693]

Costs Associated With the Provision of Disclosures to Retirement Investors

Financial Institutions will incur costs associated with preparing and sending the new disclosure requirements. The Department does not have data on the number of Retirement Investors that have relationships with Financial Institutions that would engage in transactions covered under the amended exemption. For the purposes of this analysis the Department uses the number of defined contribution plan participants (114.9 million).[694] According to the Plan Sponsor Council of America, 38.8 percent of plans offer investment advice to participants.[695] Accordingly, the Department estimates that 44.6 million plan participants will receive the disclosures.[696] Additionally, the Department estimates that 67.8 million IRA owners will receive disclosures.[697]

Of the 44.6 million plan participants, it is assumed that 3.9 percent, or 1.7 million plan participants would receive paper disclosures.[698] The Department assumes that there will not be a measurable increase in the time burden for a clerical worker to prepare the additional disclosures for individuals already receiving plan disclosures. The Department estimates that providing the additional disclosures would require two additional pages, resulting in a material cost estimate of $173,914.[699]

Of the 67.8 million IRA owners, it is assumed that 28.2 percent, or 19.1 million IRA owners would receive paper disclosures.[700] Again, the Department assumes that there would not be a measurable increase in the time burden for a clerical worker to prepare the additional disclosures for individuals who would already receive account disclosures. The Department estimates that providing the additional disclosures would require two additional pages, resulting in a material cost estimate of $1.9 million.[701]

Summary of Costs Associated With the General Disclosures

The Department estimates that the total cost associated with preparing and providing the general disclosures discussed above to be approximately $8.9 million in the first year and $2.1 million in subsequent years.[702]

Costs Associated With Rollover Documentation and Disclosure for Financial Institutions

Compared to the requirements in the existing exemption, the amendment clarifies the rollover disclosure requirements in Section II(b)(3) and II(c)(3). Before engaging in a rollover or making a recommendation to a plan participant as to the post-rollover investment of assets, the Financial Institution and Investment Professional is required to document the basis for their conclusions to recommend a rollover, and must provide that documentation to the Retirement Investor.

In the proposal, the Department proposed requiring the rollover documentation for all rollovers, including plan to IRA rollovers, IRA to IRA rollovers, and plan to plan rollovers. In the finalized exemption, the Department is limiting this requirement to plan to IRA rollovers. As discussed in the Affected Entities section, the Department estimates that 4.5 million rollovers will be affected by the amendments to PTE 2020–02 annually.[703]

As a best practice, the SEC already encourages broker-dealers to record the basis for significant investment decisions, such as rollovers, although doing so is not required under Regulation Best Interest or the Advisers

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registered investment advisers) × (100% − 30%)) ≈ 11,983 Financial Institutions updating existing disclosures. The number of financial entities needing to draft their Relationship and Conflict of Interest disclosure is estimated as: (200 robo-advisers + 31 non-bank trustees) + ((600 non-retail broker-dealers + 8,035 SEC-registered investment advisers + 8,363 State-registered investment advisers) × 30%) ≈ 5,330 Financial Institutions drafting new disclosures. Of these 5,330 Financial Institutions, 976 are small. The hours burden is calculated as: ((11,983 entities updating × (30 minutes ÷ 60 minutes)) + ((976 small entities drafting × 1 hour) + (4,354 entities drafting × 5 hours)) ≈ 28,738 burden hours. The labor rate is applied as: 28,738 burden hours × $165.71 ≈ $4,762,239. Note: Due to rounding values may not sum.

[691] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019), 17 CFR 240.15l–1(a)(2)(i).

[692] This requirement is consistent with requirements under the SEC's Advisers Act, Regulation Best Interest, and Form CRS that require most registered investment advisers and broker-dealers with retail investors to provide disclosures. (*See* Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019), 17 CFR 240.15l–1(a)(2)(i).)

[693] The burden is estimated as: [(1,920 broker-dealers + 16,398 registered investment advisers) × (30 minutes ÷ 60 minutes)] + [(84 insurers + 200 robo-advisers + 31 non-bank trustees) × 1 hour] ≈ 9,474 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 9,474 burden hours × $165.71 ≈ $1,569,868.

[694] In 2021, there were approximately 114,931,000 defined contribution participants. (*See* U.S. Department of Labor, EBSA, Private Pension Plan Bulletin Abstract of 2021 Form 5500 Annual Reports, (September, 2023), Table A1, *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf.*)

[695] Plan Sponsor Council of America, *PSCA's 66th Annual Survey of Profit Sharing and 401(k) Plans,* Table 110, (2023).

[696] This is estimated as: 114,931,000 × 38.8% ≈ 44,593,228.

[697] In 2023, there were 67,781,000 IRAs. (*See* Cerulli, The Cerulli Report, U.S. Retirement End-Investor 2023, Exhibit 5.12, (2023)).

[698] The number of plan participants receiving paper disclosures is estimated as: (44,593,228 plan participants receiving investment advice × 3.9%) ≈ 1,739,136 paper disclosures.

[699] The cost is estimated as: (1,739,136 paper disclosures × 2 pages) × $0.05 ≈ $173,914.

[700] This is estimated as: 67,781,000 IRA owners × 28.2% ≈ 19,114,242 paper disclosures.

[701] The cost is estimated as: (19,114,242 paper disclosures × 2 pages) × $0.05 ≈ $1,911,424.

[702] The cost in the first year is estimated as: ($512,106 to prepare the written acknowledgment + $1,569,868 to prepare the written statement of the Care Obligation & Loyalty Obligations + $4,762,239 to prepare the written statement of all material facts + 2,085,338 to prepare and send disclosures) ≈ $8,929,550. The cost in subsequent years is attributable to the $2,085,338 to prepare and send disclosures. Note that the total value may not equal the sum of the parts due to rounding.

[703] The Department estimates that 4,485,059 rollovers from defined contribution plan accounts will occur annually. For more information on how the number of IRA rollover is estimated, refer to the Affected Entities section. In light of ongoing litigation, the Department is assuming for purposes of this discussion that all Affected Entities will become subject to these requirements, regardless of whether they currently provide fiduciary investment advice.

Act.[704] In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest's effective date of June 30, 2020. Just over half (52 percent) of the broker-dealers surveyed indicated they already require their financial advisers to provide the rationale documentation for rollover recommendations.[705]

The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover documentations and five minutes for financial advisers whose firms already require them to do so. This result in a labor cost estimate of $142.0 million.[706]

These rollover disclosures are expected to be two pages in length and accompany other documentation associated with the transactions at no additional postage cost. The materials cost is estimated as $0.05 per page, totaling $8,571 annually.[707]

This results in an estimated annual cost of approximately $142.0 million.[708] The Department received a comment stating that these hourly burdens were underestimated. The Department acknowledges this comment but deems this a reasonable estimate of the marginal time for this requirement. In practice, this requirement should be a logical outgrowth of a consultation, where the financial professional is simply documenting the relevant factors that resulted in the investment recommendation. Initially, firms may differ in the time burdens of this requirement according to their complexity and level of current implementation of Regulation Best Interest. However, the Department assumes that the regulatory uniformity introduced by this rulemaking, including in its disclosure requirements, will bring the marginal costs associated with this requirement in-line with these estimates. The Department has increased its estimate of the number of disclosures needing to be sent out, which result in an overall increase in the cost estimate.

The Department assumes Financial Institutions that do not have enhanced technology capabilities for other regulations will take a mixed approach, combining current technology solutions with manual processes. Accordingly, the Department estimates that Financial Institutions already requiring rollover documentation will face no more than a nominal burden increase, and only to the extent that their current compliance systems do not meet the requirements of this exemption. Those firms currently not documenting rollover recommendations will likely face a larger, but still somewhat limited burden.

Costs Associated With Annual Report of Retrospective Review for Financial Institutions

PTE 2020–02 currently requires Financial Institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of, and achieve compliance with, the conditions of this exemption, the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The retrospective review must include a discussion of any self-corrections of violations.

Robo-advisers, non-bank trustees, and newly reliant broker-dealers, registered investment advisers, and insurance companies will incur costs associated with conducting the annual review as a result of this rulemaking.

The Department does not have data on how many will incur costs associated with this requirement; however, the Department expects that many of entities already develop an audit report. Broker-dealers are subject to similar annual review and certification requirements under FINRA Rule 3110,[709] FINRA Rule 3120,[710] and FINRA Rule 3130; [711] SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)–7; and insurance companies in many States are already subject to State insurance law based on the NAIC's Model Regulation.[712] Accordingly, in this analysis, the Department assumes that these entities will incur minimal costs to meet this requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[713] The Department assumes that State-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent of advising retirement plans will incur costs associated with producing a retrospective review report.

The Department assumes that 10 percent of robo-advisers, non-bank trustees, and newly reliant broker-dealers and insurance companies will incur the full cost of producing an audit report. The Department estimates that 0.8 percent of newly reliant registered investment advisers will incur the full cost of producing the audit report.

This results in an estimate of 123 entities not currently producing audit reports, of which 26 are small entities.[714] The remaining 5,629 entities will need to make modifications to satisfy the requirements, of which 1,062

[704] See 84 FR 33318, 33360 (''[W]e encourage broker-dealers to record the basis for their [rollover] recommendations . . . .'').

[705] Deloitte, *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package,* Deloitte, (Mar. 6, 2020).

[706] The burden is estimated as: (4,485,059 rollovers × 49% advisor assisted × 48% not already documenting × (30 minutes ÷ 60 minutes)) + (4,485,059 rollovers × 49% advisor assisted × 52% already documenting × (5 minutes ÷ 60 minutes)) ≈ 622,676 hours. A labor rate of $228.00 is used for a personal financial adviser. The labor rate is applied in the following calculation: 622,676 burden hours × $228 ≈ $141,970,058. Note, the total values may not equal the sum of the parts due to rounding.

[707] The number of disclosures mailed is estimated as: 4,485,059 rollovers × 49% advisor assisted × 3.9% disclosures sent by mail ≈ 85,709 disclosures. The material and postage cost is estimated as: 85,709 disclosures mailed × $0.05 per page × 2 pages ≈ $8,571. Note, the total values may not equal the sum of the parts due to rounding.

[708] Total cost is estimated as: $8,571 materials and postage cost + $141,970,058 to produce the disclosures ≈ $141,978,629. Note, the total values may not equal the sum of the parts due to rounding.

[709] *Rule 3110. Supervision,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3110.*

[710] *Rule 3120. Supervisory Control System,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3120.*

[711] *Rule 3130. Annual Certification of Compliance and Supervisory Processes,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3130.*

[712] NAIC Model Regulation, Section 6.C.(2)(i) (The same requirement is found in the NAIC Suitability in Annuity Transactions Model Regulation (2010), Section 6.F.(1)(f).)

[713] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[714] This is estimated as: {[(1,920 broker-dealers + [(8,035 SEC-registered investment advisers + 8,363 State-registered investment advisers) × 8%] + 84 insurers) × 30% that are newly relying on PTE 2020–02] + (200 robo-advisers + 31 non-bank trustees)} × 10% ≈ 123 Financial Institutions. Note: Due to rounding values may not sum.

are small.[715] The Department received no comments on this assumption.

The Department estimates that it will take a legal professional five hours for small firms and ten hours for large firms to produce a retrospective review report, resulting in an estimated cost of $0.2 million.[716] The Department estimates that it will take a legal professional one hour for small firms and two hours for large firms to modify existing reports, on average. This results in an estimated cost of $1.7 million.[717]

The Department estimates it will take a certifying officer two hours for small firms and four hours for large firms to review the report and certify the exemption, resulting in an estimated cost burden of approximately $4.1 million.[718]

This results in a total cost annual cost of $6.0 million.

The Department is clarifying that the Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with the exemption. Under the original exemption, Financial Institutions were already required to maintain their policies and procedures. The Department's estimates for any additional cost for entities updating their policies and procedures are discussed in the section labeled costs associated with written policies and procedures for Financial Institutions, below.

Costs Associated With Written Policies and Procedures for Financial Institutions

The time required to establish, maintain, and enforce written policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards will depend on the size and complexity of the Financial Institution. Entities, particularly small entities, may also get compliance support from third parties which could lead to efficiencies of implementation.

Entities newly reliant upon PTE 2020–02 due to this rulemaking will likely need to develop these policies and procedures. The Department estimates that, for entities newly reliant upon PTE 2020–02 due to this rulemaking, this requirement will take legal professionals 40 hours at a large firm and 20 hours at a small firm in the first year.[719] Retail broker-dealers and all registered investment advisers should have policies and procedures in place to satisfy other regulators that can be amended to comply with this rulemaking. For instance, the Department acknowledges that for registered investment advisers, this rulemaking may apply to a broader range of activities performed than the Advisers Act, and therefore, some registered investment advisers may need to revisit their policies and procedures to ensure compliance. The Department estimates it will take 10 hours for small firms and 20 hours for large firms to amend their policies and procedures. The Department estimates the requirement to have an estimated cost of $18.5 million in the first year.[720]

The rulemaking adds a requirement to review policies and procedures at least annually and to update them as needed to ensure they remain prudently designed, effective, and current. This includes a requirement to update and modify the policies and procedures, as appropriate, after considering the findings in the retrospective review report. The Department estimates that it will take a legal professional an additional five hours for all entities reliant on the exemption. The Department estimates that the requirement results in an estimated first year cost of $10.9 million and an annual cost of approximately $15.4 million in subsequent years.[721]

The amendments also require Financial Institutions to provide their complete policies and procedures to the Department upon request. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that it will request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department assumes that a clerical worker will prepare and send their complete policies and procedures to the Department and that it will take them 15 minutes to do so. The Department received no comments on these assumptions. The Department estimates

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[715] This is estimated as: {[(1,920 broker-dealers + 84 insurers + 8,035 SEC-registered investment advisers + 8,363 State-registered investment advisers) × 30% that are newly relying on PTE 2020–02] + (200 robo-advisers + 31 non-bank trustees)} − ({[(1,920 broker-dealers + [(8,035 SEC-registered investment advisers + 8,363 State-registered investment advisers) × 8%] + 84 insurers) × 30% that are newly relying on PTE 2020–02] + (200 robo-advisers + 31 non-bank trustees)} × 90%) =5,629 Financial Institutions. Note: Due to rounding values may not sum.

[716] The burden is estimated as: (26 small Financial Institutions × 5 hours) + [(96 large Financial Institutions) × 10 hours] ≈ 1,094 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: {(26 small Financial Institutions × 5 hours) + [(96 large Financial Institutions) × 10 hours]} × $165.71 ≈ $181,289. Note, the total values may not equal the sum of the parts due to rounding.

[717] The burden is estimated as: (1,062 small Financial Institutions × 1 hours) + [(4,567 large Financial Institutions) × 2 hours] ≈ 10,196 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: {(1,062 small Financial Institutions × 1 hours) + [(4,567 large Financial Institutions) × 2 hours]} × $165.71 ≈ $1,689,582. Note, the total values may not equal the sum of the parts due to rounding.

[718] The burden is estimated as: (1,088 small Financial Institutions × 2 hours) + [(4,663 large Financial Institutions) × 4 hours] ≈ 20,830 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: 20,830 burden hours × $198.25 ≈ $4,129,476 Note, the total values may not equal the sum of the parts due to rounding.

[719] The Department estimates that 3,531 entities, consisting of 302 retail broker-dealers, 129 non-retail broker-dealers, 85 SEC-registered retail registered investment advisers, 144 SEC-registered non-retail registered investment advisers, 2,192 State-registered retail registered investment advisers, 568 State-registered non-retail registered investment advisers, 71 insurers and insurance agents, 10 robo-advisers, and 31 non-bank trustees, are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document.

[720] The burden is estimated as follows: [(302 small retail broker-dealers + 85 small SEC-registered retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small State-registered retail registered investment advisers + 568 small State-registered non-retail registered investment advisers) × 30% newly reliant on the PTE × 10 hours] + {[(1,017 large retail broker-dealers + 129 small non-retail broker-dealers + 4,859 large SEC-registered retail registered investment advisers + 2,947 large SEC-registered non-retail registered investment advisers + 4,450 large State-registered retail registered investment advisers + 1,153 large State-registered non-retail registered investment advisers + 71 small insurers) × 30% newly reliant on the PTE] + (10 small robo-adviser + 31 non-bank trustees) × 20 hours} + {[(471 large non-retail broker-dealers + 13 large insurers) × 30% newly reliant on the PTE] + 190 large robo-advisers) × 40 hours]} ≈ 111,864 hours. The labor rate is applied in the following calculation: 111,864 burden hours × $165.71 ≈ $18,536,977. Note, the total values may not equal the sum of the parts due to rounding.

[721] The burden is estimated as follows: The first-year cost of updating policies and procedures for plans that currently have policies and procedures: [(302 small retail broker-dealers + 85 small SEC-registered Retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small State-registered retail registered investment advisers + 568 small State-registered non-retail registered investment advisers) × 30% newly reliant on the PTE] + [(1,018 large retail broker-dealers + 129 small non-retail broker-dealers + 4,859 large SEC-registered retail registered investment advisers + 2,947 large SEC-registered non-retail registered investment advisers + 4,450 large State-registered retail registered investment advisers + 1,153 large State-registered non-retail registered investment advisers + 71 small insurers) × 30% newly reliant on the PTE] + (10 small robo-adviser + 30 small non-bank trustees) + [(471 large non-retail broker-dealers + 13 large insurers) × 70% already reliant on the PTE] + (190 large robo-advisers + 1 large non-bank trustees) ≈ 13,112 entities. The burden estimate is calculated as: 13,112 × 5 hours ≈ 65,559 hours. The labor rate is applied in the following calculation: 65,559 hours × $165.71 ≈ $10,863,864. In subsequent years the cost of updating is calculated as: (All 18,632 affected entities × 5 hours) ≈ 93,161 burden hours. The labor rate is applied in the following calculation: 93,161 burden hours × $165.71 burden hours = $15,437,780. Note, the total values may not equal the sum of the parts due to rounding.

that the requirement will result in an estimated cost of approximately $2,700 in the first year[722] and $800 in subsequent years.[723] The Department assumes Financial Institutions will send the documents electronically and thus will not incur costs for postage or materials.

This results in a total cost of $29.4 million in the first year and $15.4 million in subsequent years.[724]

Summary of Total Cost for the Amendments to PTE 2020–02

The Department estimates that in order to meet the additional conditions of the amended PTE 2020–02, affected entities will incur a total cost of $248.1 million and a per-firm cost of $13,314 in the first year and a total cost of $165.5 million and a per-firm cost of $8,883 in subsequent years.[725]

Costs Associated With PTE 84–24

PTE 84–24 provides an exemption for insurance agents, insurance brokers, and pension consultants to receive a sales commission from an insurance company for the purchase of an insurance or annuity contract with plan or IRA assets. Relief is also provided for a principal underwriter for an investment company registered under the Investment Company Act of 1940 to receive a sales commission for the purchase of securities issued by the investment company with plan or IRA assets.

The Department is amending PTE 84–24 to exclude the receipt of compensation received as a result of providing investment advice from the existing relief. Except for Independent Producers, fiduciary advisers will be expected to rely on the relief provided by PTE 2020–02, rather than PTE 84–24. The rulemaking provides exemptive relief to fiduciaries who are Independent Producers that recommend annuities from an unaffiliated Financial Institution to Retirement Investors. Relief for Independent Producers depends on protective conditions that substantially mirror those contained in PTE 2020–02. The conditions are tailored to protect Retirement Investors from the specific conflicts that arise for Independent Producers who are compensated through commissions when providing investment advice to Retirement Investors regarding the purchase of an annuity.

Some commenters remarked that the proposal had underestimated the number of Independent Producers that would be affected by the proposal. As discussed in the Affected Entities section of this analysis, the Department has considered the comments and revised its estimate of the number of Independent Producers and the number of transactions affected by the amendments to PTE 84–24. Commenters also remarked that the Department had underestimated the costs that entities relying on the NAIC Model Regulation would incur to comply with the proposal. Accordingly, the Department has reviewed the requirements of the NAIC Model Regulation and has modified its time estimates, described in further detail below.

The Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data on what proportion of entities are subject to the requirements in the NAIC Model Regulation, SEC, or State insurance departments. The analysis below considers a level of prior compliance with other regulators, when estimating the cost of compliance as many of these entities are already meeting some, if not most, of the requirements of this rulemaking.

Summary of Affected Entities

The Department expects that 87,799 entities will be affected by the amendments to PTE 84–24, consisting of 1,011 pension consultants, 10 investment company principal underwriters that service plans, 10 investment company principal underwriters that service IRAs, 86,410 Independent Producers, and 358 insurance companies.[726] Additionally, the Department estimates that 1,727 plans will be affected by the amendments.[727]

Costs of Rule Review

The Department estimates that entities—including pension consultants, investment company principal underwriters, and insurance companies—currently relying on the exemption will need to review the rule. In the proposal, the Department assumed that rule review would take, on average, two hours. The Department received several comments indicating that this was an underestimate. Upon, further consideration and consistent with the changes made to PTE 2020–02, the Department estimates that such a review will take each Financial Institution, on average, 20 hours to review the rule. Applying the labor rate associated with legal professionals, this results in an estimated cost of approximately $4.6 million.[728]

The Department understands that Independent Producers will also need to understand the rule and how it affects their business. It is expected that they will get substantial help in compliance from third parties such as the insurance carriers they represent or the IMOs they contract with in preparing materials and training. The Department allocates five hours of time per Independent Producer to review the policies and procedures developed by the carriers and integrate the standards into their independent business practices. The Department estimates this to cost roughly $71.4 million in total, assuming an opportunity cost of $165.29 per hour for the Independent Producer.[729] Therefore, the total cost associated with rule familiarization is estimated to be $76.0 million.[730]

[722] The burden is estimated as: (165 × (15 minutes ÷ 60 minutes)) ≈ 41 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (165 × (15 minutes ÷ 60 minutes)) × $65.99 ≈ $2,722. Note, the total values may not equal the sum of the parts due to rounding.

[723] The burden is estimated as: (50 × (15 minutes ÷ 60 minutes)) = 13 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (50 × (15 minutes ÷ 60 minutes)) × $65.99 ≈ $825. Note, the total values may not equal the sum of the parts due to rounding.

[724] The cost in the first year is estimated as: ($18,536,977 + $10,863,864 + $2,722) ≈ $29,403,563. The cost in subsequent years is estimated as: ($15,437,780 + $825) ≈ $15,438,605. Note, the total values may not equal the sum of the parts due to rounding.

[725] The first-year total cost includes: ($61,751,119 for rule review + $8,929,550 for general disclosures + $141,978,629 for rollover disclosures + $6,000,348 for the retrospective review + $29,403,563 for policies and procedures) = $248,063,209. The total cost in subsequent years includes: ($2,085,338 for general disclosures + $141,978,329 for rollover disclosures + $6,000,348 for the retrospective review + $15,538,605 for policies and procedures) = $165,502,919. Note, the total values may not equal the sum of the parts due to rounding.

[726] For more information on how the number of each entity type is calculated, refer to the Affected Entities section.

[727] For more information on how the number of each entity type is calculated, refer to the Affected Entities section.

[728] The burden is estimated as: (1,389 entities × 20 hours) ≈ 27,772 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 27,772 burden hours × $165.71 ≈ $4,602,148.

[729] The cost estimate for Independent Producers is estimated as: 86,410 Independent Producers × 5 hours ≈ 432,050 burden hours. The labor rate is applied in the following calculation: (86,410 Independent Producers × 5 hours) × $165.29 ≈ $71,413,545. Note, the total values may not equal the sum of the parts due to rounding.

[730] Combining the $4,602,148 for firms and the $71,413,545 results in a total estimated cost of $76,015,692.

Costs Associated With Disclosures to Investors

The amendment requires Independent Producers to provide disclosures to Retirement Investors at or before engaging in a transaction covered by this exemption. Under the amendments, Independent Producers seeking relief will be required to provide:

(1) a written acknowledgment that the Independent Producer is providing fiduciary investment advice to the Retirement Investor and is a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) a written statement of the Care Obligation and Loyalty Obligation that is owed;

(3) a disclosure of all material facts relating to the scope and terms of the relationship with the Retirement Investor, such as material fees and costs, the types and scope of services provided, and notice of the Retirement Investor's right to request additional information regarding cash compensation;

(4) a disclosure of all material facts relating to Conflicts of Interest that are associated with the recommendation;

(5) a written explanation of the basis to recommend an annuity; and

(6) a written explanation of the basis to recommend a rollover.

Costs Associated With Preparing General Disclosure Documents

For more generalized disclosures, the Department assumes that insurance companies will prepare and provide disclosures required by the exemption to Independent Producers selling their products. Additionally, in the PTE 84–24, the Department is providing model language that will satisfy the requirements associated with the written fiduciary acknowledgement and written statement of the Care Obligation and Loyalty Obligation.

However, some of the disclosures required by the exemption are tailored specifically to the Independent Producer. For these, the Department assumes that the disclosure will need to be prepared by the Independent Producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures and that the costs associated with the preparation will be covered by charges imposed by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in charges. The Department expects that this charge will not exceed the cost of preparing the disclosure in house.

Costs Associated With the Written Fiduciary Acknowledgement

The Department is including model language in the preamble to PTE 84–24 that details what should be included in the fiduciary acknowledgment for Independent Producers. The Department assumes that the time associated with preparing the disclosures will be minimal. Further, these disclosures are expected to be uniform in nature. Accordingly, the Department estimates that these disclosures will not take a significant amount of time to prepare.

Due to the nature of Independent Producers, the Department assumes that most Insurers will make draft disclosures available to Independent Producers, pertaining to their fiduciary status. However, the Department expects that a small percentage of Independent Producers—about 5 percent or 4,320 Independent Producers—may draft their own disclosures. The Department assumes that a legal professional for each of the 358 insurance companies and an insurance sales agent for 4,320 Independent Producers, will spend 30 minutes to produce a written acknowledgement in the first year. This results in an estimated cost of approximately $387,000 in the first year.[731]

Cost Associated With the Statement of the Care Obligation and Loyalty Obligation

Regarding the required written statement of the Care Obligation and Loyalty Obligation owed by the Independent Producer, the Department similarly assumes that most Insurers will make draft disclosures available to Independent Producers. Further, the Department has provided model language that satisfied this requirement. The Department assumes that a legal professional for each of the 358 insurance companies will spend one hour of legal staff time and 5 percent of Independent Producers, or 4,320 Independent Producers, will spend one hour to prepare the statement in the first year. This results in an estimated cost of approximately $773,000 in the first year.[732]

Costs Associated With the Relationship and Conflict of Interest Disclosure

The rulemaking expands on the existing requirement for a written description of the services provided to also require a statement on whether the Retirement Investor would pay for such services, directly or indirectly, including through third-party payments. This disclosure must also include a notice of the Retirement Investor's right to request additional information regarding cash compensation.

The Department recognizes that many Independent Producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that these costs associated with the preparation will be covered by charges imposed by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost to the Independent Producer. The Department received several comments regarding the number of Independent Producers and has revised its estimate of them in its analysis.

Accordingly, the Department assumes that all 86,410 Independent Producers in this analysis will need to prepare the disclosure. The Department assumes that for small Independent Producers, a legal professional will spend three hours of legal staff time drafting the written material facts disclosure, while for large Independent Producers, a legal professional will spend five hours of legal staff time drafting the written disclosure. This results in an estimated cost of approximately $43.2 million in the first year.[733]

[731] The burden is estimated as: [(358 Financial Institutions + 4,320 Independent Producers) × (30 minutes ÷ 60 minutes)] ≈ 2,339 hours. A labor rate of approximately $165.71 is used for a legal professional and $165.29 is used for an independent producer. The labor rates are applied in the following calculation: [(358 Financial Institutions × (30 minutes ÷ 60 minutes)) × $165.71] + [(4,320 Independent Producers × (30 minutes ÷ 60 minutes)) × $165.71] ≈ $386,657. Note, the total values may not equal the sum of the parts due to rounding.

[732] This is estimated as: (4,320 Independent Producers + 358 insurance companies) × 1 hour ≈ 4,678 hours. A labor rate of $165.29 is used for an Independent Producer and $165.71 for a legal professional at an insurance company. The labor rate is applied in the following calculation: (4,320 Independent Producers × 1 hour × $165.29) + (358 insurance companies × 1 hour × $165.71) ≈ $773,313. Note, the total values may not equal the sum of the parts due to rounding.

[733] The burden is estimated as: [(85,541 small Independent Producers × 3 hours) + (869 large Independent Producers × 5 hours)] ≈ 260,967 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(85,541 small Independent Producers × 3 hours) + (869 large Independent Producers × 5 hours)] × $165.71 ≈ $43,244,858. Note, the total values may not equal the sum of the parts due to rounding.

Costs Associated With the Compensation Disclosure

Upon request of the Retirement Investor, the Independent Producer must disclose a reasonable estimate of the amount of cash compensation received and the frequency of occurrence. The Department is adopting a structure similar to that of the NAIC Model Regulation and New York Rule 194, such that Retirement Investors will first receive a notice of their right to request additional information regarding cash compensation and will only receive such information if requested. The Department expects that Independent Producers will not incur a significant cost to provide this information. Based on observations of similar disclosure structures, the Department estimates that 10 percent of the estimated 500,000 annual transactions will include a request for this disclosure. The cost associated with the provision of this custom disclosure will be discussed in the Costs Associated with the Provision of Disclosures to Retirement Investors section below.

Costs Associated With Documenting the Basis for an Annuity Recommendation, Rollover Recommendation, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan

The amendment requires an Independent Producer to provide a disclosure to investors that documents the Independent Producer's consideration to recommend an annuity or rollover. Due to the fact-specific nature of this disclosure, the Department assumes that the content of the disclosure will need to be prepared by the Independent Producer. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may seek external legal support to assist with drafting the disclosures. However, the Department expects that most Independent Producers will prepare the disclosure themselves. The Department received no comments on this assumption.

The Department estimates that 500,000 Retirement Investors will receive documentation of the basis for recommending an annuity each year.[734] The Department assumes that, for each of these Retirement Investors, an Independent Producer will spend one hour of their time drafting the documentation. This results in an estimated cost of approximately $41.3 million annually.[735]

Costs Associated With the Provision of Disclosures to Retirement Investors

As described in the Affected Entities section, the Department estimates that 500,000 Retirement Investors will engage in covered transactions with an Independent Producer, and therefore receive documentation of the basis for recommending an annuity each year.[736]

As discussed at the beginning of the cost section, the Department assumes that 28.2 percent of disclosures sent to IRA owners will be mailed. Accordingly, of the estimated 500,000 affected Retirement Investors, 141,000 Retirement Investors are estimated to receive paper disclosures.[737] For paper copies, an insurance sales professional is assumed to take two minutes to prepare and mail the required information to the Retirement Investor. Thus, this requirement results in an estimated labor cost of approximately $777,000.[738] The Department assumes that each disclosure will include seven pages, resulting in annual material and paper costs of approximately $145,000.[739] Additionally, as discussed above, the Department estimates that 10 percent of Retirement Investors will request additional compensation information and will need to be provided with an additional compensation disclosure. The Department assumes it will take 10 minutes to complete the estimated two-page disclosure and prepare it for mailing, resulting in a cost of approximately $1.5 million annually.[740]

Additionally, Independent Producers are required to send the documentation to the Insurer. The Department expects that such documentation will be sent electronically and result in a de minimis burden. The Department received no comments on this assumption.

Summary Costs Associated With Disclosures

The estimates described above result in a total cost estimate of $88.1 million in the first year and $43.7 million in subsequent years for the preparation and provision of all disclosures.[741]

Costs Associated With Policies and Procedures

The amendment requires Insurers to establish, maintain, and enforce written policies and procedures to review each recommendation from an Independent Producer before an annuity is issued to a Retirement Investor. The Insurer's policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the insurance, or any affiliate or related entity, ahead of the interests of the Retirement Investor. Insurers' policies and procedures must also include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have

[734] For information on this estimate, refer to the estimate of IRAs affected by the amendments to PTE 84–24 in the Affected Entities section.

[735] The burden is estimated as: 500,000 rollovers × (30 minutes ÷ 60 minutes) = 250,000 hours. A labor rate of approximately $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [500,000 rollovers × (30 minutes ÷ 60 minutes)] × $165.29 = $41,322,500. Note, the total values may not equal the sum of the parts due to rounding.

[736] For information on this estimate, refer to the estimate of IRAs affected by the amendments to PTE 84–24 in the Affected Entities section.

[737] This is estimated as: (500,000 Retirement Investors × 28.2%) = 141,000 paper disclosures. Note, the total values may not equal the sum of the parts due to rounding.

[738] This is estimated as: (141,000 paper disclosures × (2 minutes ÷ 60 minutes)) = 4,700 hours. A labor rate of $165.29 is used for an insurance sales agent. The labor rate is applied in the following calculation: (141,000 paper disclosures × (2 minutes ÷ 60 minutes)) × $165.29 = $776,863. Note, the total values may not equal the sum of the parts due to rounding.

[739] This is estimated as: 141,000 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 7 pages)] = $145,230. Note, the total values may not equal the sum of the parts due to rounding.

[740] The labor cost is estimated as: (50,000 disclosures × 28.2% sent by mail × (10 minutes ÷ 60 minutes)) = 8,803 hours. A labor rate of $165.29 is used for an insurance sales agent. The labor rate is applied in the following calculation: (50,000 disclosures × 28.2% sent by mail × (10 minutes ÷ 60 minutes)) × $165.29 = $1,455,103. The material cost is estimated as: 14,100 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 2 pages)] = $10,998. The total cost is estimated as: $1,455,103 + $10,998 = $1,466,101. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document. Note, the total values may not equal the sum of the parts due to rounding.

[741] The cost in the first year is estimated as: ($386,657 for the disclosure confirming fiduciary status + $773,313 for the written statement of the Care Obligation & Loyalty Obligation Owed + $43,244,858 for the statement in the Relationship and Conflict of Interest disclosure + $41,322,500 for the rollover disclosure) + ($776,863 to prepare and send disclosures + $145,230 for material and postage costs) + ($1,455,103 for additional compensation disclosure preparation + $10,998 for materials and postage) = $88,115,522.The cost in subsequent years is estimated as: ($41,322,500 for the rollover disclosure + $776,863 to prepare and send disclosures + $145,230 for material and postage costs) + (1,455,103 for additional compensation disclosure + $10,998 for materials and postage) = $43,710,694. Note, the total values may not equal the sum of the parts due to rounding. Note, the total values may not equal the sum of the parts due to rounding.

failed to adhere to the Impartial Conduct standards, or who lack the necessary education, training, or skill. Finally, Insurers must provide their complete policies and procedures to the Department within 30 days upon request.

These requirements are consistent with, though more protective than, the requirements in NAIC Model Regulation. The NAIC Model Regulation has been updated and revised several times; however, both the 2010 NAIC Model Regulation [742] and the 2020 revisions to the NAIC Model Regulation [743] include a requirement to ''establish and maintain procedures for the review of each recommendation prior to issuance of an annuity.'' [744] While the 2010 version required that such procedures be ''designed to ensure that there is a reasonable basis to determine that a recommendation is suitable,'' [745] the 2020 version requires such procedures be ''designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives.'' [746]

Most States have adopted some form of the NAIC Model Regulation, and, to date, 43 States have adopted the most recent version, and New York has adopted its own, more protective set of requirements in New York Rule 187.[747] The Harkin Amendment, Section 989J of the Dodd-Frank Act, requires States to adopt rules that meet or exceed the minimum requirements of model regulation modifications within five years of adoption.[748]

While many Insurers may have policies and procedures in place that largely satisfy the requirements of the rulemaking, the Department expects that many will need to change and improve policies and procedures to be fully compliant.

The Department received several comments indicating that the time needed to develop policies and procedures was underestimated. In response, the Department has revised upwards both the time to develop policies and procedures, as well as the time to review the rule, which includes any planning necessary for implementation.

The Department expects that satisfying this requirement will be more time consuming for larger entities due to the complexity of their businesses. The Department assumes that, for each large Insurer, legal professionals will spend, on average, 40 hours of legal staff time drafting or modifying the policies and procedures, and for each small insurance company, legal professionals will spend, on average, 20 hours of legal staff time. This results in an estimated cost of approximately $1.4 million in the first year.[749]

The rulemaking requires that the Insurer update and modify policies and procedures in response to the findings of the retrospective review. Accordingly, in the following years, the Department assumes for each Insurer, legal professionals will spend five hours reviewing. This results in an estimated cost of approximately $296,000 in subsequent years.[750]

The rule also requires Insurers to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. The Department assumes that for each Insurer, reviewing the recommendations of Independent Producers will take approximately 30 minutes. This results in an estimated cost of approximately $49.6 million each year.[751]

The rulemaking also requires Insurers to provide their complete policies and procedures to the Department within 30 days of request. As discussed above for PTE 2020–02, the Department estimates that it will request 165 policies and procedures in the first year and 50 in subsequent years. Assuming that the number of requests for the entities covered under PTE 2020–02 is equivalent to the number of requests for the entities covered under PTE 84–24, the Department assumes that it will request three policies and procedures from insurers in the first year and one request in subsequent years, on average.[752] This results in an estimated cost of approximately $50 in the first year [753] and $15 in subsequent years.[754]

The Department estimates that satisfying the requirements described above will result in a total cost of approximately $50.9 million in first year and $49.9 million in subsequent years.[755]

[742] NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.*

[743] NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.*

[744] This language was included in both the 2010 and 2020 versions of Model Regulation 275. See NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.;* NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2020).

[745] NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.*

[746] NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2020), *https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.*

[747] When the Department conducted its analysis of States in July 2023, 39 States had adopted the NAIC Model Regulation, including its best interest standard: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Since then, the NAIC Model Regulation has also been adopted by Utah, Oklahoma, Vermont, and California. NAIC, *Implementation of 2020 Revision to Model #275: Suitability in Annuity Transaction Model Regulations,* (January 2024),*https://content.naic.org/sites/default/files/files/cmte-a-aswg-mdl-275-adoption-map_4.pdf.* New York's Rule 187 also contains a best interest standard in Section 224.4 and policy and procedure requirements in Section 224.6.

[748] NAIC. *Suitability in Annuity Transactions Model Regulation* (#275) Best Interest Standard of Conduct Revisions Frequently Asked Question, (May 2021).

[749] This is estimated as: (301 small insurance companies × 20 hours) + (57 large insurance companies × 40 hours) ≈ 8,286 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 8,286 hours × $165.71 ≈ $1,373,123. Note, the total values may not equal the sum of the parts due to rounding.

[750] This is estimated as: 358 insurance companies × 5 hours ≈ 1,788 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (358 insurance companies × 5 hours) × $165.71 ≈ $296,302. Note, the total values may not equal the sum of the parts due to rounding.

[751] This is estimated as: (500,000 recommendations × (30 minutes ÷ 60 minutes)) ≈ 250,000 hours. A labor rate of $198.25 is used for a financial professional. The labor rate is applied in the following calculation: (500,000 recommendations × (30 minutes ÷ 60 minutes)) × $198.25 ≈ $49,562,500. Note, the total values may not equal the sum of the parts due to rounding.

[752] The number of requests in the first year is estimated as: 358 insurance companies × (165 requests in PTE 2020–02 ÷18,632 Financial Institutions in PTE 2020–02) ≈ 3 requests. The number of requests in subsequent years is estimated as: 358 insurance companies × (50 requests in PTE 2020–02 ÷18,632 Financial Institutions in PTE 2020–02) ≈ 1 request.

[753] The burden is estimated as: 3 requests × (15 minutes ÷ 60 minutes) = 0.75 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (3 requests × (15 minutes ÷ 60 minutes)) × $65.99 = $49.49.

[754] The burden is estimated as: 1 request × (15 minutes ÷ 60 minutes) = 0.25 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (1 request × (15 minutes ÷ 60 minutes)) × $65.99 = $16.50.

[755] The cost in the first year is estimated as: ($1,373,123 to develop policies and procedures + $49,562,500 to review rollover recommendations + $49 to provide policies and procedures to the Department) = $50,935,672. The cost in subsequent years is estimated as: ($296,302 to review policies and procedures + $49,562,500 to review rollover

Continued

Costs Associated With Retrospective Review

The amendment requires Insurers to conduct a retrospective review at least annually. The review is required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review is required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. The retrospective review must also include a review of Independent Producers' rollover recommendations and the required rollover disclosure.

As part of this review, the Insurer must prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with the exemption.

The Insurer annually must provide a written report to a Senior Executive Officer which details the review. A Senior Executive Officer is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution. The Senior Executive Officer must annually certify that (A) the officer has reviewed the report of the retrospective review; (B) the Insurer has provided Independent Producers with the methodology and results of the retrospective review, has corrected any prohibited transactions—including paying excise taxes and reporting to the IRS, and that the Insurer has received a certification that the Independent Producer has filed Form 5330 within 30 days after the form is due; (C) the Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and (D) the Insurer has in place a prudent process to modify such policies and procedures.

Insurers are also required to provide the Independent Producer with the underlying methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction the Independent Producer engaged in with respect to investment advice defined under Code section 4975(e)(3)(B). The Insurer must instruct the Independent Producer to correct any prohibited transactions, report those transactions to the IRS on Form 5330 and provide a copy of that form to the Insurer, and pay any resulting excise taxes imposed by Code section 4975. The Department assumes that the insurance company will provide the methodology and results electronically.

The Department lacks data on the average number of Independent Producers selling annuities per insurance company. For the purposes of this analysis, the Department assumes that, on average, each Independent Producer sells the products of three insurance companies. From each of these insurance companies, they may sell multiple products. As such, the Department assumes that each year, insurance companies will need to prepare approximately 259,230 retrospective reviews,[756] or on average, each Insurer will need to prepare approximately 725 retrospective reviews.[757]

The Department received comments remarking that its estimate for the retrospective review understated the burden of this requirement. In the final rulemaking, the Department has stated that Insurers may use sampling in their review of an Independent Producer's transactions so long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed. With this in mind, the Department has not revised its estimate of the average time conducting the retrospective review of each Independent Producer will take. However, the Department received several comments regarding the number of Independent Producers and has revised them upward in our analysis. This has increased the total estimated cost of the retrospective review requirement.

The Department assumes that, for each Independent Producer selling an Insurer's products, legal professionals at the insurance company will spend one hour of legal staff time, on average, conducting and drafting the retrospective review. This results in an estimated cost of approximately $43.0 million.[758]

The Department assumes it will take a Senior Executive Officer four hours to review and certify the reports. This results in an estimated annual cost of approximately $0.2 million.[759]

The Department assumes that the insurance company will provide the methodology and results electronically. The Department received no comments on this assumption. The Department estimates that it will take clerical staff five minutes each to prepare and send each of the estimated 259,230 retrospective reviews. This results in an estimated annual cost of approximately $1.4 million.[760] The Department expects the results to be provided electronically, thus the Department does not expect there to be any material costs with providing Independent Producers with the retrospective review.

The Department estimates that satisfying the requirements for retrospective reviews will result in an estimated total annual cost of approximately $44.6 million.[761]

The cost associated with updating and modifying policies and procedures in response to the findings of the retrospective review is discussed above in the discussion of policies and procedures.

Costs Associated With Self-Correction

The amendment requires an Independent Producer that chooses to use the self-correction provision of the exemption to notify the Insurer of any corrective actions taken due to a violation of the exemption's conditions. As discussed above, the Insurer must

recommendations + $16 to provide policies and procedures to the Department) = $49,858,818. Note, the total values may not equal the sum of the parts due to rounding.

[756] This is estimated as: 86,410 Independent Producers × 3 insurance companies covered ≈ 259,230 retrospective reviews.

[757] This is estimated as: 259,230 retrospective reviews ÷ 358 insurance companies ≈ 725 retrospective reviews, on average.

[758] This is estimated as: 259,230 retrospective reviews × 1 hour ≈ 259,230 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (259,230 retrospective reviews × 1 hour) × $165.71 ≈ $42,957,003. Note, the total values may not equal the sum of the parts due to rounding.

[759] This is estimated as: 358 firms × 4 hours ≈ 1,430 hours. A labor rate of $133.24 is used for a Senior Executive Officer. The labor rate is applied in the following calculation: 1,430 hours × $133.24 ≈ $190,594.

[760] This is estimated as: 259,230 retrospective reviews × (5 minutes ÷ 60 minutes) ≈ 21,603 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (259,230 retrospective reviews × (5 minutes ÷ 60 minutes)) × $65.99 ≈ $1,425,549. Note, the total values may not equal the sum of the parts due to rounding.

[761] The annual cost is estimated as: ($42,957,003 to conduct the retrospective review + $190,594 for the review of the retrospective review + $1,425,549 for the provision of the report to Independent Producers) = $44,573,147. Note, the total values may not equal the sum of the parts due to rounding.

discuss corrective actions in the retrospective review. The Department does not have data on how often violations will occur, or on how often Independent Producers will choose to use the self-correction provisions of the amendment. The Department expects that such violations will be rare. For illustration, the Department assumes that one percent of transactions will result in self-correction, which would result in 5,000 notifications of self-correction being sent. Assuming it will take an Independent Producer 30 minutes, on average, to draft and send a notification to the insurance company, it will result in an annual cost of approximately $413,000.[762]

The self-correction provisions of this rulemaking allow entities to correct violations of the exemption in certain circumstances, when either the Independent Producer has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. The correction must occur within 90 days of the day the Independent Producer learned or should have learned of the violation. The Independent Producer must notify the Insurer responsible for conducting the retrospective review, and the violation and correction must both appear in the written report of the retrospective review. Without the self-correction provisions, an Independent Producer would also be required to report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).[763]

Costs Associated With Recordkeeping

The final amendment incorporates a new recordkeeping provision for transactions involving the provision of fiduciary investment advice that is similar to the recordkeeping provision in PTE 2020–02 and retains the existing recordkeeping requirements in Section V(e) of PTE 84–24 for transactions that do not involve the provision of fiduciary investment advice. In the proposal, the Department proposed a broader recordkeeping requirement, but in response to comments, the final amendment scaled back the amended recordkeeping conditions in the exemption. The recordkeeping provision in the final amendment requires Independent Producers to maintain for six years from the date of a covered transaction sufficient records to demonstrate that the conditions of the exemption have been met.

For this analysis, the Department only considers the cost for Insurers and Independent Producers complying with the new recordkeeping requirements. The Department estimates that the additional time needed to maintain records to be consistent with the exemption will require an Independent Producer and Insurers two hours, resulting in an estimated cost of $28.7 million.[764]

Summary of Total Cost for the Amendments to PTE 84–24

The Department estimates that in order to meet the additional conditions of the amended PTE 84–24, affected entities will incur a total cost of $288.7 million in the first year and $167.2 million in subsequent years.[765]

Costs Associated With the Mass Amendments

The following analysis summarizes the changes and associated costs to PTE 75–1, PTE 77–4, PTE 1980–83, PTE 83–1, and PTE 86–128. For more information on the cost estimates, refer to the Paperwork Reduction Act statements for the amendments, published elsewhere in today's edition of the **Federal Register**.

The most significant change in the amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 is the removal of relief for the receipt of compensation by an investment advice fiduciary in connection with the provision of fiduciary investment advice. Entities previously relying on these exemptions for relief concerning investment advice will be required to meet the conditions of PTE 2020–02 or PTE 84–24 to receive relief. Several commenters on the proposal expressed concern about the cost burden associated this change, with many stating that the Department had not considered the cost associated with moving to PTE 2020–02. In consideration with these comments, the Department has increased its cost estimates for entities newly relying on PTE 2020–02 and PTE 84–24. The increases include significant increases in the cost estimates to review and implement the rule and to establish policies and procedures. For a complete discussion of the cost estimates, refer to the discussion of costs associated with PTE 2020–02 and PTE 84–24 above.

Costs Associated With PTE 75–1

In the proposal, the Department proposed to amended PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRA owners to Financial Institutions. In the final rulemaking, the Department has decided to keep the recordkeeping requirement unchanged from the existing exemption.

Summary of Affected Entities

The amendment to PTE 75–1 affects banks, reporting dealers, and broker-dealers registered under the Securities Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 1,919 broker-dealers and 2,025 banks will use PTE 75–1.[766]

Costs Associated With Disclosure Requirements in Part V

The Department amends PTE 75–1 Part V to allow an investment advice fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if (1) the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties, and (2) prior to the extension of credit, the plan or IRA receives written disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged.

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[762] The burden is estimated as: (500,000 transaction × 1% of transactions resulting in self-correction × (30 minutes ÷ 60 minutes)) = 2,500 hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: (500,000 transaction × 1% of transactions resulting in self-correction × (30 minutes ÷ 60 minutes)) × $165.29 = $413,225. Note, the total values may not equal the sum of the parts due to rounding.

[763] The Retrospective Review also requires a certification that Form 5330 and any resulting excise taxes have been filed and paid as appropriate.

[764] This is estimated as: (86,410 Independent Producers + 358 insurance companies) × 2 hours ≈ 173,535 hours. A labor rate of $165.29 is used for an Independent Producer and $165.71 for a legal professional at an insurance company. The labor rate is applied in the following calculation: (86,410 Independent Producers × 2 hours × $165.29) + (358 insurance companies × 2 hours × $165.71) ≈ $28,683,939.

[765] The first-year total cost includes: ($76,015,692 for rule review + $88,115,522 for general disclosures + $50,935,672 for policies and procedures + $44,573,147 for the retrospective review + $413,225 for self-correction + $28,683,939 for recordkeeping) = $288,737,197. The total cost in subsequent years includes: ($43,710,694 for disclosures + $49,858,818 for policies and procedures + $44,573,147 for the retrospective review + $413,225 for self-correction + $28,683,939 for recordkeeping) = $167,239,823. Note, the total values may not equal the sum of the parts due to rounding.

[766] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

The Department believes that it is a usual and customary business practice to maintain records required for demonstrating compliance with SEC-mandated disclosure distribution regulations. Further, the Department believes that this new requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b–16(1) for margin transactions.[767] Therefore, the Department concludes that this requirement produces no additional burden to the public.

Costs Associated With Removing Fiduciary Investment Advice From Parts III and IV

Additionally, the Department is amending PTE 75–1 Parts III and IV, which provide relief for investment advice fiduciaries, by removing relief for compensation received as a result of providing fiduciary investment advice from the covered transactions. Investment advice providers will instead have to rely on the amended PTE 2020–02 and the investment advice providers costs are accounted for in the cost estimates for PTE 2020–02.

Summary of Total Cost for the Amendments to PTE 75–1

The removal of investment advice from PTE 75–1 Parts III and IV moves the estimated costs of providing investment advice to the cost estimates for PTE 2020–02. While the Department estimates that most entities will rely on PTE 2020–02, the increase in the total cost for PTE 75–1 results from revisions to some estimates, such as time burdens for compliance, which have been adjusted in response to comments.

Costs Associated With PTE 77–4, PTE 80–83, PTE 83–1

Summary of Affected Entities

The amendment to PTE 77–4 affects mutual fund companies. As discussed in the Affected Entities section, the Department estimates that 812 mutual fund companies will be affected by the amended PTE 77–4.[768]

PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 25 fiduciary-banks with public offering services will be affected by the amended PTE 80–83.[769]

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

Summary of Total Cost for the Amendments to PTE 77–4, PTE 80–83, and PTE 83–1

The Department is amending PTE 77–4, PTE 80–83, and PTE 83–1, which include relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers will instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions and the investment advice providers' costs are accounted for in the cost estimates for PTE 2020–02.

Costs Associated With Amendment to PTE 86–128

Summary of Affected Entities

The amendments to PTE 86–128 will affect fiduciaries of employee benefit plans and IRAs that rely on the class exemption to effect or execute securities transactions (''transacting fiduciaries'') and independent plan fiduciaries that authorize the plan or IRA to engage in the transactions (''authorizing fiduciaries''). Fiduciaries of employee benefit plans and IRAs will be affected by the removal of relief for the receipt of compensation as a result of providing investment advice. Fiduciaries who fall under the definition of a Financial Institution under PTE 2020–02 may rely on that exemption for relief for compensation as a result of investment advice. The costs associated with PTE 2020–02 are discussed elsewhere in this analysis. For more information about the cost for Fiduciaries of employee benefit plans that will continue to rely on PTE 86–128, refer to the Paperwork Reduction Act sections for PTE 86–128, also published in today's **Federal Register**.

As discussed in the Affected Entities section, the Department estimates that 251 broker-dealers will be affected by the amendments to PTE 86–128. Additionally, the Department estimates that 10,000 IRAs will engage in transactions covered under this class exemption, of which 210 are new IRAs.[770]

In the proposal, a few commenters expressed concern that disruption would be caused by the amendments. One commenter expressed concern that the removal of investment advice would increase costs to retirement investors, as entities would need to comply with PTE 2020–02. The Department did not receive comments specifically addressing the Department's estimates of the number of entities that would continue to rely on PTE 86–128 or plans receiving services from those entities.

Summary of Total Cost for the Amendments to PTE 86–128

The Department is adding a new Section II(d) which removes relief in this exemption for the receipt of compensation as the result of the provision of fiduciary investment advice. Instead, investment advice providers will have to rely on PTE 84–24 and PTE 2020–02 for exemptive relief covering transactions involving the provision of fiduciary investment advice and the investment advice providers' costs are accounted for in the cost estimates for PTE 84–24 and PTE 2020–02.

The Department had proposed imposing additional requirements on the independent plan fiduciaries authorizing the IRA to engage in these transactions (''authorizing fiduciary'') under the conditions contained in the exemption. In the final rulemaking, the Department has decided to not impose such requirements. Additionally, the Department proposed including a new recordkeeping requirement applicable to Section VII. The Department received several comments opposing this requirement, particularly the requirement to make records available to participants and beneficiaries. In consideration of the comments received, the Department has also removed this requirement in the final amendment.

As such, as finalized, the amendments to PTE 86–128 do not impose additional burdens on the entities who continue to rely on the exemption.

10. Regulatory Alternatives

The Department considered various alternative approaches in developing this rulemaking. Those alternatives are discussed below.

Broader Rule

The Department considered a definition of an investment advice

[767] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 258 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[768] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

[769] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

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fiduciary that would be broader in scope, similar to the 2016 Final Rule. In promulgating the 2016 Final Rule, the Department expanded the definition of a fiduciary beyond the five-part test included in the 1975 regulation. The 2016 Final Rule covered as fiduciary investment advice:

- recommendations by a person who represents or acknowledges their fiduciary status under the Act or the Code;
- advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the Retirement Investor;
- recommendations directed to a specific Retirement Investor or Investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA; and
- recommendations to buy, sell or hold assets held in IRAs and other non-Title I ERISA plans.

In developing this rulemaking, the Department has crafted a more focused definition that addresses the scope issues identified by the Fifth Circuit's *Chamber* opinion while still protecting Retirement Investors. The Department was also cognizant of stakeholders' concerns that compliance costs associated with the broader 2016 Final Rule would lead to adverse consequences such as increases in the cost of investment advice and potential loss of access by Retirement Investors with small account balances.

Unlike the 2016 Final Rule, the amended definition does not automatically treat as fiduciary advice all compensated recommendations directed to a specific Retirement Investor regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA. The current rulemaking instead limits application of investment advice fiduciary status to circumstances that indicate the Retirement Investor may place trust and confidence in the recommendation as a professional recommendation based upon the particular needs of the investor. The rulemaking reflects the Department's interpretation of the text of the statute, as informed by the Fifth Circuit's emphasis on relationships of trust and confidence. For example, an entity can satisfy the test under (c)(1)(i) of this rulemaking only if a recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is individualized to the Retirement Investor, reflects professional or expert judgment as applied to the individual investor's circumstances, and may be relied upon by the Retirement Investor to advance their own interests; essentially, the entity has held themselves out as a trusted advice provider and invited the Retirement Investor's reliance on them.

No Amendment to PTE 2020–02

The Department considered not amending PTE 2020–02 and leaving the exemption in its present form. The Department has retained the core components of the original PTE, including the Impartial Conduct Standards and the requirement for strong policies and procedures aimed at avoiding and mitigating conflicts of interest. These are fundamental investor protections that are necessary to ensure the Financial Institutions and Investment Professionals provide investment advice that is in the best interest of Retirement Investors. The retention of the core elements of PTE 2020–02 will also ensure that any work Financial Institutions have done to comply with PTE 2020–02 will prepare them to comply with the amended exemption.

However, the Department believes that broadening the exemption to cover all principal transactions and robo-advice, as well as providing additional protections are necessary to more fully protect Retirement Investors and ensure that fiduciary investment advice providers adhere to the standards outlined in PTE 2020–02. Therefore, as discussed in greater detail in the preamble to amended PTE 2020–02, also published in today's **Federal Register**, the amendments clarify and tighten the existing text of PTE 2020–02, while also broadening the scope of the exemption so more parties can use it.

No Amendment to PTE 84–24

The Department is aware that insurance companies sometimes sell insurance products through independent agents who sell multiple insurance companies' products. Thus, when the Department originally finalized PTE 2020–02, the Department explained that insurance companies could rely on either PTE 2020–02 or PTE 84–24. As a result, the Department considered the option of leaving PTE 84–24 unaltered, but ultimately concluded that the amendment will be a better approach with regards to covered advice providers.

Since the Department first issued PTE 2020–20, insurance companies that distribute annuities through independent agents have expressed concerns that they may not be able to effectively comply with PTE 2020–02 due to the difficulties overseeing independent insurance producers who do not work for any one insurance company and are not obligated to recommend only one company's annuities. The Department understands that this compliance issue has been resolved by reliance on PTE 84–24.

However, without the amendments, PTE 84–24 offers few of the protections provided by PTE 2020–02. Further, insurance companies' continued reliance on PTE 84–24 instead of PTE 2020–02 could prevent Retirement Investors from being able to fully compare varying products and services. In order to address these concerns, the Department has amended PTE 84–24 to provide exemptive relief for independent insurance producers who receive a sales commission or fee(s) from an insurance company in connection with the purchase of annuities or other insurance products with plan or IRA assets. The amendment addresses insurance industry concerns regarding the workability of PTE 2020–02's conditions, while also ensuring that fiduciary investment advice is delivered pursuant to the same core principles that protect Retirement Investors under PTE 2020–02.

The Department could have amended PTE 84–24 differently. In particular, the Department could have utilized a narrower definition of compensation that gets relief under the exemption. This approach could be more protective of Retirement Investors and reduce conflicts, but this alternative would have been more disruptive to business models than the selected approach.

Including an Individual Contract Requirement

The Department also considered amending PTE 2020–02 to require an enforceable written contract between the Financial Institution and the Retirement Investor. The predecessor to PTE 2020–02, the Best Interest Contract Exemption in the Department's 2016 rulemaking,[771] required such an enforceable contract. Ultimately, the Department concluded that the better course of action was not to include such a requirement. The Department is cognizant of the Fifth Circuit's finding that the contractual requirement in the Department's 2016 Rulemaking exceeded the scope of the Department's authority. In crafting an exemption that does not include an enforceable written

[771] *See* 81 FR 21002 (Apr. 8, 2016).

contract, the Department intends to avoid any potential disruption in the market for investment advice.

Instead, the Department believes that the compliance structure of the amended exemption includes sufficient oversight and compliance measures. For example, Financial Institutions' reports regarding their retrospective review are required to be certified by a Senior Executive Officer of the Financial Institution and provided to the Department within 30 business days of request. The exemption also includes eligibility provisions, which the Department believes will encourage a culture of compliance among Financial Institutions and Investment Professionals.

The amendment also conditions relief on the Financial Institutions reporting any non-exempt prohibited transactions to the IRS, correcting those transactions, and paying any resulting excise taxes imposed under Title II of ERISA. Further, the amendment adds the repeated failure to report, correct, or pay an excise tax to the list of factors that could make a Financial Institution ineligible to rely on PTE 2020–02. The Department believes these additional conditions will provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

Relying on Disclosure Alone

Some commenters responding to the 2015 proposed rule [772] advocated that the Department issue broad PTEs that exempt all or almost all existing and potential adviser business models and compensation arrangements on the sole condition that material conflicts be disclosed. However, the Department declines to take this approach because the Department does not believe that disclosure alone is adequately protective of Retirement Investors.

As discussed above in the ''Need for Regulatory Action'' section, many of the issues in the retirement saving space arise out of a combination of inexpert customers and conflicted advisers. Enhanced disclosure requirements help make the industry more transparent and accessible. However, most Retirement Investors are not as financially sophisticated as those providing investment advice, which can make it extremely difficult to detect lapses in the quality of financial advice. Due to the complexity of the industry, Retirement Investors may not fully understand disclosures of advisers' conflicts or, the impacts that those conflicts could have on their investments. A large body of research discussed in the regulatory impact analysis for the 2016 Final Rule suggested that disclosures alone can have, at best, a minor impact on conflicts, and can sometimes exacerbate the conflicted behavior.[773] Advisers may inflate the bias in their advice to counteract any discounting that might occur because of the disclosure of conflicts.[774] In addition, even when inexpert Retirement Investors receive easy-to-understand disclosures alerting them to conflicts, there is no ready way for them to use that knowledge to improve investment outcomes, inasmuch as they are still dependent on the adviser's recommendations and expertise.

Adding a Requirement for a Web Disclosure

The Department considered amending PTE 2020–02 and PTE 84–24 to require Financial Institutions to disclosure the sources of third-party compensation received in connection with recommended investment products on a public web page and requested comments on the matter in the preamble to the proposed amendment. Such disclosures could allow market-based forces to extend protections to consumers by discouraging and eliminating the most conflicted compensation practices.

These disclosures would allow Investment Professionals, experts, and consultants, as well as academic researchers, to draw attention to the concerning aspects of the conflicts and even rate firms based on the scope of their conflicts.[775] However, industry commenters generally opposed the condition on the grounds that it would be very costly to maintain such a website and that it would only provide a limited benefit to Retirement Investors. Due to these comments, the Department decided against inclusion of a web disclosure exemption condition at this time.

Allowing for More Parties To Review Records

For the amendment to PTE 2020–02, the Department considered allowing more parties to review the records necessary to determine whether the exemption is satisfied, such as:

- any authorized employee of the Department or the Department of the Treasury,
- any fiduciary of a plan that engaged in a transaction pursuant to this exemption,
- any contributing employer, any employee organization whose members are covered by a plan that engaged in a transaction pursuant to this exemption, and
- any participant or beneficiary of a plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

Although the proposed broader recordkeeping condition is consistent with other exemptions, the Department understands commenters' concerns regarding broader access to the documents and has concern that broad access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Investment Professionals.

The Department does not have data on how often Financial Institutions would receive such requests. For the purposes of this analysis, the Department assumes that, on average, Financial Institutions would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the amendments would have resulted in an annual cost of approximately $15.4 million.[776]

Proposed Disclosures to Retirement Investors That Were Modified

The proposed rulemaking included the Conflict of Interest Disclosures and the Rollover Disclosures that were changed for the final rulemaking. The

[772] *See* FR 21927 (Apr. 20, 2015).

[773] *See* FR 20946, 20950–51 (Apr. 8, 2016).

[774] George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest,* 101(3) American Economic Review 423–28, (May 2011).

[775] Augustin Landier & David Thesmar, *Regulating Systemic Risk Through Transparency: Tradeoffs in Making Data Public,* Working Paper 17664 National Bureau of Economic Research (December 2011), 320, *https://www.nber.org/system/files/working_papers/w17664/w17664.pdf. See also* Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?,* 83(2) Journal of Financial Economics 271–295 (2007).; Randall A. Heron & Erik Lie, *What Fraction of Stock Option Grants to Top Executives Have Been Backdated or Manipulated*?, 55(4) Management Science 513–525; Mark Carhart, Ron Kaniel & Adam Reed, *Leaning for the Tape: Evidence of Gaming Behavior in Equity Mutual Funds,* 57(2) Journal of Finance 661–693 (2002).; Truong X. Duong & Felix Meschke, *The Rise and Fall of Portfolio Pumping Among U.S. Mutual Funds,* 60 Journal of Corporate Finance (February 2020).

[776] The burden is estimated as follows: (19,528 Financial Institutions × 10 requests) × (30 minutes ÷ 60 minutes) = 96,450 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(19,528 Financial Institutions × 10 requests) × (30 minutes ÷ 60 minutes)] × $165.71 = $15,368,343.

changes were to align the disclosure requirements with requirements under Regulation Best Interest and the NAIC model rules. Doing so reduced the cost of compliance, while the Department continues to monitor the effectiveness and utility of the disclosures.

Adding Specificity To Conflict of Interest & Material Fact Disclosures

The Department received many comments asserting that the conflict of interest and material fact disclosure requirements in the proposal would burden Financial Institutions without providing sufficient incremental benefits to Retirement Investors beyond those provided by the disclosures required by the SEC's Regulation Best Interest standard. While the Department also received comments expressing support for the Department's proposed amendments that would have clarified and tightened the existing PTE 2020–02 disclosure requirements, the Department ultimately decided to base the pre-transaction disclosure requirements on the SEC's Regulation Best Interest disclosure requirements. The Department made this determination to ensure that Retirement Investors received sufficient information to make informed decisions, while also reducing compliance burdens by adopting requirements consistent with existing SEC requirements.

Eligibility

The Department considered conditioning eligibility for both PTE 84–24 and 2020–02 on the actions of both fiduciaries themselves and any ''affiliates.'' The benefit of using this broad term was to foster a wide-reaching culture of compliance in the retirement investment industry. However, in response to industry comments stating that the Department's use of the term ''affiliate'' was confusing and overbroad, the Department decided to use the narrower term ''controlled group'' in the ineligibility provisions of both final amendments.

The Department also revised the ineligibility provisions based on foreign convictions to exclude any convictions that occur within foreign jurisdictions included on the Department of Commerce's list of ''foreign adversaries.'' [777] This change was made in response to commenter concerns that convictions have or could occur in foreign nations that are intended to harm U.S.-based Financial Institutions and thus, would not truly meet the section's ''substantially equivalent'' requirement.

Finally, the Department considered the inclusion of a Department-led ineligibility determination, again, as a way to promote a culture of compliance in the industry. However, the Department ultimately decided to condition ineligibility on determinations in court proceedings, whether domestic or foreign convictions, that met the standards outlined in the ineligibility section. This decision was made after consideration of commenters' due process concerns.

11. Uncertainty

In estimating costs associated with rollover documentations, the Department faces uncertainty in determining the number of rollovers affected by the amendments to PTE 2020–02 and PTE 84–24. Some financial services professionals who do not generally serve as fiduciaries may act in a fiduciary capacity when making certain rollover recommendations, and thus will be affected by the exemptions. Alternatively, the opposite can also be true. Financial services professionals who generally serve as fiduciaries may act in a non-fiduciary capacity in handling certain rollover recommendations, and thus will not be affected by the exemptions. Thus, there is uncertainty in estimating the cost of compliance. The Department expects that the rulemaking will result in lower fees and expenses for plan participants, but the Department faces uncertainty in estimating the magnitude of savings.

N. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (*44 U.S.C. 3506(c)(2)(A)*), the Departments solicited comments concerning the information collection requirements (ICRs) included in the proposed rule. At the same time, the Departments also submitted ICRs to OMB, in accordance with 44 U.S.C. 3507(d).

The Department received comments that addressed the burden estimates used in the analysis of the proposed rule. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

ICRs are available at *RegInfo.gov* (*https://www.reginfo.gov/public/do/PRAMain*). Requests for copies of the ICR or additional information can be sent to the PRA addressee:

By mail: James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210

By email: ebsa.opr@dol.gov

There is no paperwork burden associated with the final rule. However, there is paperwork burden associated with the amendments to PTEs 75–1, 84–24, 86–128, and 2020–02. The Department estimates that the amendments would not affect the paperwork burden related to PTEs 77–4, 80–3, and 83–1. The PRA analysis for the amendments is included with each of the respective amendments.

PTE 75–1

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75–1 (Security Transactions with Broker-Dealers, Reporting Dealers and Banks).

OMB Control Number: 1210–0092.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 3,944.

Estimated Number of Annual Responses: 3,944.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 15,778 hours.

Estimated Total Annual Burden Cost: $0.

PTE 84–24

Type of Review: Revision of an Existing Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

OMB Control Number: 1210–0158.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 89,818.

Estimated Number of Annual Responses: 1,498,615.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 1,093,403 hours.

Estimated Total Annual Burden Cost: $191,759.

PTE 86–128

Type of Review: Revision to an existing collection.

[777] 15 CFR 7.4.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86–128 (Securities Broker-Dealers).

OMB Control Number: 1210–0059.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 326.

Estimated Number of Annual Responses: 4,150.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 177 hours.

Estimated Total Annual Burden Cost: $3,300.

PTE 2020–02

OMB Control Number: 1210–0163.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 18,632.

Estimated Number of Annual Responses: 114,609,171.

Frequency of Response: Initially, Annually, when engaging in exempted transaction.

Estimated Total Annual Burden Hours: 2,599,221 hours.

Estimated Total Annual Burden Cost: $18,359,543.

O. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [778] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[779] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. Below is the Department's FRFA.

1. Need for and Objectives of the Rule

As discussed earlier, the Department believes that changes to the marketplace since 1975, when the Department finalized the five-part ''fiduciary'' test, have made the existing definition inadequate and obsolete. This rulemaking will update the definition of ''fiduciary'' to reflect changes to the retirement and financial advice marketplaces since 1975 and add important protections to existing prohibited transaction class exemptions. More detail can be found in the ''Need for Regulatory Action'' section of this regulatory impact analysis.

Smaller retirement plans may be more susceptible to conflicts of interest on the part of service providers, because they are less likely than larger retirement plans to receive investment advice from a service provider that is acting as a fiduciary. Smaller plans have historically received investment advice from insurance brokers or broker-dealers, who may be subject to conflicts of interest.[780] Larger plans may also have sufficient resources and in-house expertise to make investment decisions without outside assistance.[781] Additionally, many sponsors of smaller plans may have a lack of knowledge of whether the providers to the plan are fiduciaries and how the provider's compensation varies based on the investment options selected.[782]

One commenter noted that, according to the Morningstar 2023 Retirement Plan Landscape Report, participants in small plans pay nearly double what participants in large plans pay.[783] As such, small plans and their participants could see significant benefits from the protections provided in the amendments.

2. Comments From the Small Business Administration on the RFA

The U.S. Small Business Administration Office of Advocacy (SBA) submitted a comment expressing concern regarding a number of assumptions and calculations in the RFA.[784] The Department has considered the comment letter and addressed them as appropriate.

The SBA first expressed concern that the number of affected entities is underestimated, with particular concern for the estimate of small, affected entities. In response to this comment, among others, Department has revised multiple estimates. The commenter highlighted the Department's assumptions that the regulation would affect 4,000 Independent Producers. The number of Independent Producers was revised upwards from 4,000 to 86,410. The number of affected insurance companies was also re-estimated using a new methodology based on the *Statistics of U.S. Businesses,* which increased the number of affected insurance companies from 398 to 442. Additionally, the Department's estimate for discretionary fiduciaries was reconsidered. Instead of looking at all broker-dealers, the Department decided to estimate discretionary fiduciaries with the number of dual-registered broker-dealers. The Department believes that this produces a more accurate estimate of discretionary fiduciaries. This reduces the estimate of discretionary fiduciaries from 1,894 to 251. In response to additional comments, the Department has also added 31 non-bank trustees to the small and total affected entities list. This estimate is described in the Affected Entities section of the regulatory impact analysis. Finally, the affected entity estimates for broker-dealers, registered investment advisers, and banks all were revised with the same methodology used in the proposal using updated data. None of these changes for broker-dealers, registered investment advisers, and banks exceeded 5 percent of the original estimates. These changes are all discussed in further detail in the regulatory impact analysis. Since the Department's small entity estimates are based off shares of the total affected entities, these changes result in an updated number of affected small entities in the RFA.

Additionally, the SBA recommended that the Department use different data sources to calculate the share of affected entities that are small. Specifically, they recommended that the Department use the *Statistics of U.S. Businesses* from the U.S. Census Bureau. In response, the Department has updated the small, affected entity estimates using shares calculated from this data source where applicable. This change, combined with the affected entities changes, alter the small, affected entity estimates. In the proposal, the rulemaking was estimated to affect 11,919 small entities in the regulatory impact analysis and 27,057 small entities in the RFA. In the Final rule, this estimate has been updated to affect 91,956 small entities in the regulatory impact analysis and 107,446 in the RFA. Looking at notable changes, the number of small Independent Producers has increased to 85,564 from 3,960 in the proposal. The number of small discretionary fiduciaries decreased from 1,835 to 243 and the number of mutual fund companies decreased from 796 to 728 in the

[778] *5 U.S.C. 601 et seq.*

[779] *5 U.S.C. 601(2), 603(a); see 5 U.S.C. 551.*

[780] U.S. Government Accountability Office, GAO–11–119, *401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest,* U.S. Government Accountability Office (2011), *http://www.gao.gov/products/GAO-11-119.*

[781] *Id.*

[782] *Id.*

[783] In this analysis small plans are defined as plans with less than $25 million in assets, while large plans are defined as plans with more than $100 million in assets. (*See* Lia Mitchell, *2023 Retirement Landscape Report: An In-Depth Look at the Trends and Forces Reshaping U.S. Retirement Plans,* Morningstar Center for Retirement & Policy Studies (April 2023).

[784] Comment letter received from the U.S. Small Business Administration Office of Advocacy on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

proposal. All other changes in small, affected entities were smaller than 5 percent of the original estimates. The Department has also provided tables to illustrate how small entities are distributed across size categories based on revenue.

The SBA also expressed concern that the Department had not thoroughly analyzed the costs to small entities relative to large ones. The commenter provided a survey of expectations regarding future compliance costs, but this survey did not provide a breakdown of these costs or expectations by business size.[785] They did not provide additional data or suggest an alternative methodology for the Department to analyze the differential costs of the rulemaking on small entities. In the absence of such data, the Department is unable to provide unique estimates of costs for different small plan sizes. However, in response to this comment and others, the Department has chosen to revise upwards many of the cost averages described in the FRFA, and has also instituted different hourly burden estimates for small and large firms in certain requirements. Additionally, the Department has added a discussion to this analysis about the estimated cost of small institutions of varying sizes and displayed these costs as a share of revenue at these differently sized firms.

This rulemaking applies the same compliance requirements, regardless of the size of the entity, under the premise that the provisions of the rulemaking are necessary to protect Retirement Investors when engaged in an otherwise prohibited transaction. Further, when considering the SBA size thresholds, nearly all Financial Institutions affected by the rulemaking are considered small entities. As such, all comments received on the proposal have been considered with small entities in mind. For more information on how the Department considered commenters' feedback on the rulemaking and its estimates, refer to the regulatory impact analysis.

The SBA also expressed concern that the Department did not properly analyze regulatory alternatives that would decrease the burdens on small entities. As described above, all alternatives and comments received on the proposal have been considered with small entities in mind. In particular, SBA highlighted two alternatives that they believe merited further discussion. First, SBA stated that the Department should quantify the cost savings associated with not amending PTE 2020–02. Second, SBA stated that the Department should consider the cost savings associated with exempting small businesses from the definition of an investment advice fiduciary. Realistically, these alternatives must be discussed as one, because if the Department amended the definition of an investment advice fiduciary without amending PTE 2020–02, then that would leave small businesses without exemptive relief. This would save small businesses the compliance costs of PTE 2020–02, but would ultimately leave them unable to provide investment advice, potentially incurring much larger costs in lost business. Exempting small businesses from treatment as investment advice fiduciaries, in combination with not amending PTE 2020–02, would remove all of the costs described in the Regulatory Flexibility Analysis, thus incurring a cost savings of $138.1 million in the first year and $62.4 million in subsequent years. However, many investors, plans, and retirees rely on small Financial Institutions, especially under the expansive definitions utilized in the RFA. Assuming the distribution of the investment advice amongst firms is similar to the distribution of revenue, then this could leave approximately 38 percent of the market for investment advice without protection.[786] The Department considered this alternative, but ultimately decided that investors utilizing these small financial firms deserve protection, and that the regulatory uniformity imposed by a single standard would reduce confusion and be better for the market for investment advice.

Finally, the Department notes that many small entities also sponsor retirement plans and therefore are subject to ERISA liability. As noted above in the Need for Regulatory Action section, ERISA plan fiduciaries, particularly those for small plans, are often confused as to whether the advice they receive is fiduciary, may receive inadequate disclosures and can be steered into poor performing funds, negatively impacting the plan and its participants and beneficiaries. For those small plan sponsors, this rulemaking will now ensure that that advice they receive is held to a fiduciary standard which will in turn reduce the sponsor's expected amount of ERISA liability.

3. Other Significant Comments on the RFA

In addition to the comment's received from the SBA discussed above, several commenters expressed concern that the proposal would increase costs on small businesses. One commenter elaborated that small businesses do not have compliance departments to implement the changes necessary. Some of these commenters noted that the proposal could force some small businesses to stop offering services to Retirement Investors.

The Department acknowledges that the transition costs in this rulemaking may be more burdensome for smaller businesses; however, as discussed above, compliance with some of the requirements will be smaller for entities with less complex business models. Additionally, many small institutions will outsource compliance tasks. The Department expects that for any entity choosing to outsource, the cost of hiring a third party will be less than the cost to use available staffing.

The Department expects that is particularly true regarding how Independent Producers will experience costs. Nearly all Independent Producers are considered small entities under the SBA definition. Many of which are one person operations or relatively small firms on a headcount basis. The Department understands that when examined in isolation this fact can lead to erroneous conclusions regarding the burden these individual firms will experience. In practice Independent Producers frequently partner and/or contract with carriers directly or through third parties called Insurance Marketing Organizations. These organizations provide varying levels of support to Independent Producers. This support can take several forms such as carrier contracting, lead generation, back-office administration, compliance, training, and any combination of these and other pertinent services. While this structure is exemplified by Independent Producers, the Department expects that other small Financial Institutions will rely on similar mechanisms.

[785] Nat'l Ass'n of Ins. & Fin. Advisors, NAIFA Survey Shows the DOL's Fiduciary Proposal Will Increase Costs and Reduce Access to Retirement Planning Services (Dec. 19, 2023), *https://advocacy.naifa.org/news/naifa-surveyshows-the-dols-fiduciary-proposal-will-increase-costs-and-reduce-access-to-retirement-planning-services.*

[786] According to Departmental Analysis of the *Statistics of U.S. Businesses* by examining a weighted average of the receipts attributable to small firms.

This structure leads to economies of scale in areas such as compliance. For this reason, the Department based its assumptions on this operational structure while describing the burdens. The Department believes that the burdens described in the FRFA represent a reasonable blended average of these approaches across a spectrum of organizational and relational complexity.

4. Affected Small Entities

The SBA defines small businesses and issues size standards by industry.[787] [788] The SBA defines a small business in the financial investments and related activities sector as a business with up to $47.0 million in annual receipts. 97 percent of broker-dealers [789] and 99 percent of registered investment advisers [790] are small businesses according to the SBA size standards.

TABLE 8—AFFECTED SMALL FINANCIAL ENTITIES

	Prohibited transaction exemptions					
	2020–02	84–24	75–1	77–4	80–83	86–128
Broker-Dealers	1,862		1,862			
Registered Investment Advisers	16,195					
Pure Robo-Advisers	10					
Discretionary Fiduciaries						243
Insurance Companies	71	261				
Insurance Producers		85,564				
Banks			1,538		19	
Mutual Fund Companies				728		
Investment Company Principal Underwriters	(1)	20				
Nonbank Trustees	30					
Pension Consultants	(1)	924				

[1] Pension consultants and investment company principal underwriters who were relying on PTE 84–24 for investment advice will no longer be able to rely on the exemption as amended for receipt of compensation as a result of providing investment advice. However, these pension consultants and investment company principal underwriters can rely on PTE 2020–02 when they are part of a Financial Institution, such as a registered investment adviser, broker-dealer, insurance company, or bank, which are already accounted for.

In its economic analysis for its initial issuance of PTE 2020–02, the Department included all entities eligible for relief on a variety of transactions and compensation that may not have been covered by prior exemptions in its cost estimate. In 2020, the Department acknowledged that not all these entities will serve as investment advice fiduciaries to plans and IRAs within the meaning of Title I and the Code. Additionally, it is unclear how widely Financial Institutions will rely upon the new exemptions and which firms are most likely to choose to rely on it.

This analysis, like the analysis from 2020, includes all entities eligible for relief in its cost estimate. These estimates are subject to caveats like those in 2020, though this rule will expand the parties that will be considered investment advice fiduciaries and also will narrow the exemption alternatives. In the proposal, the Department received several comments regarding its estimate of the number of financial entities that would be affected. Commenters expressed concern about the Department's assumption that all eligible entities already rely on PTE 2020–02, as some entities did not consider their conduct to trigger fiduciary status. These commenters noted that under the amended definition of a fiduciary, these entities would consider themselves fiduciaries for the first time and incur transition costs, accordingly. In response to this comment, the Department has revised its estimate to assume that 30 percent of broker-dealers, registered investment advisers, and insurance companies were not previously relying upon PTE 2020–02 and will incur the transition costs under this rulemaking.

In response to comments, the Department has conducted an analysis of small entities across a wide range of revenue and asset categories. Additionally, the Department has amended its calculations of small entities in the RFA to utilize the Statistics of U.S. Businesses from the U.S. Census Bureau. Due to a lack of sufficiently detailed data, the Department cannot provide a breakdown of entities by revenue for robo-advisers and principal underwriters. Additionally, while data on insurance companies is presented in the Statistics of U.S. Businesses, the Department does not believe that this data has sufficient granularity to describe the entities affected by this rulemaking. This rulemaking will only affect a select subset of insurance companies writing annuities and some life insurance products. Therefore, the Department will continue to utilize its existing source from the LIMRA factbook, which details the largest sellers of annuities by revenue. From this number, the Department is able to calculate the number of large annuity sellers and use this to calculate the number of small annuity sellers. However, since this data only provides direct data on the largest annuity sellers, the Department is unable to provide a revenue breakdown for this industry. Additionally, since the SBA size definition for banks is based on assets, rather than receipts, the Department will continue to use FDIC asset data to define bank size in the RFA. The NAICS codes used in generating this table are subsequently discussed in the FRFA during individual discussions of each small, affected entity.

[787] *13 CFR 121.201.*

[788] *15 U.S.C. 631 et seq.*

[789] This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, *https://www.naics.com/business-lists/counts-by-naics-code/.*

[790] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, *https://www.naics.com/business-lists/counts-by-naics-code/.*

TABLE 9—SHARE OF AFFECTED SMALL ENTITIES BY REVENUE

Revenue	<$100 Thousand	$100–$500 Thousand	$0.5–$1 Million	$1–$5 Million	$5–$25 Million	$25–$47 Million	SBA large	SBA small [791]
Broker-Dealers	16.6%	45.7%	17.6%	12.7%	3.7%	0.8%	3.0%	97.0%
Registered Investment Advisers	24.3	46.7	14.6	10.8	2.1	0.3	1.2	98.8
Pure Robo-Advisers							95.0	5.0
Discretionary Fiduciaries	16.6	45.7	17.6	12.7	3.7	0.8	3.0	97.0
Insurance Companies							24.9	75.1
Insurance Producers	18.7	53.6	15.6	9.7	1.7	0.2	1.0	99.0
Mutual Fund Companies	27.1	29.2	8.3	18.1	10.1	2.1	10.4	89.6
Investment Company Principal Underwriters							0.0	100.0
Pension Consultants	10.8	22.7	12.9	27.9	14.7	2.3	8.6	91.4
Nonbank Trustees	15.3	44.0	17.9	16.0	3.9	0.5	2.4	97.6
Banks [792]	4.9	10.8	18.5	22.3	11.7	7.8	24.1	75.9

In addition to providing the share of small affected entities in each asset or revenue category, this data is also displayed in the form of a calculated number of small affected entities in Table 10. This is generated by applying the percentages from Table 9 to the total affected entities numbers previously calculated in the Affected Entities section of the regulatory impact analysis. It should be noted that, due to rounding differences in the table, some of the numbers presented will not sum to the total small entity number.

TABLE 10—CALCULATED NUMBER OF AFFECTED SMALL ENTITIES BY REVENUE

Revenue	<$100 Thousand	$100–$500 Thousand	$0.5–$1 Million	$1–$5 Million	$5–$25 Million	$25–$47 Million	SBA large	SBA small [793]
Broker-Dealers	318	877	337	244	71	16	58	1,862
Registered Investment Advisers	3,987	7,658	2,394	1,771	339	47	203	16,195
Pure Robo-Advisers							190	10
Discretionary Fiduciaries	42	115	44	32	9	2	8	243
Insurance Companies							110	333
Insurance Producers	16,176	46,302	13,458	8,402	1,469	183	846	85,564
Mutual Fund Companies	220	237	68	147	82	17	84	728
Investment Company Principal Underwriters							0	20
Pension Consultants	110	229	131	283	148	23	87	924
Nonbank Trustees	5	14	6	5	1	0	1	30
Banks [794]	99	218	375	451	236	157	487	1,538

Registered Investment Advisers

Small, registered investment advisers who provide investment advice to retirement plans or Retirement Investors and registered investment advisers who act as pension consultants will be directly affected by the amendments to PTE 2020–02. The Department estimates that 16,598 registered investment advisers, including 200 robo-advisers, will be affected by the amendments.[795] The Department estimates that 98.8 percent of Registered Investment Advisers are small businesses according to the SBA size standards.[796] Based on these statistics, the Department estimates that 16,195 small registered investment advisers exclusive of pure robo-advisers, including those registered with the SEC and the State, will be affected by the amendments.[797]

Robo-Advisers

The amendments to PTE 2020–02 will affect robo-advisers. The Department estimates that 200 robo-advisers will be affected by the amendments.[798] The Department does not have information on how many of these robo-advisers are considered small entities. The Department expects that most robo-advisers will not be considered small. For the purposes of this analysis, the Department assumes that 5 percent of robo-advisers, or an estimated 10 robo-advisers, are small entities.

Broker-Dealers

Small broker-dealers who provide investment advice to retirement plans or Retirement Investors and registered investment advisers who act as pension consultants will be directly affected by the amendments to PTE 2020–02. Additionally, the amendments modify PTE 75–1 and PTE 86–128 such that small broker-dealers will no longer be able to rely on those exemptions for investment advice. The Department does not have information about how many small broker-dealers provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners. However, the Department believes that few broker-dealers,

[791] The total value may not equal the sum of the parts due to rounding.

[792] The SBA Size categorization for banks is based on total assets, not revenue. Banks are presented on the same chart for simplicity, but their figures are based off of asset cutoffs at $50, $100, $200, $400, $600, and $850 million.

[793] The total value may not equal the sum of the parts due to rounding.

[794] The SBA Size categorization for banks is based on total assets, not revenue. Banks are presented on the same chart for simplicity, but their figures are based off of asset cutoffs at $50, $100, $200, $400, $600, and $850 million.

[795] For more information on this estimate, refer to the Affected Entities section of the regulatory impact analysis.

[796] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, *https://www.naics.com/business-lists/counts-by-naics-code/*.

[797] The number of small investment advisers, who do not provide pure robo-advice, is estimated as: (16,398 investment advisers − 200 robo-advisers) × 98.7% = 16,185 small investment advisers.

[798] For more information on this estimate, refer to the Affected Entities section of the regulatory impact analysis.

regardless of size, will continue to rely on PTE 75–1 and PTE 86–128 for transactions that do not involve investment advice.

The Department assumes that 1,920 broker-dealers will be affected by the amendments.[799] The Department estimates that 97.0 percent of broker-dealers are small businesses according to the SBA size standards.[800] Accordingly, the Department assumes that 1,862 small broker-dealers will be affected by the amendments.[801]

Discretionary Fiduciary

The amendments to PTEs 75–1 Parts III & IV, 77–4, 80–83, 83–1, and 86–128 will exclude the receipt of compensation from transactions that result from the provision of investment advice. Therefore, fiduciaries will have to rely on another exemption to receive compensation for investment advice, such as PTE 2020–02. Fiduciaries that exercise full discretionary authority or control could continue to rely on these exemptions, as long as they comply with all of the applicable exemption's conditions. Discretionary fiduciaries will still be able to effect or execute securities transactions. Any discretionary fiduciaries seeking relief for investment advice, however, will be required to rely on the amended PTE 2020–02. The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that will rely on the amended exemption.

For the purposes of this analysis, the Department believes that the number of dual-registered broker-dealers that render services to retirement plans provides a reasonable estimate of the number of entities that will rely on the exemption. As of December 2022, there were 456 broker-dealers registered as SEC- or State-registered investment advisers.[802] Consistent with the assumptions made about broker-dealers affected by the amendments to PTE 2020–02, the Department estimates that 55 percent, or 251 broker-dealers will be affected by the amendments to PTE 86–128.[803]

Insurance Companies

The amendments to PTE 2020–02 and PTE 84–24 affect small insurance companies and captive agents. The existing version of PTE 84–24 granted relief for all insurance agents, including insurance agents who are overseen by a single insurance company; however, the amendments exclude insurance companies and captive agents currently relying on the exemption for investment advice. These entities will be required to comply with the requirements of PTE 2020–02 for relief involving investment advice.

In the proposal, the Department assumed that the number of companies selling annuities through captive or independent distribution channels would be proportionate to the sales completed by each respective channel. The Department requested comments on this assumption but did not receive any directly addressing it. In the proposal, the Department based its estimate on the percent of sales completed by independent agents and career agents in the individual annuity distribution channel. This resulted in an estimate that approximately 46 percent of sales are done through captive distribution channels and 54 percent of sales are done through independent distribution channels.

One recent source stated that 81 percent of individual annuities sales are conducted through an independent distribution channel.[804] The Department uses this statistic to update its estimate of the number of sales through the independent distribution channel. The Department assumes that the percent of companies selling annuities through an independent distribution channel is proportionate to the percent of sales conducted through an independent distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel but has adopted this assumption due to a lack of additional data.

Also, the Department recognizes that some insurance companies use multiple distribution channels, though the Department did not receive any comment on how common the use of multiple distribution channels is. Looking at the 10 insurance companies with the highest annuity sales in 2022, one relied on captive distribution channels, seven relied on independent distribution channels, and two relied on both.[805] Accordingly, most insurance companies appear to primarily use either independent distribution or a combination of captive and independent distribution. However, any entity using a captive insurance channel, or using both captive and independent channels, likely has already incurred most of the costs of this rulemaking under PTE 2020–02. Costs are estimated by assuming that entities using a third-party distribution system, even if they also use captive agents, will incur costs for the first time under amended PTE 84–24. This assumption leads to an overestimation of the cost incurred by insurance companies.

Following from the revised assumption that 81 percent of activity being associated with independent, or third party, channels, the Department estimates that 84 insurance companies distribute annuities through captive channels and will rely on PTE 2020–02 for transactions involving investment advice. Further, the Department estimates that 358 insurance companies distribute annuities through independent channels and will rely on PTE 84–24 for transactions involving investment advice.[806] Regarding entities affected by PTE 84–24, 73.1 percent, or approximately 262 entities, are estimated to meet the SBA definition of small entities. For entities affected by PTE 2020–02, the Department continues to rely on the estimated number of small insurers developed in the Affected Entities section of the regulatory impact analysis, which is 71 small entities. This

[799] For more information on this estimate, refer to the Affected Entities section of the regulatory impact analysis.

[800] This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, *https://www.naics.com/business-lists/counts-by-naics-code/.*

[801] The number of retail broker-dealers affected by this exemption is estimated as: (1,919 broker-dealers × 96.9%) = 1,860 broker-dealers.

[802] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[803] In 2023, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting. (*See* Cerulli Associates, *U.S. RIA Marketplace 2023: Expanding Opportunities to Support Independence,* Exhibit 5.10. The Cerulli Report.) The Department assumes the percentage of broker-dealers provide advice to retirement plans is the same as the percent of investment advisers providing services to plans. This is calculated as 456 hybrid broker-dealers × 55% = 251 affected entities.

[804] This study considers sales by independent agents, independent broker-dealers, national broker-dealers, and banks to be sales in the independent distribution channel, while sales by career agents and direct means are considered to be in the captive distribution channel. (*See* Ramnath Balasubramanian, Christian Boldan, Matt Leo, David Schiff, & Yves Vontobel, *Redefining the Future of Life Insurance and Annuities Distribution,* McKinsey & Company (January 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*)

[805] Annuity sales are based on LIMRA, *U.S. Individual Fixed Annuity Sales Breakouts, 2022, https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2022/q4/2022-ye-fixed-breakout-results.pdf.* Information on distribution channels is based on review of insurance company websites, SEC filings of publicly held firms, and other publicly available sources.

[806] The number of insurance companies using captive distribution channels is estimated as 442 × 81% = 358 insurance companies. The number of insurance companies using independent distribution channels is estimated as 442 − 358 = 84 insurance companies.

figure was not re-calculated based on the *Statistics of U.S. Businesses* because it accounts exclusively for insurers selling annuities, while the *Statistics of U.S. Businesses* would include all direct insurers.

Captive Insurance Agents

Additionally, as discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that 1,577 captive insurance agents will be affected by the amendments. The Department estimates that 99 percent of these captive agents work for small entities.[807] Thus, the Department estimates there are 1,561 captive insurance agents that will be affected by the amendments.[808]

Independent Producers

The rulemaking also affects independent insurance producers that recommend annuities from unaffiliated Financial Institutions to Retirement Investors, as well as the Financial Institutions whose products are recommended. While captive insurance agents are employees of an insurance company, other insurance agents are ''independent'' and may work with multiple insurance companies. Though these independent insurance producers may rely on PTE 2020–02, the Department believes they are more likely to rely on PTE 84–24. For this reason, the Department only considers captive insurance agents in the analysis for PTE 2020–02 and not Independent Producers.

The Independent Insurance Agents and Brokers of America estimated that there were 40,000 Independent Producers in 2022. The Department does not have data on what percent of Independent Producers serve the retirement market. In the proposal, the Department assumed that 10 percent, or 4,000, of these Independent Producers serve the retirement market. As noted in the Affected Entities section of the regulatory impact analysis, the Department received several comments suggesting that its estimate for the number of independent insurance agents was too low. while commenters provided estimates that were substantially higher, asserting an estimate between 80,000 and 120,000 agents an appropriate level, the commenters did not provide any documentation or basis for their suggestions. In response, the Department analyzed employment data from the March 2023 Current Population Survey to identify the number of self-employed workers in the ''Finance and Insurance'' industry whose occupation was listed as ''Insurance Sales Agents.'' This identified 86,410 self-employed insurance sales agents in the Finance and Insurance industry.[809] The Department decided to utilize this as the number of Independent Producers for the analyses presented even though this data point likely contains workers who do not sell annuities or would otherwise not be impacted by the rulemaking; therefore, the Department believes this results in an overestimate of costs associated with Independent Producers.[810]

The Department estimates that 99 percent of these entities are small entities.[811] As such, the Department estimates that 85,564 small Independent Producers will be affected by the amendment.

Pension Consultants

The Department expects that pension consultants will continue to rely on the existing PTE 84–24; however, the amendment will exclude compensation received by pension consultants as a result of providing investment advice from relief under the existing PTE 84–24. As such, any pension consultants relying on the existing exemption for investment advice will be required to work with a Financial Institution under PTE 2020–02 to receive compensation for fiduciary investment advice. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84–24 and as a part of registered investment advisers for the amended PTE 2020–02.

As discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that 1,011 pension consultants serve the retirement market. The Department estimates that approximately 91.4 percent of these entities are small entities.[812] As such, the Department estimates that 924 pension consultants will be affected by the amendments.

Principal Company Underwriter

The Department expects that some investment company principal underwriters for plans and IRAs rely on the existing PTE 84–24. The amendment excludes compensation received by investment company principal underwriters as a result of providing investment advice from relief under the existing PTE 84–24. As such, any principal company underwriter relying on the existing exemption for investment advice will be required to work with a Financial Institution under amended PTE 2020–02 to receive compensation for fiduciary investment advice. In this analysis, the Department includes principal company underwriters in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02 as registered investment advisers.

As discussed in the Affected Entities section, the Department assumes that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs will use this exemption once with one client plan. The Department estimates that approximately 97 percent of these entities are small entities.[813] As a result,

[807] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support-table-size-standards.*

[808] The number of captive insurance agents is calculated as: (1,577 captive agents × 99.0%) = 1,561 captive insurance agents serving the annuity market.

[809] EBSA Tabulations based off the March 2023 Current Population Survey.

[810] When revising its estimate of Independent Producers for the final rulemaking, the Department considered using the proportion of premiums attributable to life insurance activity as a proxy for the share of insurance agents that sell annuities. Data from the U.S. Department of the Treasury, Federal Insurance Office, ''Annual Report on the Insurance Industry,'' indicates that roughly 23 percent of insurance premiums in 2023 were from life insurance activity. Assuming that this translates into 23 percent of insurance agents selling life insurance products would reduce the number of estimated independent life insurance producers affected from 86,410 to 20,185. If the Department assumed this level of Independent Producers it would result in a total estimated cost associated with the PTE 84–24 rulemaking of just $67.7 million in the first year and $36.3 million in subsequent years. The Department ultimately decided to not use share of insurance premiums adjustment in the Final Rule.

[811] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support-table-size-standards.*

[812] This is estimated on the percent of entities with annual receipts less than $45.5 million for the industry Third Party Administration of Insurance and Pension Funds, NAICS 524292. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support-table-size-standards.*

[813] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Banking and Securities Intermediation, NAICS 523110. *See* NAICS Association, *Count by*

Continued

the Department estimates that all 10 of the estimated small investment company principal underwriters for plans and all 10 of the estimated small investment company principal underwriters for IRAs will be affected by the proposed amendments.

Banks and Credit Unions

The amendments to PTE 80–83, PTE 75–1, and PTE 2020–02 may affect banks and credit unions. The amendments to PTE 80–83 and PTE 75–1 will exclude entities currently relying on the existing exemptions for investment advice, which will instead be required to comply with PTE 2020–02 for relief.

The Department estimates that approximately 76 percent of commercial banks are small banks.[814] As discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that 4,049 commercial banks will use the amended PTE 75–1, of which 3,076 are estimated to be small.[815] Additionally, in the Affected Entities section of the regulatory impact analysis, the Department estimates that 25 fiduciary-banks with public offering services will use the amended PTE 80–83, of which, 19 are estimated to be small.[816] The Department recognizes that these estimates assume that the proportion of small banks using the aforementioned PTEs will be the same as the proposition of all banks using the PTEs. The Department recognizes that the banking industry within the United States is characterized by high market concentration.[817]

The amendments could also affect credit unions. The Department estimates that there are approximately 4,645 credit unions.[818] In 2023, the SBA estimated that there are 4,586 small credit unions.[819] As discussed in the Affected Entities section of the regulatory impact analysis, while the Department acknowledges that some credit unions may rely on PTE 75–1 and PTE 80–83 as amended, the Department does not have data, and did not receive any comment on the proposal, to suggest how many credit unions current rely on these exemptions or will continue to rely on these exemptions as amended.

Mutual Fund Companies

The amendments modify PTE 77–4 such that mutual fund companies providing services to plans can no longer rely on PTE 77–4 for relief when giving investment advice and will instead need to rely on PTE 2020–02 for relief.

As discussed in the Affected entities section of the regulatory impact analysis, the Department estimates that 812 mutual fund companies will be affected by the amendments to PTE 77–4. The Department estimates that approximately 92 percent of these mutual fund companies, or 744 mutual fund companies, are small.[820]

Mortgage Pool Sponsors

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates. The amendments exclude exemptive relief for investment advice. Under the rulemaking, these mortgage pool sponsors operating as or under a Financial Institution will be able to rely on PTE 2020–02 for relief concerning investment advice.

5. Impact of the Rule

The Department believes the costs associated with the amendments are modest because the rulemaking was developed in consideration of other regulatory conduct standards. The Department believes that many Financial Institutions and Investment Professionals have already developed compliance structures for similar regulatory standards. The Department does not expect that the rulemaking will impose a significant compliance burden on small entities. As discussed, the Department estimates that the rulemaking will impose costs of approximately $536.8 million in the first year and $332.7 million in each subsequent year, of which approximately $328.7 million in the first year and $140.7 million in each subsequent year will be imposed on small Financial Institutions.

The table below summarizes the estimated aggregate cost for small entities due to the proposed amendments to each exemption. The following section describes estimated cost for each entity type for each exemption.

TABLE 11—SUMMARY OF TOTAL COST AND AVERAGE PER-ENTITY COSTBY EXEMPTION FOR SMALL ENTITIES

	Total cost		Per-entity cost	
	First year	Subsequent years	First year	Subsequent years
PTE 84–24	$201,839,804	$82,820,265	$2,326	$954
PTE 2020–02	126,887,617	57,891,821	6,984	3,186
Mass Amendments [1]				
Total	328,727,421	140,712,086	9,310	4,140

[1] As finalized, the amendments to the Mass Amendment do not impose an additional burden on entities continuing to rely on those exemptions. However, the amendments will require entities to rely on PTE 84–24 and PTE 2020–02 for exemptive relief covering transactions involving the provision of fiduciary investment advice. These costs are accounted for in the cost estimates for PTE 84–24 and PTE 2020–02.

NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.

[814] This is estimated on the percent of commercial banks with assets less than $850 million. *See* Federal Deposit Insurance Corporation, *FOIA RIS Data Bulk Download,* (September 2023), *https://www.fdic.gov/foia/ris/index.html.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support--table-size-standards.*

[815] The number of small commercial banks that would use PTE 75–1 is estimated as: (4,049 banks × 76%) = 3,076 small banks.

[816] The number of small banks that would use PTE 80–83 is estimated as: (25 fiduciary-banks with public offering services × 76%) = 19 banks.

[817] Jim DiSalvo, *Banking Trends: Has the Banking Industry Become Too Concentrated?,* Federal Reserve Bank of Philadelphia, (2023), *https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/economic-insights/2023/q1/bt-has-the-banking-industry-become-too-concentrated.pdf.*

[818] For more information on how the number of credit unions is estimated, refer to the Affected Entities section of the regulatory impact analysis.

[819] 88 FR 18906 (March 29, 2023).

[820] This is estimated on the percent of entities with annual receipts less than $40 million for the industry Open End Investment Fund, NAICS 525910. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support--table-size-standards.*

Note: The sum of the columns may not sum to total due to rounding.

Preliminary Assumptions and Cost Estimate Inputs

The Department also assumes affected entities will likely incur only incremental costs if they are already subject to rules or requirements from the Department or another regulator. The Department acknowledges that not all entities will decide to use the amended PTE 2020–02 and PTE 84–24 for transactions resulting from fiduciary investment advice. Some may instead rely on other existing exemptions that better align with their business models. However, for this cost estimation, the Department assumes that all eligible entities will use the PTE 2020–02 and PTE 84–24 for such transactions. The Department recognizes that this may result in an overestimate, as not all entities will necessarily rely on these exemptions.

The Department does not have information on how many Retirement Investors—including plan beneficiaries, plan participants, and IRA owners—receive electronic disclosures from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of Retirement Investors in plans that are receiving electronic disclosures will be similar to those under the Department's 2020 and 2002 electronic disclosure safe harbors.[821] Accordingly, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors in plans will be sent electronically, and the remaining 3.9 percent will be sent by mail.[822] Additionally, the Department assumes that approximately 72 percent of IRA owners will receive disclosures electronically.[823] Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one Financial Institution to another) will be 100 percent electronic.

The Department assumes that various types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $65.99 for clerical personnel, $133.24 for a top executive, $165.29 for an insurance sales agent, $165.71 for a legal professional, $198.25 for a financial manager, and $228 for a financial adviser.[824] Additionally, in response to comments, the Department has also analyzed these costs according to different revenue sizes. The per entity costs for the rulemaking as a share of revenue are displayed below.

TABLE 12—TOTAL THREE-YEAR AVERAGE PER-ENTITY COST BY ENTITY AND REVENUE, SHARE OF REVENUE[825]

Revenue	Independent producer (%)	Pension consultant (%)	Insurer (%)	Broker (%)	RIA[826] (%)	Robo adviser (%)	Nonbank trustee (%)	Bank[827] (%)
<$100k	3.16	6.63		5.62	4.91		7.34	<0.001
$100–$500k	0.53	1.10		0.97	1.04		1.23	<0.001
$0.5–$1m	0.21	0.44		41	61		0.50	<0.001
$1–$5m	0.05	0.11		0.12	0.29		0.14	<0.001
$5–$25m	0.01	0.02		0.05	0.22		0.05	<0.001
$25–$47m	0.00	0.01		0.04	0.17		0.05	<0.001
SBA Small	0.01	0.01	0.28	0.01	0.01	0.11	0.01	<0.01

Cost Associated With PTE 2020–02

Summary of Affected Entities

The analysis presented in this section is distinct from that presented in the regulatory impact analysis because the Department is relying on the SBA definition of a small entity and an updated source recommended by the SBA for the RFA whereas the regulatory impact analysis utilizes an alternative definition and data source. The result of using the SBA definition in conjunction with its preferred data source is an increase in the estimated number of affected small entities from 3,531, which was used in the regulatory impact analysis, to 18,169 in the RFA for PTE 2020–02. Costs are allocated to small entities in two manners depending on the task. When allocating the fixed costs of review, development of disclosure, and compliance measures instituted at an entity level, the costs are distributed using the time, labor, and other assumptions presented in the regulatory impact analysis associated with the task for small entities. Alternatively, when the costs are associated with transactional or revenue generating activity, the costs are calculated on a revenue weighted basis. For example, Census *Statistics of U.S. Businesses* data show that approximately 99 percent of Investment Advice firms reporting under NAIC 523930 have revenues under the SBA threshold. These firms generate roughly 30 percent of the industry classes' receipts. Therefore, when the Department allocates fixed costs, the costs will be calculated based on the number of affected small entities such as for rule review, where 99% of the total 16,398 Investment Advisers are allocated 20 hours of a legal professionals' time to review. When the cost is variable or transaction based,

[821] 85 FR 31884 (May 27, 2020); 67 FR 17263 (Apr. 9, 2002).

[822] The Department estimates approximately 94.2 percent of Retirement Investors receive disclosures electronically. This is the sum of the estimated share of Retirement Investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of Retirement Investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

[823] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration internet Use Survey which indicated that 86 percent of adults 65 and over use email on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) × (86% are internet fluent) = 72% are internet fluent and find electronic delivery acceptable.

[824] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates. *See* EBSA, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[825] Values are displayed as a share of the midpoint for each revenue category. For instance, values in the "<$100k" category are displayed as a share of $50,000.

[826] This includes both State-registered and SEC-registered investment advisers.

[827] The SBA Size categorization for banks is based on total assets, not revenue. Banks are presented on the same chart for simplicity, but their figures are based off of asset cutoffs at $50, $100, $200, $400, $600, and $850 million.

such as with rollover documentation costs, the costs allocated to small firms will be around 30 percent of the total costs.

Cost To Review the Rule

The Department estimates that all 18,169 of the small Financial Institutions affected will each need to review the rule, as it applies to their business. The Department acknowledges that the review process will vary significantly by institution. Some organizations may use in-house teams to review the rule and devise an implementation plan, others may outsource review to a third party, and still others may choose a hybrid approach. Outsourcing the review process can lead to efficiencies as one organization reviews the rule and then provides information to many others. These efficiencies may be particularly beneficial to small entities which make up the majority of entities. The Department estimates that such a review will take a legal professional, on average, 20 hours to review the rule and develop an implementation plan, resulting in a total cost of $60.2 million.[828] The Department increased this burden estimate from 9 hours in response to comments received.

Cost Associated With General Disclosures

The amendments require small entities to modify existing general disclosures and develop additional general disclosures to those required under the existing exemption. For more information on the changed requirements for each disclosure, refer to the descriptions in the preamble and regulatory impact analysis of this document. The Department estimates that the total cost for the 18,169 small Financial Institutions to update their disclosure materials and distribute the newly required disclosures is $4.4 million during the first year and approximately $570,000 in each subsequent year.[829]

Cost Associated With Rollover Documentation and Disclosure

As discussed in the cost section of the regulatory impact analysis, the Department bases its estimates on the rollover activity observed in 2023, where the nearly half of the 4,485,059 rollovers, or 2,197,679 rollover transactions, involved receiving advice.[830] The Department lacks reliable data on the number of rollovers that involve small Financial Institutions. As described in the Affected Entities section of this RFA the Department assumes the percent of rollovers conducted by small institutions is proportional to the percent of revenue generated by entities classified as small within the entity category being discussed. Using the proportional revenue of each type of entity the Department estimates that approximately 579,598 rollovers, or 26.4 percent, will be conducted via small Financial Institutions.

Building from the discussion above, the Department estimates an annual cost of approximately $39.1 million for rollover transaction documentation.[831]

Cost Associated With Written Policies and Procedures

Entities that were not previously complying with PTE 2020–02 will incur the cost to develop policies and procedures in the first year. As described in more detail in the Cost section of the regulatory impact analysis, the time burdens assumed depend on prior reliance on either a previous version of the PTE or similar regulatory scheme in which much of the required work is assumed to be complete. For small entities that are currently complying with the requirement, the Department assumes 10 hours to bring their current policies and procedures into compliance and 20 hours for firms to develop them from first principles. Additionally, the Department estimates that most entities will require an additional 5 hours to update their policies and procedures each year. The amendments will also require Financial Institutions to provide their complete policies and procedures to the Department within 30 days of request. This cost is incorporated into the estimate presented above but discussed separately below for completeness's sake. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that the Department will request a total of 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. Assuming the number of requests from small institutions is proportionate to the number of small Financial Institutions, the Department estimates that it will request 160 policies and procedures from small Financial Institutions in the first year and 49 in subsequent years.[832] The Department estimates that fulfilling the requirement will result an estimated cost of approximately $2,656 in the first year [833] and $808 in subsequent years.[834] The cost for a firm receiving the request will be approximately $17 in years when a request is made and no

[828] The burden is estimated as: (18,169 entities x 20 hours) ≈ 363,381 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (18,169 entities × 20 hours) × $165.71 ≈ $60,215,805.

[829] The burden cost for producing and updating disclosures is estimated as:

Newly reliant entities create fiduciary disclosure {[(18,169 small entities − 41 robo-advisor, and non-bank trustees) × 30% × (30 minutes ÷ 60 minutes)] + (41 × (30 minutes ÷ 60 minutes)} ≈ 2,740 hours;

Previously reliant entities update fiduciary disclosure [(18,169 small entities − 41 robo-advisor, and non-bank trustees) × 70% × 10% × (10 minutes ÷ 60 minutes)] ≈ 211 hours;

Previously reliant entities develop written statement of Care and Loyalty Obligation disclosure [18,057 small entities × (30 minutes ÷ 60 minutes)] ≈ 9,029 hours;

Newly reliant entities develop written statement of Care and Loyalty Obligation disclosure (112 small entities × 1 hour) ≈ 112 hours;

Newly reliant entities create Relationship and Conflict of Interest disclosure {[(18,169 small entities − 41 robo-advisor, and non-bank trustees − 1,862 broker-dealers) + (1,862 broker-dealers × (600 non-retail ÷ 1,920 total broker-dealers)) × 30%] + [(41 robo-advisor, and non-bank trustees) × 1 hour] ≈ 5,074 hours;

Previously reliant entities update All Material Facts disclosure [(18,169 small entities − 41 robo-advisor, and non-bank trustees − 1,862 Broker-dealers) + (1,862 Broker-dealers × (600 non-retail ÷ 1,920 total Broker-dealers)) × 70% × (30 minutes ÷ 60 minutes)] ≈ 5,897 hours;

Aggregating these tasks results in an hour burden of 23,062 hours and an equivalent burden cost of $3,821,660 to produce and update the disclosures.

The burden for disclosure materials is estimated as: (5,474,608 small entity disclosures × $0.10) ≈ $574,609.

[830] For more information on how the number of IRA rollovers is estimated, refer to the Affected Entities section of the regulatory impact analysis.

[831] The burden is estimated as: 2,197,679 rollovers × 27.6% involving small entities = 605,564 small rollovers. The labor rate of $64.60 per rollover (based on a rate of $228 per hour for a Personal Financial Adviser) and a material cost of $0.10 per paper rollover disclosure are applied in the following calculation: [(605,564 small rollovers × $64.60) + (605,564 small rollovers × 3.9% paper disclosures × $0.10)] = $39,121,801. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[832] The percent of Financial Institutions that are small is estimated as: (18,169 small Financial Institutions/18,632 Financial Institutions) = 97.5%. The number of policies and procedures requested from small financial entities in the first year is estimated as: (165 × 97.5%) = 161. The number of policies and procedures requested from small financial entities in the first year is estimated as: (50 × 97.5%) = 49.

[833] The burden is estimated as: (161 × (15 minutes ÷ 60 minutes)) = 40 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (161 × (15 minutes ÷ 60 minutes)) × $65.99 = $2,656. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[834] The burden is estimated as: (49 × (15 minutes ÷ 60 minutes)) ≈ 12 burden hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (49 × (15 minutes ÷ 60 minutes)) × $65.99 = $808. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

cost in most years when no request is made.

The requirements to maintain and review policies and procedures are estimated to result in an aggregate cost of $20.0 million in the first year and $15.0 million in subsequent years for small Financial Institutions, or roughly $1,101 average cost per entity in the first year and $829 in subsequent years.[835]

Costs Associated With Annual Report of Retrospective Review for Financial Institutions

PTE 2020–02 requires Financial Institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of and achieve compliance with the conditions of this exemption, Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption.

While entities relying on the existing exemption will not incur additional costs with this requirement, robo-advisers, and newly reliant broker-dealers, registered investment advisers, and insurance companies, who either were not covered under, or not relying upon, the existing exemption, will incur costs associated with conducting the annual review. As stated in the regulatory impact analysis, the Department assumes that 30 percent of entities that were previously able to rely on the PTE chose not to do so and will be newly reliant due to this rulemaking and incur a full cost of compliance. As presented previously in the regulatory impact analysis, the Investment Adviser Association estimated in 2018 that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[836] The Department assumes that State-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent of advising retirement plans will incur costs associated with producing a retrospective review report.

The Department assumes that 10 percent of robo-advisers and newly reliant broker-dealers and insurance companies will incur the full cost of producing an audit report. The Department estimates that 0.8 percent of newly reliant registered investment advisers will incur the full cost of producing the audit report.

This results in an estimate of 98 newly affected small entities not currently producing audit reports.[837] The remaining 5,479 newly affected small entities will need to make modifications to satisfy the requirements.[838]

The Department estimates that it will take a legal professional five hours for small firms to produce a retrospective review report, resulting in an estimated cost of $0.1 million.[839] The Department estimates that it will take a legal professional one hour for small firms to modify existing reports, on average. This results in an estimated cost of $0.9 million.[840]

The Department estimates it will take a certifying officer two hours for small firms to review the report and certify the exemption, resulting in an estimated cost burden of approximately $2.2 million.[841]

This results in a total cost annual cost of $3.1 million.

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 2020–02, affected small entities will incur a total cost of $131.9 million in the first year and $62.9 million in subsequent years.[842] The cost by requirement and entity type is summarized below.

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[835] This burden in the first year is estimated as: [(5,250 small entities × 10 hours) + (229 small entities × 20 hours) + (12,731 small entities × 5 hours)] ≈ 120,785 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is used in the following calculation: [(5,250 small entities × 10 hours) + (229 small entities × 20 hours) + (12,731 small entities × 5 hours)] × $165.71 ≈ $20,008,658. Additionally, 160 small entities will spend 15 minutes each providing the Department with a copy of their policies and procedures in the first year resulting an additional burden of approximately 40 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [160 small entities × (15 minutes ÷ 60 minutes)] × $65.99 ≈ 2,656. The total cost for the first year is estimated as: $20,008,658 + $2,656 = $20,011,315. This burden in the second year is estimated as: (18,169 small entities × 5 hours) ≈ 90,857 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is used in the following calculation: (18,169 small entities × 5 hours) × $165.71 ≈ $15,053,951. Additionally, 49 small entities will spend 15 minutes each providing the Department with a copy of their policies and procedures in the first year resulting an additional burden of approximately 12 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [49 small entities × (15 minutes ÷ 60 minutes)] × $65.99 ≈ $808. The total cost for the second year is estimated as: $15,053,951 + $808 = $15,054,760.

[836] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[837] This is estimated as: {[(1,861 broker-dealers + 71 insurers) × 10%] + [(7,935 SEC-registered investment advisers + 8,260 State-registered investment advisers) × 0.8%] × 30% that are newly relying on PTE 2020–02] + (10 robo-advisers + 31 non-bank trustees) × 10%} ≈ 98 Financial Institutions. Note: Due to rounding values may not sum.

[838] This is estimated as: {[(1,861 broker-dealers + 71 insurers) × 90%] + [(7,935 SEC-registered investment advisers + 8,260 State-registered investment advisers) × 99.2%] × 30% that are newly relying on PTE 2020–02] + (10 robo-advisers + 31 non-bank trustees) × 90%} ≈ 5,479 Financial Institutions. Note: Due to rounding values may not sum.

[839] The burden is estimated as: (98 small entities creating an audit × 5 hours) ≈ 490 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 630 burden hours × $165.71 ≈ $81,236. Note, the total values may not equal the sum of the parts due to rounding.

[840] The burden is estimated as: 5,353 small entities updating an audit × 1 hours) ≈ 5,353 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 5,353 burden hours × $165.71 ≈ $886,983. Note, the total values may not equal the sum of the parts due to rounding.

[841] The burden is estimated as: 5,479 newly reliant small entities × 2 hours) ≈ 25,377 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: 10,958 burden hours × $198.25 ≈ $2,172,432. Note, the total values may not equal the sum of the parts due to rounding.

[842] The burden in the first year is estimated as: $60,215,805 for rule review + $4,398,045 for disclosures + $39,121,801 for rollover documentation + $20,008,658 for policies and procedures + $8,171,727 for retrospective review = $131,918,693. The burden in the subsequent years is estimated as: $574,609 for disclosures + $39,121,801 for rollover documentation + $15,053,951 for policies and procedures + $8,171,727 for retrospective review = $62,922,896.

TABLE 13—THREE-YEAR AVERAGE COST BY TYPE OF ENTITY AND REQUIREMENT

	Broker-dealer	SEC-registered investment adviser	State-registered investment adviser	Insurance company	Robo-adviser	Non-bank trustee
Total	$2,057,340	$8,766,344	$9,124,980	$77,978	$11,047	$34,247
Per-Entity	$1,105	$1,105	$1,105	$1,105	$1,105	$1,105
Disclosure:						
Total	$101,864	$846,560	$881,193	$6,509	$8,143	$4,820
Per-Entity	$55	$107	$107	$92	$814	$155
Rollover Documentation:						
Total	$878,139	$18,493,989	$19,250,589	$2,048	$460,359	$36,678
Per-Entity	$472	$2,331	$2,331	$29	$46,036	$1,183
Policies:						
Total	$1,789,886	$7,232,234	$7,528,108	$76,028	$19,333	$59,932
Per-Entity	$961	$911	$911	$1,077	$1,933	$1,933
Retrospective Review:						
Total	$350,946	$1,351,008	$1,406,278	$13,309	$4,661	$14,449
Per-Entity	$188	$170	$170	$189	$466	$466
Total:						
Total	$5,178,174	$36,690,135	$38,191,149	$175,871	$503,542	$150,125
Per-Entity	$2,781	$4,624	$4,624	$2,492	$50,354	$4,843
SBA:						
SBA Threshold	$47,000,000	$47,000,000	$47,000,000	$47,000,000	$47,000,000	$47,000,000
Per-Entity Cost as a Percentage of SBA Threshold.	0.006%	0.010%	0.010%	0.005%	0.107%	0.010%

In response to comments, the Department has also conducted an analysis of these per-entity costs as a share of a variety of different entity sizes. This analysis for PTE 2020–02 is presented below in Table 14.

TABLE 14—THREE-YEAR AVERAGE PER-ENTITY COST OF PTE 2020–02 BY ENTITY AND REVENUE, SHARE OF REVENUE [843]

Revenue	Insurance company (%)	Broker-dealers (%)	SEC-registered RIA (%)	State-registered RIA (%)	Robo-advisers (%)	Nonbank trustees (%)
<$100k		4.66	4.91	4.91		7.34
$100–$500k		0.81	1.04	1.04		1.23
$0.5–$1m		0.35	0.61	0.61		0.50
$1–$5m		0.10	0.29	0.29		0.14
$5–$25m		0.04	0.22	0.22		0.05
$25–$47m		0.04	0.17	0.17		0.05
SBA Small	0.01	0.01	0.01	0.01	0.11	0.01

Cost Associated With PTE 84–24

Summary of Affected Entities

As discussed in the Affected Entities section of the regulatory impact analysis, the Department expects that 86,769 small financial entities will be affected by the amendments, including 924 pension consultants, 20 investment company principal underwriters, 85,564 Independent Producers, and 261 insurance companies.[844]

Cost To Review the Rule

The Department estimates that all 86,769 of the small Financial Institutions affected will each need to review the rule and develop an implementation plan, as it applies to their business. The Department estimates that such a review and planning will take a legal professional, on average, 20 hours for small insurers, pension consultants, and mutual fund underwriters. The Department expects that the majority of Independent Producers will receive support from the carrier(s) they are contracted with or the Insurance Marketing Organization in understanding the rulemaking and therefore allocates five hours of time per Independent Producer to review the policies and procedures developed by the carriers and integrate the standards into their independent business practices, resulting in a total cost of $74.7 million in the first year.[845]

Costs Associated With General Disclosures

The amendment requires small Independent Producers to provide disclosures to Retirement Investors prior to, or at the time of, a transaction covered by this exemption. For more information on the requirement changes for each disclosure, refer to the descriptions in the preamble and regulatory impact analysis of this

[843] Values are displayed as a share of the midpoint for each revenue category. For instance, values in the ''<$100k'' category are displayed as a share of $50,000.

[844] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

[845] The burden is estimated as: [(85,564 Independent Producers × 5 hours) + (1,205 entities × 20 hours) ≈ 450,835 hours. A labor rate of $165.71 is used for a legal professional and a labor rate of $165.29 for an Independent Producer. The labor rate is applied in the following calculation: [(85,564 Independent Producers × 5 hours × $165.29) + (1,205 entities × 20 hours × $165.71)] ≈ $74,707,970. Note: Due to rounding values may not sum.

document. The Department estimates the marginal cost of the disclosure requirements to be approximately $43.6 million in the first year for the development of disclosures to meet the requirements of the rulemaking.[846]

Cost Associated With Rollover Documentation and Disclosure

The amendment requires an Independent Producer to provide a rollover disclosure that is similar to the disclosure required in the amended PTE 2020–02. As discussed in the regulatory impact analysis, the Department assumes that such disclosures will be prepared by the Independent Producer.

In the regulatory impact analysis, the Department estimates that 500,000 Retirement Investors will receive documentation of the basis for recommending a rollover each year.[847] The Department does not have data on what proportion of rollovers will be produced by small Independent Producers. For the purposes of this analysis, the Department assumes that the proportion of rollovers advised by small Independent Producers is equal to the share of revenue associated with small Independent Producers compared to the revenue produced by all Independent Producers. The Department estimates that approximately 48.7 percent of rollovers will be produced by small Independent Producers.[848] The Department estimates small Independent Producers will need to provide approximately 243,600 rollover disclosures annually. This results in an estimated cost of approximately $20.1 million annually.[849]

Costs Associated With the Provision of Disclosures to Retirement Investors

The Department estimates that the number of disclosures that will need to be provided to Retirement Investors by small entities is equal to the number of rollover disclosures, or approximately 243,600 disclosures. Preparing and sending the general disclosures described above is estimated to cost of approximately $450,000.[850] Additionally, as discussed in more detail in the Cost section of the regulatory impact analysis, the Retirement Investor may request a follow up disclosure which is intended to provide more detail on the compensation associated with the potential transaction. The Department estimates that 10 percent of Retirement Investors will request additional information regarding the rollover and will need to be provided this disclosure which is estimated to cost approximately $714,000 to produce and provide.[851]

Additionally, Independent Producers will be required to send the documentation to the insurance company for pre-transaction approval. The Department expects that such documentation will be sent electronically and result in a de minimis burden.

Costs Associated With the Retrospective Review

The amendment requires a retrospective review to be conducted at least annually. The review must be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review is required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Insurers will be required to annually provide a written report that details the review to a Senior Executive Officer for certification. Insurers will also be required to provide the Independent Producer with the underlying methodology and results of their retrospective review.

In the final rulemaking, the Department has stated that Insurers may use sampling in their review of an Independent Producer's transactions so long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed. With this in mind, the Department has not revised its estimate of the average time conducting the retrospective review of each Independent Producer will take. However, the Department received several comments regarding the number

[846] The burden is estimated as: Fiduciary Notice = For Independent Producers: [(86,410 Independent Producers × 99% proportion of entities are small Independent Producers × 5% assumed to create disclosure) × (30 minutes ÷ 60 minutes)] ≈ 2,139 hours. Applying a labor rate for an Independent Producer results in: (2,139 hours × $165.29) ≈ $353,571. For insurers: 358 insurers × 73.1% proportion of entities that are small × (30 minutes ÷ 60 minutes) ≈ 131 hours. Applying a labor rate for a legal professional results in: (131 hours × $165.71) ≈ $21,652. Combining the costs for both entity types yields: $353,571 + $21,052 ≈ 375,223 to create the fiduciary notice.

Written Statement of Care Obligation & Loyalty Obligation = For Independent Producers: [(86,410 Independent Producers × 99% proportion of entities are small Independent Producers × 5% create disclosure) × 1 hour] ≈ 4,278 hours. Applying a labor rate for an Independent Producer results in: (4,278 hours × $165.29) ≈ $707,142. For insurers: 358 insurers × 73.1% proportion of entities that are small × 1 hour ≈ 261 hours. Applying a labor rate for a legal professional results in: (261 hours × $165.71) ≈ $43,303. Combining the costs for both entity types yields: $707,142 + $43,303 ≈ $750,445. Relationship and Conflict of Interest disclosure= [(86,410 Independent Producers × 99% proportion of entities are small Independent Producers) × 3 hours] ≈ 256,691 hours. Applying a labor rate for legal professional results in: (256,691 hours × $165.71) ≈ $42,536,316. Summing these components results in the total estimated cost of: ($353,571 for Fiduciary Notice by Independent producer + $21,652 for Fiduciary Notice by Insurer + $707,142 for Statement of Care Obligation & Loyalty Obligation by Independent Producer + $43,303 for Statement of Care Obligation & Loyalty Obligation by Insurer + $42,536,316 for Relationship and Conflict of Interest disclosures by Independent Producer) ≈ $43,661,983.

[847] For information on this estimate, refer to the estimate of IRAs affected by the amendments to PTE 84–24 in the Affected Entities section of the regulatory impact analysis.

[848] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support—table-size-standards.*

[849] The burden is estimated as: [(500,000 rollovers × 48.7% proportion of business activity associated with small entities) × (30 minutes ÷ 60 minutes)] ≈ 121,824 burden hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [(500,000 rollovers × 48.7% proportion of business activity associated with small entities) × (30 minutes ÷ 60 minutes)] × $165.29 ≈ $20,136,349. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[850] The labor cost is estimated as: [(500,000 disclosures × 28.2% sent by mail × 48.7% proportion of business activity associated with small Independent Producers) × (2 minutes ÷ 60 minutes)] ≈ 2,290 burden hours. A labor rate of $165.29 is used for an insurance sales agent. The labor rate is applied in the following calculation: [(500,000 disclosures × 28.2% sent by mail × 48.7% proportion of business activity associated with small Independent Producers) × (2 minutes ÷ 60 minutes)] × $165.29 ≈ $378,563. The material cost is estimated as: 68,709 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 7 pages)] ≈ $70,770. The total cost is estimated as: $378,563 + $70,770 ≈ $449,334. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[851] The labor cost is estimated as: (500,000 rollovers × 48.7% proportion of business activity associated with small entities × 10% request rate) ≈ 24,365 requests for the Detailed Compensation Disclosure. Each disclosure is estimated to take 10 minutes to prepare. Therefore, the hours burden is: 24,365 disclosure requests × (10 minutes ÷ 60 minutes) ≈ 4,061 burden hours. A labor rate of $165.29 is used for an insurance sales agent. The labor rate is applied in the following calculation: 4,061 burden hours × $165.29 ≈ $671,212. The mailing cost is estimated as: (24,365 requests × 28.2% receiving disclosures via mail) ≈ 6,871 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 2 pages)] + (2 minutes ÷ 60 minutes) to prepare the disclosure for mailing × $165.29 labor rate for an Insurance Sales Agent ≈ $43,216. The total cost is estimated as: $671,212 + $43,216 ≈ $714,427. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

of Independent Producers and has revised them upward accordingly.

The Department estimates that Insurers will need to prepare a total of 259,230 retrospective reviews.[852] The Department does not have data on the proportion of retrospective reviews that will be prepared by small insurance companies. As presented in the Summary of Affected Entities section of this RFA, the proportion of activity or cost associated with small entities for entity level tasks is attributed by the share of small entities in that industry. This results in an estimate of approximately 189,428 retrospective reviews for small insurance companies.[853]

The Department assumes that the audit preparation will take one hour of a legal professional's time, at a labor cost of $165.71 per hour. Therefore, the cost to small insurers is estimated at approximately $31.4 million annually.[854] The certification of the summary of the audits is expected to take a Senior Executive Officer, at a labor cost of $133.24 per hour, an average of four hours per small entity, which results in an estimated approximate cost of $139,273.[855] Finally, the Department estimates that it will take a clerical professional, at a labor rate of $65.99 per hour, five minutes per report to provide the results and methodology to Independent Producers. This results in an estimated cost to small entities of roughly $1 million.[856] These communications are assumed to be electronic therefore there are no postage or materials costs.

The Department estimates that meeting the requirements of the rulemaking, which include conducting and drafting the retrospective review, having the review certified by a Senior Executive, and providing feedback to Independent Producers to result in an annual cost of approximately $32.6 million.[857]

Costs Associated With Self-Correction

The amendment requires an Independent Producer that chooses to use the self-correction provision of the exemption to notify the Insurer of any corrective actions taken due to a violation of the exemption's conditions. As discussed above, the Insurer must discuss corrective actions in the retrospective review. The Department does not have data on how often violations will occur, or on how often Independent Producers will choose to use the self-correction provisions of the amendment. The Department expects that such violations will be rare. For illustration, the Department assumes that 1 percent of transactions will result in self-correction. This results in 2,436 notifications of self-corrections being sent from small Independent Producers. Assuming it will take an Independent Producer 30 minutes, on average, to draft and send a notification to the insurance company, it will result in an annual cost of approximately $201,363.[858]

Costs Associated With Policies and Procedures

The amendment requires Insurers to establish, maintain, and enforce written policies and procedures for the review of each Independent Producer's recommendation before an annuity is issued to a Retirement Investor. The Insurer's policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any affiliate or related entity, ahead of the interests of the Retirement Investor. Insurers' policies and procedures must also include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed to adhere to the impartial conduct standards, or who lack the necessary education, training, or skill. Finally, Insurers must provide their complete policies and procedures to the Department within 30 days upon request.

The Department estimates that drafting or modifying the policies and procedures will cost approximately $0.9 million in the first year[859] and that the requirement to review policies and procedures annually will cost approximately $217,000 in subsequent years for small entities.[860] The Department estimates that it will take the Insurer approximately 30 minutes to review the Independent Producers rollover recommendation and to provide feedback to the Independent Producer resulting in an annual cost of $159,000.[861] Providing policies and procedures to the Department upon request is estimated to result in a de minimis annual cost.[862]

[852] For more information on this estimate, refer to the Cost section of the regulatory impact analysis.

[853] The number of retrospective reviews prepared by small insurance companies is estimated as: [259,230 × (358 entities × 73.1% SBA small entities)] ≈ 189,428 retrospective reviews.

[854] This burden is estimated as: (189,428 reviews by small entities × 1 hour) ≈ 189,428 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (189,428 reviews by small entities × 1 hour) × $165.71 ≈ $31,390,045.

[855] This burden is estimated as: (358 entities × 73.1% SBA small entities) × 4 hours ≈ 1,045 hours burden. A labor rate of $133.24 is used for a senior executive officer. The labor rate is applied in the following calculation: (358 entities × 73.1% SBA small entities × 4 hours) × $133.24 ≈ $139,273.

[856] This burden is estimated as: 189,428 reviews by small entities × (5 minutes ÷ 60 minutes) ≈ 15,786 burden hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [189,428 reviews by small entities × (5 minutes ÷ 60 minutes)] × $65.99≈ $1,041,694.

[857] This burden is the combination of: $31,390,045 to conduct the review + $139,273 to review and certify the review + $1,041,694 to provide review results to Independent Producers ≈ $32,571,012.

[858] The burden is estimated as: [(500,000 transactions × 1% of transactions resulting in self-correction × 48.7% proportion of business activity associated with small Independent Producers) × (30 minutes ÷ 60 minutes)] ≈ 1,218 hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [(500,000 transactions × 1% of transactions resulting in self-correction × 48.7% proportion of business activity associated with small Independent Producers) × (30 minutes÷ 60 minutes)] × $165.29 ≈ $201,363.

[859] This is estimated as: (358 insurers × 73.1% proportion of small insurance companies × 20 hours) ≈ 5,226 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (358 insurers × 73.1% proportion of small insurance companies × 20 hours) × $165.71 ≈ $866,069. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[860] This is estimated as: (358 insurers × 73.1% proportion of small insurance companies × 5 hours) = 1,307 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (358 insurers × 73.1% proportion of small insurance companies × 5 hours) × $165.71 ≈ $216,517. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[861] This is estimated as: [(500,000 IRA rollover transactions × 0.3% proportion of business activity associated with small insurers) × (30 minutes ÷ 60 minutes)] ≈ 802 burden hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: [(500,000 IRA rollover transactions × 0.3% proportion of business activity associated with small insurers) × (30 minutes ÷ 60 minutes)] × $198.25 ≈ $158,969. The communication of the outcome is expected to be provided electronically.

[862] The number of requests in the first year is estimated as: [(358 insurers × 73.1% proportion of insurance companies that are small) ÷ 87,799 affected entities] × (165 requests in PTE 2020–02 ≈ 3 requests. The number of requests in subsequent years is estimated as: [(358 insurers × 73.1% proportion of small insurance companies) ÷ 87,799 affected entities] × 50 requests in PTE 2020–02 ≈ 1 request. The burden is estimated as: (3 requests × (15 minutes ÷ 60 minutes)) = 0.75 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculations: Year one: (3 requests × (15 minutes ÷ 60 minutes)) × $65.99 ≈ $49. Subsequent years: (1 request × (15 minutes ÷ 60 minutes)) × $65.99 ≈ = $17.

Costs Associated With the Recordkeeping

The amendment incorporates a new recordkeeping provision for transactions involving the provision of fiduciary investment advice that is similar to the recordkeeping provision in PTE 2020–02, and retains the existing recordkeeping requirements in Section V(e) of PTE 84–24 for transactions that do not involve the provision of fiduciary investment advice. The Department estimates that the additional time needed to maintain records for the Financial Institutions to be consistent with the exemption will require an insurance company and Independent Producer two hours annually, resulting in an estimated annual cost of $28.4 million.[863]

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 84–24, small, affected entities would incur a total cost of $201.8 million in the first year and $82.8 million in subsequent years. The total and per-entity cost by type of entity is broken down in the table below.

TABLE 15—COST BY TYPE OF SMALL ENTITY AND REQUIREMENT, FIRST YEAR

	Independent producer	Pension consultants	Financial institutions/ insurance companies	Mutual fund underwriters
Rule Review:				
Total	$70,714,175	$3,061,442	$866,069	$66,284
Per-Entity	826	3,314	3,314	3,314
Disclosure:				
Total	64,897,138		65,955	
Per-Entity	758		249	
Policies and Procedures:				
Total			1,025,087	
Per-Entity			3,923	
Retrospective Review:				
Total			32,571,012	
Per-Entity			124,640	
Self-Correction:				
Total	201,363			
Per-Entity	2			
Recordkeeping:				
Total	28,285,670		86,607	
Per-Entity	331		331	
Total:				
Total Cost	164,098,348	3,061,442	34,613,730	66,284
Per-Entity Cost	1,918	3,314	132,457	3,314
SBA:				
Threshold (in $ millions)	15.0	45.5	47.0	47.0
Per-Entity Cost as a Percentage of SBA Threshold	0.013%	0.007%	0.282%	0.007%

In response to comments, the Department has also conducted an analysis of these per-entity costs as a share of a variety of different entity sizes. This analysis for PTE 84–24 is presented below in Table 16.

TABLE 16—THREE-YEAR AVERAGE PER-ENTITY COST OF PTE 84–24 BY ENTITY AND REVENUE, SHARE OF REVENUE[864]

Revenue	Independent producer (%)	Insurance company	Pension consultants (%)	Investment company principal underwriters
<$100k	3.16		6.63	
$100–$500k	0.53		1.10	
$0.5–$1m	0.21		0.44	
$1–$5m	0.05		0.11	
$5–$25m	0.01		0.02	
$25–$47m	0.00		0.01	
SBA Small	0.01	0.28	0.01	0.01

[863] This is estimated as: (85,564 Independent Producers + 301 small insurance companies) × 2 hours = 171,650 hours. A labor rate of $165.29 is used for an Independent Producer. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(85,564 Independent Producers × 2 hours × $165.29) + (301 small insurance companies × 2 hours × $165.71)] = $28,372,277.

[864] Values are displayed as a share of the midpoint for each revenue category. For instance, values in the ''<$100k'' category are displayed as a share of $50,000.

Costs Associated With the Mass Amendments

Cost Associated With PTE 75–1

Summary of Affected Entities

The amendment to PTE 75–1 will affect banks, reporting dealers, and broker-dealers registered under the Security Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 3,944 Financial Institutions, comprised of 1,919 broker-dealers and 2,025 banks, would use PTE 75–1.[865] The Department estimates that, of these affected entities, 1,861 broker-dealers and 1,538 banks would be small.

Costs Associated With Disclosure Requirements in Part V

The Department amended PTE 75–1 Part V to allow an investment advice fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if certain conditions are met.[866] Prior to the extension of credit, the plan or IRA must receive written a disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged. As discussed in the regulatory impact analysis, the Department expects that these disclosures are common business practice and will not create an additional burden on small broker-dealers or banks.

Costs Associated With Recordkeeping in Parts II and V

Additionally, the Department proposed to amend PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to Financial Institutions. For the final amendments, this requirement was removed, so there is no added burden for recordkeeping.

Costs Associated With Removing Fiduciary Investment Advice From Parts III and IV

Finally, the Department amended Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers will instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide records and documentation under PTE 2020–02, this amendment will not result in additional costs.

Summary of Total Cost

The removal of investment advice from PTE 75–1 Parts III & IV moves the estimated costs of providing investment advice to the cost estimates for PTE 2020–02 and leaves other burdens unchanged. While the Department estimates that most entities will rely on PTE 2020–02, the increase in the total cost for PTE 75–1 results from revisions to some estimates, such as time burdens for compliance, which have been adjusted in response to comments. In response to comments, the Department has conducted an analysis of the remaining per-entity costs as a share of a variety of different entity sizes.

Cost Associated With PTE 77–4, PTE 80–83, PTE 83–1, and PTE 86–128

Summary of Affected Entities

The amendment to PTE 77–4 will affect mutual fund companies. As discussed in the Affected Entities section, the Department estimates that 812 mutual fund companies will be affected by the amended PTE 77–4.[867]

PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 19 small fiduciary-banks with public offering services will be affected by the amended PTE 80–83.[868]

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

The amendment to PTE 86–128 will affect fiduciaries of employee benefit plans that affect or execute securities transactions (''transacting fiduciaries'') and independent plan fiduciaries that authorize the plan. As discussed in the Affected Entities section, the Department estimates that 243 transacting fiduciaries will be affected by the amendments to PTE 86–128.

Summary of Total Cost

The Department amended PTE 77–4, PTE 80–83, PTE 83–1, and PTE 86–128 by removing receipt of compensation as a result of providing fiduciary investment advice from the covered transactions. Investment advice providers will instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide such documentation under these exemptions, these amendments will result in a de minimis change for investment advice providers. Thus, these amendments will not result in measurable additional costs.

6. Duplicate, Overlapping, or Relevant Federal Rules

The rules in ERISA and the Code that govern advice on the investment of retirement assets overlap with SEC rules that govern the conduct broker-dealers that advise retail investors and the fiduciary duty imposed on investment advisers by the Advisers Act. The Department considered conduct standards set by other regulators, such as SEC, NAIC, and FINRA, in developing the final rule, with the goal of avoiding overlapping or duplicative requirements. To the extent the requirements overlap, compliance with the other disclosure or recordkeeping requirements can be used to satisfy the exemption, as long as the conditions are satisfied.

7. Description of Alternatives Considered

Section 604 of the RFA requires the Department to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. This rulemaking involves predominantly small entities which required the impact on small entities to be a primary concern. The Department tried to align the requirements in this rulemaking with the requirements set by other regulators to minimize regulatory burden.

Additionally, the Department has removed certain requirements in the PTEs, resulting in a lower compliance cost for fiduciary advice providers. For instance:

- The Department removed the requirement of the right to obtain specific information regarding costs, fees, and compensation. Removing this requirement saved small entities $82.86 per-entity for entities already relying on PTE 2020–02, and $165.71 per-entity for

[865] For more information on how the number of each type of entity is estimated, refer to the Affected Entities sections of the regulatory impact analysis and the Regulatory Flexibility Analysis.

[866] For more information on these conditions, refer to the preamble and regulatory impact analysis of this document.

[867] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

[868] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

entities newly reliant on PTE 2020–02 in the first year.[869]

• In the proposal for PTE 2020–02, the Department considered requiring a rollover disclosure for all rollovers but instead limited the disclosure to rollovers from plans to IRAs in the final exemption. The Department estimates that approximately 70 percent of rollovers are plan-to-IRA rollovers.[870] The Department estimates that small Financial Institutions will no longer need to complete approximately 246,000 rollover disclosures due to this change.[871] Removing this requirement will save small entities $64.60 for each rollover they conduct that is not between a plan and an IRA.[872] Another $0.10 per rollover will be saved for any of these transactions that are conducted with paper disclosures.

• In the final PTE 2020–02, the Department has modified the requirement for a written description of services to be more consistent with the material facts disclosure required by Regulation Best Interest. When it was separate, the description of services had a per-entity cost ranging from $96.66 per small broker-dealer to $248.66 per small Insurer in the first year.[873] The Department believes that some of these costs will be absorbed from the ability of small businesses to comply with Regulation Best Interest and this rulemaking more easily through the material facts disclosure.

• In PTE 84–24, the Department also removed a requirement to provide a general disclosure on commissions received, instead allowing this information to be provided to investors on request. This resulted in a per entity saving for small entities of $165.71 in the first year.[874]

The Department considered not amending PTE 2020–02 and leaving the exemption in its present form. The Department supports the existing PTE 2020–02 and has retained its core components in the amendment, including the Impartial Conduct Standards and the requirement for strong policies and procedures designed to mitigate conflicts of interest and ensure compliance with the exemption conditions. However, the Department believes that broadening the exemption to cover all principal transactions and robo advice, as well as providing additional protections are necessary to ensure that fiduciary investment advice providers adhere to the protective standards outlined in PTE 2020–02. Therefore, the amendments clarify and tighten the existing text of PTE 2020–02 to enhance the disclosure requirements and strengthen the disqualification provisions while also broadening the scope of the exemption so more parties can use it. For more information, refer to the preamble to amended PTE 2020–02, also published in today's **Federal Register**.

The Department has sought to, where appropriate, minimize the burden of disclosure requirements in PTE 2020–02 and PTE 84–24. For instance, in PTE 2020–02 and PTE 84–24, the Department has provided model language that will satisfy more general disclosure requirements. Additionally, based on comments received on the proposal, the Department has made several adjustments to its disclosure requirements. In the final amendments, the Department has changed the requirements to provide a written description of services to be more consistent with the disclosure requirement of all material facts required on Regulation Best Interest for both PTE 2020–02 and PTE 84–24. As such, entries already complying with Regulation Best Interest will already likely be providing sufficient disclosure for this requirement.

For PTE 2020–02, several commenters expressed concern about the burden and litigation risk associated with the ''right to obtain specific information regarding costs, fees, and compensation'' for Retirement Investors. At this time, the Department has decided to remove this element and align the disclosure conditions with the requirements of Regulation Best Interest, in order to provide a uniform and cost-effective approach to disclosures. For PTE 84–24, Investment Producers must still provide a notice of a Retirement Investor's right to request additional information regarding cash compensation. The Department considered requiring Independent Producers to produce this information by default but instead decided to make this information available by request to be similar to the obligations of an Independent Producer under Section 6.A.2.a.v and 6.A.2.b of the NAIC Model Regulation[875] and requirements in the State of New York.[876]

The Department has considered requiring Financial Institutions to disclose the sources of third-party compensation received in connection with recommended investment products on a public web page in PTE 2020–02. When considering this requirement, the Department discussed exempting small Financial Institutions from this disclosure. In the final rulemaking, the Department has decided to not include this requirement.

Based on comments received in the proposal, the Department is adding transition relief to PTEs 2020–02 and 84–24. The amended exemptions both

[869] The per-entity cost is estimated as: ($165.71 per hour × 0.5 hour) ≈ $82.86 and ($165.71 per hour × 1 hour) ≈ $165.71. A labor rate of $165.71 is used for a legal professional.

[870] As discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that approximately 6.4 million rollovers occur annually, of which 4.5 million are plan-to-IRA rollovers.

[871] The number of plan-to-plan and IRA-to-IRA rollovers is estimated as: 6.4 million total rollovers − 4.5 million plan-to-IRA rollovers = 1.9 million rollovers. The number of adviser intermediated rollovers by small Financial Institutions is estimated as: 1.9 million rollovers × 49 percent of rollovers adviser mediated × 26.4 percent rollovers by small Financial Institutions = 245,784 rollovers.

[872] The per-entity is estimated with a blended average of firms already and newly documenting rollovers. Newly documenting firms are assumed to have a burden of 0.5 hours, while already documenting firms have a burden of 5 minutes. A labor rate of $228.00 is used for a personal financial advisor. As discussed in the Cost section of the regulatory impact analysis, the Department estimates that 48% of firms already document rollovers, while 52% do not. The per-rollover cost is estimated as ((48% × 30 minutes) × $228.00) + ((52% × 5 minutes) × $228.00) = $64.60.

[873] The per-entity cost is estimated as: ($165.71 per hour × 35 minutes) ≈ $96.66 and ($165.71 per hour × 1.5 hours) ≈ $248.66. A labor rate of $165.71 is used for a legal professional.

[874] The per-entity cost is estimated as: ($165.71 per hour × 1 hour) ≈ $165.71 ≈ $165.71. A labor rate of $165.71 is used for a legal professional.

[875] NAIC Model Regulation Section 6.A.2.a.v. provides that ''[p]rior to the recommendation or sale of an annuity, the producer shall prominently disclose to the consumer . . . (v) A notice of the consumer's right to request additional information regarding cash compensation described in Subparagraph (b) of this paragraph.'' Section 6.A.2.b states that ''[u]pon request of the consumer or the consumer's designated representative, the producer shall disclose: (i) A reasonable estimate of the amount of cash compensation to be received by the producer, which may be stated as a range of amounts or percentages; and (ii) Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages.''

[876] Section 30.3(a)(4) of Rule 194 provides that ''an insurance producer selling an insurance contract shall disclose the following information to the purchaser: . . . (4) that the purchaser may obtain information about the compensation expected to be received by the producer based in whole or in part on the sale, and the compensation expected to be received based in whole or in part on any alternative quotes presented by the producer, by requesting such information from the producer.'' If such a request is made, Section 30.3(b) requires the producer to provide the following information: ''(1) a description of the nature, amount, and source of any compensation to be received . . . ; (2) a description of any alternative quotes presented by the producer . . . ; (3) a description of any material ownership interest the insurance producer . . . has in the insurer . . . ; (4) a description of any material ownership interest the insurer . . . has in the insurance producer . . . ; and (5) a statement whether the insurance producer is prohibited by law from altering the amount of compensation received from the insurer based in whole or in part on the sale.''

have an Applicability Date 150 days (which adds 90 days to the proposed 60 days) after publication in the **Federal Register**. Financial Institutions and Investment Professionals will have one year after the Applicability Date before they are responsible for full compliance. This transition relief is available for all sizes of Financial Institutions that will rely on the exemptions; however, the additional time to comply with the requirements will likely be particularly beneficial for smaller entities with fewer resources to ensure compliance.

P. Unfunded Mandate Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [877] (UMRA) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. That threshold is approximately $183 million in 2024.

For purposes of the Unfunded Mandates Reform Act, this rulemaking is expected to have an impact on the private sector. For the purposes of the rulemaking, the regulatory impact analysis shall meet the UMRA obligations.

Q. Federalism Statement

Executive Order 13132 outlines the fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the States, the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials throughout the process of developing the regulation.

As discussed throughout this analysis, this regulatory action would affect the insurance industry pertaining to annuities. These entities are also regulated by States, many of whom, as discussed in the discussion of the regulatory baseline, have taken regulatory or legislative actions. The Department has carefully considered the regulatory landscape in the States and worked to ensure that its regulations would not impose obligations on advisers or the insurance industry that are inconsistent with their responsibilities under State law, including the obligations imposed in States that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the State regulators. As discussed above, however, the Department has increased the protections afforded by many of these laws, consistent with its own responsibilities under ERISA, and has endeavored to lend greater uniformity on the provision of advice to Retirement Investors, so that advisers covered by the rule must all abide by a uniform fiduciary standard. The Department has had discussions with State insurance regulators and State-regulated parties about these issues including the need to ensure that Retirement Investors have sufficient protection when receiving investment advice.

The Department does not intend these final rules to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this final rule has federalism implications because it has no 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.

The Department intends to work with State insurance regulators as we move forward with implementation to ensure that this regulation complements the protections provided by the NAIC Model Regulation. The Department also intends to continue to work with State securities regulators.

Authority

This regulation is finalized pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894 (Sept. 2, 1974); 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713 (Oct. 17, 1978)), 3 CFR, 1978 Comp. 332, effective December 31, 1978 (44 FR 1065 (Jan. 3, 1979)), 3 CFR, 1978 Comp. 332, 5 U.S.C. App. 237, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee retirement income security act, Pensions, Plan assets.

For the reasons set forth in the preamble, the Department amends part 2510 of subchapter B of chapter XXV of title 29 of the Code of Federal Regulations as follows:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(1)–(8), 1002(13)–(16), 1002(20), 1002(21), 1002(34), 1002(37), 1002(38), 1002(40)–(44), 1031, and 1135; Div. O, Title I, Sec. 101, Pub. L. 116–94, 133 Stat. 2534 (Dec. 20, 2019); Div. T, Title I, Sec. 105, Pub. L. 117–328, 136 Stat. 4459 (Dec. 29, 2022); Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012); Secs. 2510.3–21, 2510.3–101 and 2510.3–102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 752 (2018) (E.O. 12108, 44 FR 1065 (Jan. 3, 1979)), and 29 U.S.C. 1135 note. Section 2510.3–38 also issued under Sec. 1(b) Pub. L. 105–72, 111 Stat. 1457 (Nov. 10, 1997).

■ 2. Revise § 2510.3–21 to read as follows:

§ 2510.3–21 Definition of ''Fiduciary.''

(a)–(b) [Reserved]

(c) *Investment advice.* (1) For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (ERISA), section 4975(e)(3)(B) of the Internal Revenue Code (Code), and this paragraph, a person renders ''investment advice'' with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property (as defined in paragraph (f)(10) of this section) to a retirement investor (as defined in paragraph (f)(11) of this section), and either paragraph (c)(1)(i) or (ii) of this section are satisfied:

(i) The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or

(ii) The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title

[877] Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48, (1995).

II of ERISA, or both, with respect to the recommendation.

(iii) A person does not provide ''investment advice'' within the meaning of this paragraph (c)(1)(iii) if they make a recommendation but neither paragraph (c)(1)(i) nor (c)(1)(ii) of this section is satisfied. For example, a salesperson's recommendation to purchase a particular investment or pursue a particular investment strategy is not investment advice if the person does not represent or acknowledge that they are acting as a fiduciary under ERISA Title I or Title II with respect to the recommendation and if the circumstances would not indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest. Similarly, the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of this rule.

(iv) Written statements by a person disclaiming status as a fiduciary under ERISA Title I or Title II, or this section, or disclaiming the conditions set forth in paragraph (c)(1)(i) of this section, will not control to the extent they are inconsistent with the person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.

(2) A person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such person from the provisions of section 405(a) of ERISA concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such person from the definition of the term ''party in interest'' (as set forth in section 3(14)(B) of ERISA) or ''disqualified person'' (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(d) *Execution of securities transactions.* (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of ERISA or section 4975(e)(3) of the Code, with respect to a plan or an IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan or IRA in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify:

(A) The security to be purchased or sold,

(B) A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), a price which is determined in accordance with Rule 22c–1 under the Investment Company Act of 1940 (17 CFR 270.22c–1),

(C) A time span during which such security may be purchased or sold (not to exceed five business days), and

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to a plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of ERISA concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition of the term ''party in interest'' (as set forth in section 3(14)(B) of ERISA) or ''disqualified person'' (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(e) *For a fee or other compensation, direct or indirect.* For purposes of section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code, a person provides investment advice ''for a fee or other compensation, direct or indirect,'' if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the investment advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid ''in connection with or as a result

of'' such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of investment advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of investment advice.

(f) *Definitions.* For purposes of this section—

(1) The term ''affiliate'' of a person means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, representative, or relative (as defined in paragraph (f)(13) of this section) of such person; and any corporation or partnership of which such person is an officer, director, or partner.

(2) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(3) The term ''IRA'' means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(4) The term ''IRA owner'' means, with respect to an IRA, either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) The term ''IRA fiduciary'' means a person described in Code section 4975(e)(3) with respect to an IRA. For purposes of this section, an IRA owner or beneficiary who is merely receiving investment advice is not an IRA fiduciary.

(6) The term ''plan'' means any employee benefit plan described in section 3(3) of ERISA and any plan described in section 4975(e)(1)(A) of the Code.

(7) The term ''plan fiduciary'' means a person described in ERISA section (3)(21)(A) and Code section 4975(e)(3) with respect to a plan. For purposes of this section, a plan participant or beneficiary who is receiving investment advice is not a ''plan fiduciary'' with respect to the plan.

(8) The term ''plan participant'' or ''participant'' means, for a plan described in section 3(3) of ERISA, a person described in section 3(7) of ERISA.

(9) The term ''beneficiary'' means, for a plan described in section 3(3) of ERISA, a person described in section 3(8) of ERISA.

(10) The phrase ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property'' means recommendations as to:

(i) The advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, investment strategy, or how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;

(ii) The management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.,* account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) Rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

(11) The term ''retirement investor'' means a plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

(12) The term ''investment property'' does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

(13) The term ''relative'' means a person described in section 3(15) of ERISA and section 4975(e)(6) of the Code or a sibling, or a spouse of a sibling.

(g) *Applicability.* Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 752 (2018), transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Accordingly, in addition to defining a ''fiduciary'' for purposes of section 3(21)(A)(ii) of ERISA, this section applies to the parallel provision in section 4975(e)(3)(B) of the Code, which defines a ''fiduciary'' of a plan defined in Code section 4975 (including an IRA) for purposes of the prohibited transaction provisions in the Code. For example, a person who satisfies paragraphs (c)(1)(i) or (ii) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of ERISA, a fiduciary of such a plan as defined in paragraph (f)(11), or a participant or beneficiary of such plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to Title I of ERISA.

(h) *Continued applicability of State law regulating insurance, banking, or securities.* Nothing in this section shall be construed to affect or modify the provisions of section 514 of Title I of ERISA, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

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Employee Benefits Security Administration

29 CFR Part 2550

Amendment to Prohibited Transaction Exemption 2020–02; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12057]

ZRIN 1210–ZA32

Amendment to Prohibited Transaction Exemption 2020–02

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Amendment to Class Exemption PTE 2020–02.

SUMMARY: This document contains a notice of amendment to class prohibited transaction exemption (PTE) 2020–02, which provides relief for investment advice fiduciaries to receive certain compensation that otherwise would be prohibited. The amendment affects participants and beneficiaries of employee benefit plans, individual retirement account (IRA) owners, and fiduciaries with respect to such plans and IRAs.

DATES: The amendment is effective September 23, 2024.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, telephone (202) 693–8540, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The Employee Retirement Income Security Act of 1974 (ERISA) provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent they render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or have any authority or responsibility to do so.[1] Title I of ERISA (referred to herein as Title I) imposes duties and restrictions on persons who are ''fiduciaries'' with respect to employee benefit plans. ERISA section 404 provides that Title I plan fiduciaries must act with the ''care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,'' and that they also must discharge their duties with respect to a plan ''solely in the interest of the participants and beneficiaries.''[2]

In addition to fiduciary obligations, ERISA has prohibited transaction rules that ''categorically bar[]'' plan fiduciaries from engaging in transactions deemed ''likely to injure the pension plan.''[3] These prohibitions broadly forbid a fiduciary from ''deal[ing] with the assets of the plan in his own interest or for his own account,'' and ''receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.''[4] Congress gave the Department of Labor (the Department) broad authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[5]

ERISA's Title II (also referred to herein as the Code), includes a parallel provision in section 4975(e)(3)(B), which defines a fiduciary of a tax-qualified plan, including individual retirement accounts (IRAs). Title II governs the conduct of fiduciaries to plans defined in Code section 4975(e)(1), which includes IRAs.[6] Some plans defined in Code section 4975(e)(1) are also covered by Title I of ERISA, but the definitions of such plans are not identical. Although Title II does not directly impose specific duties of prudence and loyalty on fiduciaries as Title I does in ERISA section 404(a), it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.[7] Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984,[8] Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975.[9]

On December 18, 2020, the Department exercised this authority and adopted PTE 2020–02, a prohibited transaction exemption for investment advice fiduciaries with respect to employee benefit plans and IRAs. This exemption ensured that those saving for retirement could have access to high quality advice by requiring fiduciary advice providers to render advice that is in their plan and IRA customers' best interest in order to receive any compensation that would otherwise be prohibited by ERISA and the Code.

On October 31, 2023, the Department released the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary (the Proposed Rule), along with proposed amendments to administrative prohibited transaction exemptions available to investment advice fiduciaries.[10] The Department designed the Proposed Rule to ensure that the protections established by Titles I and II of ERISA would uniformly apply to all investment advice that is provided to ''Retirement Investors''[11]), concerning the investment of their retirement assets, and that Retirement Investors' reasonable expectations are honored when they receive investment advice from financial professionals who hold themselves out as trusted advice providers.

At the same time the Department published the Proposed Rule, it also released the proposed amendment to PTE 2020–02 (the Proposed Amendment), proposed amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 that apply to the provision of investment advice (the Mass Amendment), and proposed amendments to PTE 84–24 and invited

[1] Section 3(21)(A)(ii) is codified at 29 U.S.C. 1002(3)(21)(A)(ii). The provision is in Title I of the ERISA (referred to herein as Title I), which is codified in Title 29 of the U.S. Code. This preamble refers to the codified provisions in Title I by reference to sections of ERISA, as amended, and not by their numbering in Section 29 of the U.S. Code.

[2] ERISA section 404(a).

[3] *Harris Trust Sav. Bank* v. *Salomon Smith Barney Inc.,* 530 U.S. 238, 241–42 (2000) (citation and quotation marks omitted).

[4] ERISA section 406(b)(1), (3), 29 U.S.C. 1106(b)(1), (3).

[5] ERISA section 408(a), 29 U.S.C. 1108(a).

[6] For purposes of the final rule, the term ''IRA'' is defined as any account or annuity described in Code section 4975(e)(1)(B)—(F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans.

[7] 26 U.S.C. 4975(c)(1); *cf. id.* at 4975(f)(5), which defines ''correction'' with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted ''under the highest fiduciary standards.''

[8] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

[9] 5 U.S.C. App. 752 (2018).

[10] The proposals were released on the Department's website on October 31, 2023. They were published in the **Federal Register** on November 3, 2023, at 88 FR 75890, 88 FR 75979, 88 FR 76004, and 88 FR 76032.

[11] As defined in Section V(l), Retirement Investor means a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

all interested persons to submit written comments on each.[12]

The Department received written comments on the Proposed Amendment, and on December 12 and 13, 2023, it held a virtual public hearing where witnesses provided commentary on the Proposed Amendment. After carefully considering the comments it received and the testimony presented at the hearing, the Department is granting the final amendment to PTE 2020–02 that is discussed herein (the Final Amendment) on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with its exemption procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[13]

Elsewhere in this edition of the **Federal Register**, the Department is finalizing (1) the Proposed Rule defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan for purposes of the definition of a ''fiduciary'' in ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (the ''Regulation''), (2) the Mass Amendment, and (3) the amendment to PTE 84–24.

Comments and Description of the Amendment to PTE 2020–02

As discussed below, the Department is broadening PTE 2020–02 to cover more transactions and revising some of the exemption's conditions to emphasize the core standards underlying the exemption. Consistent with the Proposed Amendment and PTE 2020–02 as it was originally granted in December 2020, this Final Amendment ensures that trusted advisers adhere to fundamental standards of fiduciary conduct when they receive compensation that otherwise is prohibited by ERISA and the Code as a result of recommending investment products and services to Retirement Investors.[14]

Under these core standards, Financial Institutions[15] and the ''Investment Professionals''[16] who work for them must:

- acknowledge their fiduciary status[17] in writing to the Retirement Investor;
- disclose their services and material conflicts of interest to the Retirement Investor;
- adhere to Impartial Conduct Standards requiring them to:
  - investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (the Care Obligation);
  - never place their own interests ahead of the Retirement Investor's interest, or subordinate the Retirement Investor's interests to their own (the Loyalty Obligation);
  - charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding ''best execution''; and
  - avoid making misleading statements about investment transactions and other relevant matters;
- adopt firm-level policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards;
- document and disclose the specific reasons for any rollover recommendations; and
- conduct an annual retrospective compliance review.

This Final Amendment builds on the existing conditions and:

- expands the exemption's scope to include recommendations of any investment product, regardless of whether the product is sold on a principal or agency basis;
- adds non-bank Health Savings Account (HSA) trustees and custodians to the definition of Financial Institution with respect to HSAs;
- revises the disclosure requirements in the Final Amendment to more closely track other regulators' disclosure requirements with respect to the provision of investment advice;
- limits 10-year disqualification to serious misconduct that has been determined in a court proceeding;
- provides new streamlined exemption provisions for Financial Institutions that give fiduciary advice in connection with a Request for Proposal (RFP) to provide investment management services as an ERISA section 3(38) investment manager; and
- makes certain other minor revisions to, and clarifications of, existing provisions of the exemption.

In addition, although the Department proposed to expand the recordkeeping requirement in the exemption, the Final Amendment maintains the recordkeeping provisions already in PTE 2020–02 without change.

The Final Amendment, which is described in more detail below, is part of the Department's broader package of changes to the definition of fiduciary advice and associated exemptions published elsewhere in today's **Federal Register**. The Department has worked to ensure that each separate regulatory action being finalized today, while capable of operating independently, works together within ERISA's existing framework. Together, these changes reduce the gap in protections that previously existed with respect to ERISA-covered investments and level the playing field for all investment advice fiduciaries. Still, the amended Regulation and each of the PTEs operate independently and should continue to do so if any component of the rulemaking is invalidated.

The Department notes the views of some commenters that it should have delayed making changes so that Financial Institutions, Investment Professionals, and the Department could have gained more experience with PTE 2020–02, as currently written, or that it should even have foregone making any changes at all in light of new standards of care imposed on broker-dealers by the Securities and Exchange Commission (SEC), and on insurance companies and insurance agents by State insurance regulators. In making changes to PTE 2020–02, however, the Department has paid close attention to the work of other regulators, and sought to build upon and complement, rather than disrupt, their compliance structures. For example, the Department has designed the Final Amendment in manner that should place Financial Institutions that have already built robust compliance structures in compliance with the SEC's

[12] The Proposed Amendment was released on October 31, 2023, and was published in the **Federal Register** on November 3, 2023. 88 FR 75979.

[13] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, subpart B (89 FR 4662 (January 24, 2024)).

[14] When using the term ''adviser,'' the Department does not refer only to investment advisers registered under the Investment Advisers Act of 1940 or under state law, but rather to any person rendering fiduciary investment advice under the Regulation. For example, as used herein, an adviser can be an individual who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

[15] As defined in Section V(d) and including registered investment advisers, banks or similar institutions, insurance companies, broker-dealers and non-bank trustees.

[16] As defined in Section V(g)).

[17] For purposes of this disclosure, and throughout the exemption, the term ''fiduciary status'' is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption uses some of the same terms that are used in the SEC's Regulation Best Interest and/or in the Investment Advisers Act and related interpretive materials issued by the SEC or its staff, the Department retains interpretive authority with respect to satisfaction of this exemption.

Regulation Best Interest: the Broker-Dealer Standard of Conduct (Regulation Best Interest)[18] in a strong position to comply with the closely aligned revised conditions of PTE 2020–02.

The Final Amendment also reflects the Department's ongoing review of issues of fact, law, and policy related to PTE 2020–02, and more generally, its regulation of fiduciary investment advice.[19] Moreover, the changes described herein reflect the Department's experience facilitating compliance with PTE 2020–02, consideration of the input it received from meetings with stakeholders since the exemption originally was finalized in 2020, and the comments received, and testimony provided, at the virtual hearing in response to the Proposed Amendment and the proposed regulation.

As discussed in greater detail below, the Department has concluded that, as amended, the exemption is flexible, workable, and provides a sound and uniform framework for Financial Institutions and Investment Professionals to provide high quality investment advice to Retirement Investors. The amended exemption also is broadly available to be relied on by Financial Institutions and Investment Professionals, without regard to their business model, fee structure, or type of product recommended, subject to their compliance with fundamental standards that protect Retirement Investors. To the extent that Financial Institutions and Investment Professionals honor terms of the amended exemption, Retirement Investors will benefit from the application of a common standard to all fiduciary investment advice recommendations to Retirement Investors that ensures they will receive prudent and loyal investment recommendations from Financial Institutions and Investment Professionals competing on a level playing field that is protective of Retirement Investors' interests.

[18] 17 CFR § 240.15l–1.

[19] See Emp. Benefits Sec. Admin. (EBSA), U.S. Dep't of Lab., New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions (Apr. 2021), (''2021 FAQs''), *available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf.* ''Q5. Will the Department take more actions relating to the regulation of fiduciary investment advice?: The Department is reviewing issues of fact, law, and policy related to PTE 2020–02, and more generally, its regulation of fiduciary investment advice. The Department anticipates taking further regulatory and sub-regulatory actions, as appropriate, including amending the investment advice fiduciary regulation, amending PTE 2020–02, and amending or revoking some of the other existing class exemptions available to investment advice fiduciaries. Regulatory actions will be preceded by notice and an opportunity for public comment. Additionally, although future actions are under consideration to improve the exemption, the Department believes that core components of PTE 2020–02, including the Impartial Conduct Standards and the requirement for strong policies and procedures, are fundamental investor protections which should not be delayed while the Department considers additional protections or clarifications.''

Applicability Date

The Final Amendment is applicable to transactions pursuant to investment advice provided on or after September 23, 2024 (the ''Applicability Date''). For transactions engaged in pursuant to investment advice recommendations that were provided before the Final Amendment's Applicability Date, the prior version of PTE 2020–02 will remain available for all parties that are currently relying on the exemption.[20]

Several commenters stated that the Proposed Amendment's Applicability Date (60-days after publication in the **Federal Register**) did not provide sufficient time for Financial Institutions and Investment Professionals to fully comply with the amended conditions. In response to these comments, the Department is adding a new Section VI, which provides a phase-in period for the one-year period beginning September 23, 2024. Thus, Financial Institutions and Investment Professionals may receive reasonable compensation under Section I of the amended exemption during this phase-in period if they comply with the Impartial Conduct Standards in Section II(a) and the fiduciary acknowledgment requirement under Section II(b)(1). This one-year phase-in period is the same as the one-year compliance period the Department provided when it originally granted PTE 2020–02.

The Department confirms that if a transaction occurred before the Applicability Date or pursuant to a systematic purchase program established before the Applicability Date, the restrictions of ERISA section 406(a)(1)(A), 406(a)(1)(D), and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), will not apply to: (1) the receipt, directly or indirectly, of reasonable compensation by a Financial Institution, Investment Professional, or any Affiliate and Related Entity, as such terms are defined in Section V, in connection with investment advice; or (2) the purchase or sale of an asset in a principal transaction, and the receipt of a mark-up, mark-down, or other payment, in either case as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. Also, no party would be required to comply with the amended conditions for a transaction that occurred before the Applicability Date.

[20] To the extent a party receives ongoing compensation for a recommendation that was made before the Applicability Date, including through a systematic purchase payment or trailing commission, the amended PTE 2020–02 would not apply unless and until new investment advice is provided.

Expanded Exemption Scope

The Department is expanding the scope of PTE 2020–02 in the Final Amendment to make it more broadly available, as requested by industry commenters. As amended, the exemption is available for Financial Institutions and Investment Professionals to receive reasonable compensation for recommending a broad range of investment products to Retirement Investors, including insurance and annuity products. Both the existing exemption and the Proposed Amendment provided narrower relief. Specifically, Section I(b) of the Proposed Amendment stated:

> This exemption permits Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, to engage in the following transactions, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) or (C), as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B):
>
> (1) The receipt of reasonable compensation; and
>
> (2) The purchase or sale of an asset in a riskless principal transaction or a Covered Principal Transaction, and the receipt of a mark-up, mark-down, or other payment.

Some commenters expressed concern that the scope of covered transactions in the Proposed Amendment was unduly limited. As support, some commenters pointed to the Department's proposed simultaneous repeal of other exemptions covering investment advice and expressed concern that they would need to rely on PTE 2020–02 or PTE 84–24 for any compensation for providing investment advice. One commenter noted that some investment advice fiduciaries that formerly could rely on the same exemption (*e.g.,* PTE 77–4) for both advice and for other transactions, such as asset management, would now have to rely on multiple exemptions. Another commenter suggested that PTE 2020–02 was not a good substitute for PTE 77–4 because it was more burdensome.

However, as the Department discussed in the preamble to the

proposed Mass Amendment,[21] the Department is seeking to provide a single standard of care that would apply universally to all fiduciary investment advice, regardless of the specific type of product or advice provider. This uniform regulatory structure for investment advice will provide greater protection for Retirement Investors and create a level playing field among investment advice providers by ensuring that advice transactions are subject to a common set of standards that are specifically designed to protect Retirement Investors from the inherent dangers posed by conflicts of interest and to ensure prudent advice. These common standards, which are included in both this exemption and the amended PTE 84–24, importantly include the Impartial Conduct Standards, the policies and procedures requirement, and the obligation to conduct annual retrospective reviews, each of which is further described below. In the Department's judgment, the advice transactions that were formerly covered by PTE 77–4 and the other exemptions affected by the Mass Amendment are just as deserving of these core protections as other advice transactions, and the need for protection is just as great.

Several commenters emphasized the need for a universal standard covering investment advice provided to Retirement Investors. These commenters described Retirement Investors who reasonably expect their relationship with an investment advice provider to be one in which they can—and should—place trust and confidence in the advice provider's recommendations. In light of the asymmetry of information and knowledge between a Retirement Investor and an advice provider, commenters noted that the Retirement Investor is at increased risk that the advice provider will prioritize its own compensation at the expense of the Retirement Investor's savings.

To ensure that there is a common standard that Retirement Investors can rely on for all products and for all tax-advantaged retirement accounts, the Department is broadening this exemption to make it available for recommendations of all types of products by all fiduciary investment advice providers as defined in ERISA, the Code, and the final Regulation that the Department is issuing today.

Transactions With Parties In Interest

In this Final Amendment, the Department is expanding the scope of the PTE 2020–02 to permit Financial Institutions, Investment Professionals, and their Affiliates and Related Entities, to receive reasonable compensation (including commissions, fees, mark ups, mark downs, and other payments) that would otherwise be prohibited under ERISA and the Code as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii), Code section 4975(e)(3)(B), and the final Regulation to Retirement Investors, including as part of a rollover from an employee benefit plan to an IRA. This is a change from the Proposed Amendment, and from the exemption that was finalized in 2020, which granted limited relief for ''covered principal transactions'' and ''riskless principal transactions,'' as those terms were defined in the Proposed Amendment. The Final Amendment provides exemptive relief for all transactions—regardless of whether they are executed on a principal or agent basis. This expansion in the scope of the exemption responds to many commenters' concerns that the Proposed Amendment unduly narrowed the availability of the exemption, including the concerns of those who argued that the language in Section I of the exemption did not sufficiently clarify whether recommendations involving insurance and annuity products were covered transactions.

This expansion in scope also responds to many industry commenters who expressed particular concern that the Proposed Amendment of PTE 2020–02 and the proposed Mass Amendment would leave certain principal transactions that previously were covered by a class exemption without exemptive relief. Many of these commenters urged the Department to expand the scope of covered principal transactions in PTE 2020–02, including to provide relief for closed-end funds that are traded on a principal basis upon their inception. Some commenters asserted more generally that the Department was inappropriately substituting its own judgment for that of Retirement Investors and their fiduciary investment advice providers and effectively preventing Retirement Investors from purchasing a wide range of securities that are recommended.

However, other commenters disagreed. Some commenters urged the Department to further narrow the scope of Covered Principal Transactions. For example, one commenter encouraged the Department to add the limitation ''for cash'' to the definition of Covered Principal Transaction, which would prevent in-kind transactions from being treated as covered principal transactions. This commenter asserted that such a change would reduce the complexity and the conflicts of interest that otherwise would be associated with such transactions. Other commenters generally supported the Department's Proposed Amendment with its limited coverage for principal transactions.

Although the Department is expanding the scope of the exemption, the Department continues to be concerned about the heightened conflicts of interest inherent in principal transactions. Principal transactions involve the purchase from, or sale to, a Plan or an IRA of an investment on behalf of the Financial Institution's own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution. Because an investment advice fiduciary engaging in a principal transaction is involved with both sides of the transaction, a Financial Institution or Investment Professional providing fiduciary investment advice in a principal transaction has a clear and direct conflict of interest.

In addition, the securities that are typically traded in principal transactions often lack pre-trade price transparency and can be illiquid. As a result, Retirement Investors may find it especially challenging to evaluate the reasonableness of recommended principal transactions. Because of these challenges, there is a danger that Financial Institutions and Investment Professionals will favor their own interests by selling unwanted investments from their inventory to unwitting investors, overcharge investors, or otherwise take advantage of investors and put their interests ahead of the investors' interests. Historically, the Department has provided relief for principal transactions that is limited in scope and subject to additional protective conditions because of these concerns.

After careful consideration of the comments, the Department is expanding the types of transactions that are covered by the exemption to ensure that Financial Institutions and Investment Professionals can recommend a wide variety of investment products to Retirement Investors. To the extent Financial Institutions and Investment Professionals comply with the stringent standards of care imposed by the Final Amendment and take seriously the exemption's requirements relating to policies and procedures, conflict mitigation, and retrospective review, the Department finds that the Final Amendment is both protective and flexible enough to accommodate a wide

[21] 88 FR 76032.

range of products, including relatively complex and risky investments. However, the Department cautions that, in order to comply with the exemptions' policies and procedures requirements, Financial Institutions selling products on a principal basis must carefully address how they will mitigate the inherent conflicts of interest associated with recommending these products to Retirement Investors.

More generally, Financial Institutions and Investment Professionals must take special care to protect the interests of Retirement Investors and to avoid favoring their own financial interests at the expense of Retirement Investors' interests. The greater the dangers posed by conflicts of interest, complexity, or risk, the greater the care Investment Professionals and Financial Institutions must take to ensure that their investment recommendations are prudent, loyal, and unaffected by either the Financial Institutions' or the Investment Professionals' conflicts of interest.

Financial Institutions and Investment Professionals

The amended exemption is broadly available for Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, including (but not limited to) independent marketing organizations (IMOs), field marketing organization (FMOs), brokerage general agencies (BGAs) and others providing administrative support.

In this Final Amendment, the Department has made some ministerial changes to the existing definitions of Investment Professionals, Affiliates and Related Entities for clarity. In particular, the Department has clarified that the definition of ''Related Entity'' includes two components: (i) a party that has an interest in an Investment Professional or Financial Institution; and (ii) a party in which an Investment Professional or Financial Institution has an interest, in either case when that interest may affect the fiduciary's best judgment as a fiduciary. The Department has also made ministerial changes, such as changing ''described'' to ''defined'' in referencing ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). Some commenters also suggested other changes in nomenclature, but the Department has concluded that the terms, as defined in the Final Amendment, are appropriately clear and consistent.

The Final Amendment also broadens the definition of the term Financial Institution to include non-bank trustees or custodians that are approved to serve in these capacities under Treasury Regulation 26 CFR 1.408–2(e) (as amended), but only to the extent they are serving as non-bank trustees or custodians with respect to HSAs. Several commenters requested the Department to expand the definition of Financial Institution under the exemption to include these non-bank trustees or custodians. As explained by some commenters, IRS-approved non-bank trustees and custodians are permitted to administer HSAs and are subject to numerous requirements under regulations and guidance issued by the Department of the Treasury.[22] Some commenters stated that these non-bank trustees service a meaningful portion of the HSA market, and argued that without eligibility to use PTE 2020–02, they may be forced to exit the market. According to these commenters, with reduced competition and fewer choices, costs to HSA plan sponsors and participants could increase. One commenter further stated that the failure to include IRS-approved non-bank HSA trustees and custodians in the definition would be inconsistent with the intent of Congress to regulate such entities similarly to other Financial Institutions under ERISA and the Code.

After consideration of these comments, which were limited to concerns regarding HSAs, the Department is expanding the definition of Financial Institution in the Final Amendment to include non-bank trustees and non-bank custodians that are approved under Treasury Regulation 26 CFR 1.408–2(e) (as amended), but only to the extent they are serving in these capacities with respect to HSAs. The Department agrees with commenters that the initial and continuing requirements to remain certified by the Department of the Treasury as a non-bank trustee or custodian provide sufficient regulatory oversight of these entities to include them within the scope of this exemption as applied to HSAs. As amended, these non-bank trustees and custodians will be permitted to serve as Financial Institutions under Section V(d)(5). To implement this change, the Department is redesignating former Section V(e)(5) to (d)(6), which covers other entities that may become Financial Institutions under future individual exemptions.

Retirement Investors

The Department is revising the definition of Retirement Investor in Section V(l) to be consistent with the definition in the final Regulation defining fiduciary investment advice. As revised, both the final Regulation and this Final Amendment define Retirement Investor to mean a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA. The preamble to the final Regulation includes additional discussion of the term ''Retirement Investor,'' which the Department is defining similarly in the Final Amendment to ensure its broad availability to investment advice fiduciaries.

These revisions should alleviate some commenters' concerns that advice providers may provide advisory tools and assistance to fiduciaries who, in turn, render investment advice to Retirement Investors. As revised, neither the final Regulation nor this Final Amendment treats investment advice fiduciaries under section 3(21)(A)(ii) of ERISA or Code section 4975(e)(3)(B) as Retirement Investors.

Exclusions

The Department is also finalizing its amendment to Section I(c) of the exemption, which limits the availability of PTE 2020–02 in certain circumstances. Specifically, section I(c)(1) excludes from the exemption relief provided to Title I Plans if the Investment Professional, Financial Institution, or any Affiliate providing the investment advice is: (A) the employer whose employees are covered by the Plan; or (B) the Plan's named fiduciary or administrator. However, a named fiduciary or administrator or their Affiliate (including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3–44) may rely on the exemption if it is selected to provide investment advice by a fiduciary who is

[22] According to the commenter, in order for a non-bank trustee or custodian to receive this certification, the entity must submit a written application to the Commissioner of the IRS demonstrating, generally, its ability to act within the accepted rules of fiduciary conduct, its capacity to account for large numbers of accountholders, its fitness to handle funds normally associated with the handling of retirement funds, sufficient net worth, and that its procedures adhere to established rules of fiduciary conduct (including that all employees taking part in the performance of the entity's fiduciary duties are required to be bonded in an amount of at least $250,000). The entity is also required to undergo an annual audit of its books and records by a qualified public accountant to determine, among other things, whether the HSA accounts have been administered in accordance with applicable law. *See* Treasury Regulation 26 CFR 1.408–2(e) (as amended).

Independent[23] of the Financial Institution, Investment Professional, and their Affiliates. The Department received several comments opposed to this exclusion, arguing that Financial Institutions should be able to charge fees for advice to their own employees under the conditions of the exemption. The Department, however, is not modifying this provision, because its position continues to be that employers generally should not use their employees' retirement benefits as a potential source of revenue or profit, without additional safeguards. Employers can always render advice and receive reimbursement for their direct expenses incurred in transactions involving their employees without the need for the exemptive relief provided in this exemption.[24]

The Department also has determined that it is inappropriate for PTE 2020–02 to be used by a Financial Institution or Investment Professional (or an affiliate thereof) that is the named fiduciary or plan administrator of a Title I Plan to receive additional compensation for providing investment advice to Retirement Investors who are participants in the Financial Institution's own Plan unless the Financial Institution or Investment Professional is selected to serve as an investment advice provider by a fiduciary that is Independent of them. Named fiduciaries and plan administrators have significant authority over plan operations and accordingly, it is imperative for the Financial Institution or Investment Professional to be selected by an Independent fiduciary who will monitor and hold them accountable for their performance as a provider of investment advice services to Retirement Investors covered by the Financial Institution's own Plan.

Pooled Employer Plans and Pooled Plan Providers

The Proposed Amendment would have been available for advice to Pooled Employer Plans (PEPs). Amended Section I(c) of the exemption would have permitted Pooled Plan Providers (PPPs), as defined in Section V(j), and their Affiliates to rely upon the exemption to provide investment advice if they are Financial Institutions within the meaning of the exemption, notwithstanding their status as named fiduciaries or plan administrators. The preamble to the Proposed Amendment stated that a PPP can provide investment advice to a PEP within the framework of the exemption and would allow PEPs to receive investment advice in the same manner as other ERISA plans.[25] While the Proposed Amendment would have created a separate category for PPPs, the Final Amendment clarifies that PPPs can rely on PTE 2020–02 when the PPP is selected by an Independent fiduciary. The change ensures that PPPs are treated in the same manner as any other Financial Institution.[26]

Commenters were generally supportive of the proposed approach, but some expressed concern about fiduciary and prohibited transaction issues related to a PPP's decision to hire affiliated parties or employer decisions to participate in a PEP. These issues are outside the scope of this exemption, because they are dependent on the particular facts and circumstances of a specific case. Accordingly, such issues would be better addressed outside the context of the relief provide in this Final Amendment, which is focused on the receipt of reasonable compensation as a result of providing investment advice.

Robo-Advice

PTE 2020–02 initially excluded investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on investor-supplied personal information without any personal interaction with or advice from an Investment Professional (robo-advice). The Proposed Amendment included robo-advice within the scope of PTE 2020–02. While a few commenters expressed concern that the Department was favoring robo-advice, most commenters supported the Department's proposed inclusion. The commenters asserted that the inclusion would simplify compliance for Financial Institutions and Investment Professionals and expand access to investment advice at a lower cost for Retirement Investors. One commenter argued that by allowing some robo-advice, the Department was making the exemption available for certain instances of discretionary investment management, as long as it was not provided by a human. However, the Department confirms that the exclusion in Section I(c)(2) limits the exemption to fiduciary investment advice.

After considering these comments, the Department is finalizing this amendment as proposed to expand the scope of the exemption by removing Section I(c)(2), which excluded robo-advice from the exemption. As discussed in the preamble to the Proposed Amendment, the Department understands that Financial Institutions may use a combination of computer models and individual Investment Professionals to provide investment advice and implement a single set of policies and procedures that governs all investment recommendations. Like any other investment advice arrangement, Financial Institutions relying on computer models must satisfy the exemption's Impartial Conduct Standards and other protective conditions in order to receive exemptive relief. As stated above, the amended exemption is sufficiently protective and flexible to accommodate a wide range of investment advice arrangements, including robo-advice.

Therefore, after reviewing the comments, the Department has not been presented with any evidence that would lead it to conclude that robo-advice arrangements cannot comply with the same conditions that are applicable to other investment advice arrangements. Additionally, the failure to include such arrangements in the amended exemption could reduce access to an important and cost-effective means of delivering investment advice to many participants and beneficiaries. The Department does not agree with the suggestion of a few commenters that the inclusion of robo-advice in the exemption would give such arrangements an unfair competitive advantage, inasmuch as they are subject to the same conditions as other advisory arrangements under the terms of the exemption.

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[23] As defined in Section V(e), For purposes of subsection I(c)(1), a fiduciary is ''Independent'' of the Financial Institution and Investment Professional if:

(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;

(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by this exemption; and

(3) the fiduciary does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for its own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year.

[24] A few existing prohibited transaction exemptions apply to employers. *See, e.g.,* ERISA section 408(b)(5) (statutory exemption that provides relief for the purchase of life insurance, health insurance, or annuities, from an employer with respect to a Plan or a wholly owned subsidiary of the employer).

[25] 88 FR at 75982.

[26] Under ERISA section 3(43)(B)(iii) employers retain fiduciary responsibility for the selection and monitoring of the PPP and any other named fiduciary of the plan, and an employer would be able to make this independent selection.

Investment Discretion

The Proposed Amendment would have redesignated Section I(c)(3) of PTE 2020–02 as Section I(c)(2) to exclude from the exemption investment advice that is provided to a Retirement Investor by a Financial Institution or Investment Professional when such Financial Institution or Investment Professional is serving in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder). The Department is finalizing this provision as proposed. As discussed in the preamble to the Proposed Amendment, the Department does not intend to change the substance of this exclusion and is clarifying that Financial Institutions and Investment Professionals cannot rely on the exemption when they act in a fiduciary capacity other than as an investment advice fiduciary. The Department notes that other exemptions exist for other types of transactions, such as discretionary asset management.

Impartial Conduct Standards

Care Obligation and Loyalty Obligation

The Department is retaining the substance of the exemption's requirement for Financial Institutions and Investment Professionals to act in the Retirement Investor's ''Best Interest'' and finalizing proposed clarifications. However, the Department is replacing the term ''Best Interest'' in the Final Amendment with its two separate components: the Care Obligation and the Loyalty Obligation. The Final Amendment specifically refers to each obligation separately, although they are unchanged in substance from the previous version of PTE 2020–02 and the Proposed Amendment. Both the Care Obligation and the Loyalty Obligation must be satisfied when investment advice is provided. As defined in amended Section V(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in amended Section V(h), to meet the Loyalty Obligation, the Financial Institution and Investment Professional must not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to those of the Investment Professional, Financial Institution or any Affiliate, Related Entity.

The Department is changing its nomenclature for these two obligations in response to comments that the phrase ''best interest'' was used in many contexts throughout this rulemaking and by various regulators with possibly different shades of meaning. For example, in paragraph (c)(1)(i) of the final Regulation, fiduciary status is based, in part, on whether a recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation ''may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.'' In the context of the final Regulation, however, ''best interest'' is not meant to refer to the specific requirements of the ''Best Interest'' standard used in PTE 2020–02, which incorporated ERISA's standards of prudence and loyalty, but rather to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests. As discussed in the preamble to the proposed Amendment, the Department is also adding an example from the prior PTE 2020–02 preamble to the operative text of Section II(a)(1) specifying that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line.

Similarly, in recommending whether a Retirement Investor should pursue a particular investment strategy through a brokerage or advisory account, the Investment Professional must base the recommendation on the Retirement Investor's financial interests, rather than any competing financial interests of the Investment Professional. For example, in order for an Investment Professional to recommend that a Retirement Investor enter into an arrangement requiring the Retirement Investor to pay an ongoing advisory fee to the Investment Professional, the Professional must prudently conclude that the Retirement Investor's interests would be better served by this arrangement than the payment of a one-time commission to buy and hold a long-term investment. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the Investment Professional's competing financial interests.

It bears emphasis, that this standard should not be read as somehow foreclosing the Investment Professional and Financial Institution from being paid on a transactional basis or ongoing basis, nor does it foreclose investment advice on proprietary products or investments that generate third-party payments,[27] or advice based on investment menus that are limited to such products, in part or whole. Financial Institutions and Investment Professionals are entitled to receive reasonable compensation that is fairly disclosed for their work. As further described below, Financial Institutions that offer a restricted menu of proprietary products or products that generate third-party payments must ensure their policies and procedures satisfy the conditions of Section II(c).

The Department received many comments on the Impartial Conduct Standards. Several commenters supported the principles-based approach, which they asserted provide fundamental investor protections that are necessary to ensure the advice is in the interest of the Retirement Investors. Some commenters noted how many investment advice professionals already hold themselves to similar professional standards of conduct. One commenter, in particular, stated that these high standards have not resulted in less access to advice.

Other commenters objected to the Impartial Conduct Standards. Some commenters argued that the Department does not have authority to include these conditions in a prohibited transaction exemption. According to these commenters, because the Care Obligation and Loyalty Obligation are based on ERISA's prudence and loyalty requirements in Title I, the Department cannot require these standards to apply

[27] The Department considers ''third-party payments'' to include such payments as sales charges when not paid directly to the Financial Institution, Investment Professional, or an Affiliate or Related Entity by a Retirement Investor; gross dealer concessions; revenue sharing payments; 12b–1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration, or financial benefit provided to the Financial Institution, Investment Professional or an Affiliate or Related Entity by a third party as a result of a transaction covered by this exemption involving a Retirement Investor.

when advice is provided to an IRA or other Title II Plan. Some commenters suggested the Department instead rely on the standards finalized by the SEC or the National Association of Insurance Commissioners (NAIC). One commenter stated that the Department is deliberately extending ERISA Title I statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans, although Title II has no such requirements.

The Department disagrees with these commenters. ERISA section 408(a) and Code section 4975(c)(2) expressly permit the Department (through the Reorganization Plan No. 4 of 1978) to grant ''a conditional or unconditional exemption'' as long as the exemption is ''(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan.''[28] Nothing in these provisions forbids the Department from drawing on the same common law standards of prudence and loyalty that have been used in analogous contexts for hundreds of years, requires the Department to limit conditions to novel provisions that Congress did not include anywhere else in ERISA's text, or expresses a preference for including standards taken from other State or Federal regulatory structures while disregarding those set forth in ERISA. These standards are an essential part of ensuring the advice is in the interest of and protective of Retirement Investors and are also administratively feasible and have been central to PTE 2020–02 since it was originally granted. In finalizing the Impartial Conduct Standards in 2020, the Department explained that this condition ''merely recognizes that fiduciaries of IRAs, if they seek to use this exemption for relief from prohibited transactions, should adhere to a best interest standard consistent with their fiduciary status and a special relationship of trust and confidence.''[29] Additionally, while Title I imposes a duty of care and a duty of loyalty on fiduciaries in all situations, the concept of care and loyalty are not unique to Title I or even to ERISA but are rather foundational principles of trust and agency law. The SEC imposes duties of care and loyalty on investment advisers and broker-dealers. The 2020 NAIC Suitability In Annuity Transactions Model Regulation 275 (the ''NAIC Model Regulation'') also relies on underlying principles of care and loyalty. These core requirements are not singularly reserved for Title I of ERISA and the Department disagrees that it is inappropriate to apply these requirements to investment advice fiduciaries to Title II plans who want to engage in otherwise statutorily prohibited transactions.

The Department received several comments on how this standard applies to insurance sales. A few commenters argued that the proposed revisions to PTE 2020–02 should take a different approach to recognize the unique aspects of its application to the insurance industry. Commenters pointed out differences between the NAIC Model Regulation standard and the exemption's Impartial Conduct Standards. One commenter accused the Department of ''entrapping insurance agents'' by holding them to the fiduciary standard based on their actions. However, a different commenter specifically supported the Department's proposal, stating that NAIC Model Regulation does not require producers to act in the ''best interest of their customers,'' and called out the need for a clear uniform standard.

A few commenters specifically raised questions about the continued applicability of Question 18 from the 2021 FAQs.[30] Question 18 asked, ''[h]ow can insurance industry financial institutions comply with the exemption?'' In response, the Department confirmed that PTE 2020–02 is available for insurance products, particularly for independent producers that work with multiple insurance companies. The Department confirms that the Department's reasoning in the response to FAQ 18 remains true for PTE 2020–02 as amended by the Final Amendment.

The Department is aware that insurance companies often sell insurance products and fixed (including indexed) annuities through different distribution channels. While some insurance agents are employees of an insurance company, other insurance agents are independent, and work with multiple insurance companies. PTE 2020–02 applies to all of these business models. In addition to PTE 2020–02, the Department is also simultaneously publishing amendments to PTE 84–24 elsewhere in this edition of the **Federal Register** which provide a pathway to compliance for insurance companies that market their products through independent insurance agents, without requiring the companies to assume or acknowledge fiduciary status.

However, insurance companies and agents may also rely upon PTE 2020–02 to the same extent as other Financial Institutions and Investment Professionals to receive relief for the receipt of otherwise prohibited compensation as a result of investment recommendations, including commissions. To the extent an insurance company that markets its products through independent agents chooses to rely on PTE 2020–02, the independent insurance agent and the financial institution (*i.e.,* the insurance company) must satisfy the exemption's conditions, including the fiduciary acknowledgement and the Impartial Conduct Standards with respect to that recommendation. In such cases, the insurance company must adopt policies and procedures to ensure it complies with the Impartial Conduct Standards and avoid incentives that place the insurance company's or the independent agent's interests ahead of the Retirement Investor's interest.

While independent producers may recommend products issued by a variety of insurance companies, PTE 2020–02 does not require insurance companies to exercise supervisory responsibility with respect to independent producers' sales of the products of unrelated and unaffiliated insurance companies for which the insurance company does not receive any compensation or have any financial interest.[31] When an insurance company is the supervisory financial institution for purposes of the exemption with respect to such an independent producer, its obligation is simply to ensure that the insurer, its affiliates, and related entities meet the exemption's terms with respect to the insurance company's annuity which is the subject of the transaction.

Under the exemption, the insurance company must:

• adopt and implement prudent supervisory and review mechanisms to safeguard the agent's compliance with the Impartial Conduct Standards when recommending the insurance company's products;

• avoid improper incentives to preferentially recommend the products, riders, and annuity features that are most lucrative for the insurance company at the customer's expense;

• ensure that the agent receives no more than reasonable compensation for its services in connection with the

[28] ERISA section 408(a), Code section 4975(c)(2).

[29] 85 FR 82822

[30] See *supra* at note 19.

[31] As defined in PTE 84–24, an Independent Producer is ''a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies, and (1) is not an employee of an insurance company (including a statutory employee as defined under Code section 3121(d)(e)); or (2) is a statutory employee of an insurance company which has no financial interest int the covered transaction.''

transaction (*e.g.,* by monitoring market prices and benchmarks for the insurance company's products, services, and agent compensation); and

- adhere to the disclosure and other conditions set forth in the exemption.

Under the exemption, the obligation of the insurance company with respect to independent producers is to oversee the recommendation and sale of its products by the independent producer, not the recommendations and sales by the independent producer involving another insurance company's products. Insurance companies could also comply with the exemption by creating oversight and compliance systems through contracts with insurance intermediaries such as IMOs, FMOs or BGAs. As one possible approach, an insurance intermediary could eliminate compensation incentives across all the insurance companies that work with the insurance intermediary, assisting each of the insurance companies with their independent obligations under the exemption. This might involve the insurance intermediary's review of documentation prepared by insurance agents to comply with the exemption, as may be required by the insurance company, or the use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for their retirement investor customers.

Finally, commenters raised an issue relating to administrative feasibility of PTE 2020–02 and its core conditions, arguing that it is too early to determine whether PTE 2020–02, as currently constituted, is administrable under ERISA section 408(a) and Code section 4975(c)(2), and that the Department has not provided evidence to evaluate whether it is administrable. Other commenters questioned the administrative feasibility of both PTE 84–24 and PTE 2020–02 more generally and took issue with the added or expanded conditions of both exemptions.

The Department notes, however, that the core conditions of both PTE 2020–02 and PTE 84–24, including all the Impartial Conduct Standards, reflect core fiduciary obligations that have been present in ERISA since its passage nearly fifty years ago, and that the duties of care and loyalty are rooted in trust law obligations that long predate ERISA. The Department and the financial services industry have decades of experience with the administration of these requirements and the Department is confident that Financial Institutions, Insurers and investment professionals can adopt supervisory structures and make investment recommendations that meet basic standards of prudence and loyalty, and that do not involve overcharging or misleading Retirement Investors.

Moreover, the changes to the exemptions accompany the Regulation, which makes significant changes to the prior rule on fiduciary investment advice, and those changes also reflect decades of experience with the prior rule and its shortcomings in the modern advice marketplace, as discussed in the preamble to the Regulation. In making revisions to PTE 2020–02, the Department has been careful to ensure that parties who are currently relying upon the exemption will be able to continue to do so, without undue additional burden or needless change, and many of the changes simply expand the scope of relief available. In addition, PTE 2020–02 and PTE 84–24 give firms considerable flexibility in adopting oversight structures to manage conflicts of interest and promote compliance. The Final Rule and the exemptions cover many transactions that would not have been treated as fiduciary advice prior to this rulemaking. Taken together, they fill gaps in the regulatory structure that were not effectively addressed by the 1975 rule or PTE 2020–02.

Based on its long experience with the advice rule, the existing exemption structure, and the core Impartial Conduct Standards, the Department has concluded that the proposed changes are necessary, administrable and consistent with the protective standards of ERISA section 408 and Code section 4975(c)(2). The Department also notes that similar regulatory efforts have been initiated and successfully administered by other State and Federal regulators. These regulatory efforts and structures include New York's Rule 187,[32] the NAIC Model Regulation, the SEC's Regulation Best Interest, and the regulation of advisers under the Investment Advisers Act.

Reasonable Compensation

The Department is retaining in the Final Amendment the reasonable compensation and best execution standards from PTE 2020–02 as proposed. Section II(a)(2)(A) provides that the compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their fiduciary investment advice services provided to the Retirement Investor must not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2). In addition, Section II(a)(2)(B) provides that the Financial Institution and Investment Professional must seek to obtain the best execution of the recommended investment transaction that is reasonably available under the circumstances as required by the Federal securities laws.

The Department received some comments objecting to the reasonable compensation standard. Some commenters stated that this standard is not specific enough and could chill an Investment Professional's willingness to recommend certain products that carry high commissions. Other commenters argued that this practice would ultimately limit the range of products available to Retirement Investors.

The Department is finalizing the reasonable compensation standard as proposed. The obligation to pay no more than reasonable compensation to service providers has been part of ERISA since its passage.[33] For example, the ERISA section 408(b)(2) and Code section 4975(d)(2) statutory exemptions expressly require that all types of services arrangements involving Plans and IRAs result in the service provider receiving no more than reasonable compensation. When acting as service providers to Plans or IRAs, Investment Professionals and Financial Institutions have long been subject to this requirement, regardless of their fiduciary status.

The reasonable compensation standard requires that compensation received by Financial Institutions and Investment Professionals not be excessive, as measured by the market value of the particular services, rights, and benefits the Investment Professional and Financial Institution are delivering to the Retirement Investor. Given the conflicts of interest associated with the commissions and other payments that are covered by the exemption and the potential for self-dealing, it is particularly important for the Department to require Investment Professionals' and Financial Institutions' adherence to these statutory standards, which are rooted in common-law principles.

The reasonable compensation standard applies to all covered transactions under the exemption,

[32] Suitability and Best Interest in Life Insurance and Annuity Transactions, 11 NYCRR 224.

[33] The default rule under common law likewise requires that a trustee's compensation be reasonable. *E.g., Nat'l Assoc. for Fixed Annuities* v. *Perez,* 217 F. Supp. 3d 1, 43–44 (D.D.C. 2016) (''[C]ommon law includes requirements of 'reasonable compensation' for trustees . . . .'' (citations omitted)); Restatement (Third) of Trusts § 38(1) (2003) (''A trustee is entitled to reasonable compensation out of the trust estate for services as trustee . . . .'').

including those involving investment products that bundle services and investment guarantees or other benefits, such as annuity products. In assessing the reasonableness of compensation in connection with covered transactions involving these products, it is appropriate to consider the value of the guarantees and benefits as well as the value of the services. When assessing the reasonableness of compensation, Financial Institutions and Investment Professionals generally must consider the value of all the services and benefits provided to Retirement Investors for the compensation, not just some of the services and benefits. If Financial Institutions and Investment Professionals need additional guidance in this respect, they should refer to the Department's regulatory interpretations under ERISA section 408(b)(2) and Code section 4975(d)(2).[34]

No Materially Misleading Statements

The Department is also retaining the requirement in Section II(a)(3) of PTE 2020–02 that prohibits Financial Institutions and Investment Professionals from making materially misleading statements to Retirement Investors. The Department is also clarifying that the prohibition against misleading statements applies to both written and oral statements. In particular, the Department is also clarifying that this condition is not satisfied if a Financial Institution or Investment Professional omits information that is needed to make the statement not misleading in light of the circumstances under which it was made.

The Department received a comment expressing concern that this condition is too vague. The Department disagrees. As the Department explained when it granted PTE 2020–02, ''materially misleading statements are properly interpreted to include statements that omit a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading. Retirement Investors are clearly best served by statements and representations that are free from material misstatements and omissions.'' [35] The Final Amendment merely adds clarity by incorporating this understanding into the exemption's operative text. Numerous courts have similarly recognized that statements can be misleading by virtue of material omissions, as well as by affirmative misstatements.[36] This is not a unique or new concept for Financial Institutions. For example, in adopting Regulation Best Interest, the SEC reminded broker-dealers of their obligations under the anti-fraud provisions of Federal Securities laws for failure to disclose material information to their customers when they have a duty to make such disclosure.[37] Financial Institutions and Investment Professionals best promote the interests of Retirement Investors by ensuring that their communications with their customers are not materially misleading.

Accordingly, the Department is finalizing the provisions in the exemption related to materially misleading statements as proposed, with minor ministerial changes to the wording, such as moving the phrases ''to the Retirement Investor'' and ''materially misleading'' for clarity.

Disclosure

The Department is generally finalizing the disclosure conditions with some modifications to the Proposed Amendment, as discussed below. While many commenters raised concerns about the burden that would be imposed on Financial Institutions if the Department required additional disclosure, others expressed support for the Department to impose additional disclosure obligations. It is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations if they are to make fully informed decisions. Additionally, clear and accurate disclosures can deter Financial Institutions and Investment Professionals from engaging in otherwise abusive practices that they would prefer not to expose.

One commenter suggested revising the disclosure condition to provide that it is sufficient for the Retirement Investor to have received the disclosure, without necessarily placing the responsibility squarely on the Financial Institution and Investment Professional to make the required disclosures. The Department declines to change the exemption from the proposal in this manner. The Department notes that, while Financial Institutions can coordinate the transmittal of required disclosures with others and rely upon vendors and others to ensure transmittal, ultimately the responsibility to make required disclosures, including the fiduciary acknowledgement, rests with the Financial Institution and Investment Professionals as set out in the exemption. In the Department's view, the proper exercise of this responsibility is critical to ensuring that Retirement Investors receive important, accurate, and timely information, and to ensuring that Financial Institutions and Investment Professionals manage their fiduciary obligations with the seriousness they deserve.

In the preamble to the Proposed Amendment, the Department requested comments regarding whether Financial Institutions should be required to provide additional disclosures on third-party compensation to Retirement Investors on a publicly available website. One potential benefit of such disclosure would be to provide information about conflicts of interest that could be used, not only by Retirement Investors, but by consultants and intermediaries who could, in turn, use the information to rate and evaluate various advice providers in ways that would assist Retirement Investors. Industry commenters generally opposed the condition, stating that it would impose significant costs to continuously maintain such a website without a commensurate benefit to the Retirement Investors.

Based on these comments, the Department has determined not to include a website disclosure requirement as an exemption condition at this time. While the Department may reconsider this decision at some future date based on its experience with the Regulation and related exemptions, any such future amendments would be subject to public notice and comment through a formal rulemaking process. Consistent with the Recordkeeping conditions in Section IV, the Department intends, however, to

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[34] *See* 29 CFR 2550.408b–2.

[35] 85 FR 82826.

[36] *E.g., Vest* v. *Resolute FP US Inc.,* 905 F.3d 985, 990 (6th Cir. 2018) (''[A] material omission qualifies as misleading information.''); *Kalda* v. *Sioux Valley Physician Partners, Inc.,* 481 F.3d 639, 644 (8th Cir. 2007) (''Additionally, a fiduciary has a duty to inform when it knows that silence may be harmful and cannot remain silent if it knows or should know that the beneficiary is laboring under a material misunderstanding of plan benefits.'' (internal citations omitted)); *Krohn* v. *Huron Mem'l Hosp.,* 173 F.3d 542, 547 (6th Cir. 1999) (''[A] fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements *or omissions* were made negligently or intentionally.'') (emphasis added); *see Mathews* v. *Chevron Corp.,* 362 F.3d 1172, 1183 (9th Cir. 2004).

[37] 84 FR 33348, note 303. The Department observes that this requirement is also consistent with, for example, the requirement under section 206 of the Advisers Act, which bars an investment adviser from making materially false or misleading statements *or omissions* to any client or prospective client. *See In the Matter of S Squared Tech. Corp.,* Release No. 1575 (SEC. Release No. Aug. 7, 1996). The SEC's Rule 10b-5 under the Exchange Act imposes a similar requirement. 17 CFR 240.10b-5(b). *See also SEC* v. *Cap. Gains Rsch. Bureau, Inc.,* 375 U.S. 180, 200 (1963) (''Failure to disclose material facts must be deemed fraud or deceit within its intended meaning'').

regularly request that Financial Institutions provide their investor disclosures to the Department to ensure that they are providing sufficient information in a manner that the Retirement Investor can understand, and that the disclosures are serving their intended purpose.

Fiduciary Acknowledgment

The Department is retaining the requirement in PTE 2020–02 for Financial Institutions to provide a written acknowledgment of fiduciary status to the Retirement Investor. At or before the time a covered transaction (as defined in Section I(b) of the Final Amendment) occurs, the Financial Institution must provide a written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I of ERISA, Title II of ERISA, or both with respect to the investment recommendation. Section II(b)(2) also requires the Financial Institution to provide a written statement of the Care Obligation and Loyalty Obligation owed by the Investment Professional and Financial Institution to the Retirement Investor. This disclosure must also be provided at or before the Financial Institution engages in the transaction.

The Department received many comments on this requirement. Some commenters supported clarifications that the acknowledgement must make clear that the recommendation is rendered in a fiduciary capacity, though some argued that the acknowledgment should be limited to specific transactions. For example, one commenter urged the Department to provide that the fiduciary acknowledgment must be an ''unconditional'' acknowledgment of fiduciary status in order to effectively address artful drafting by a Financial Institution that is intended to evade actual fiduciary status. Another commenter provided examples of disclosures that Financial Institutions have in place that are misleading to Retirement Investors. Many of these misleading disclosures state that the Financial Institution has fiduciary status, but then note there are exceptions or limitations to when the Financial Institution is acting as a fiduciary, without clearly taking a position on the Financial Institution's fiduciary status with respect to the particular recommendation. At best, this drafting may leave the Retirement Investor with many questions about when they are receiving fiduciary advice. At worst, it may leave the Retirement Investor with the mistaken impression that all recommendations it receives are provided in a fiduciary capacity when only some recommendations are subject to the protective conditions of this exemption. The Department agrees with these concerns, which provide further evidence of the need for the Final Amendment to include an unambiguous written acknowledgement requirement. Similarly, the requirement for a written statement of the Care Obligation and Loyalty Obligation is necessary to provide Retirement Investors with a clear statement of the duties Financial Institutions owe them.

Several commenters pointed to the history of Financial Institutions including fine print disclaimers of their fiduciary status. Disclosures have been used to undermine investors' reasonable expectations and the purpose of the fiduciary acknowledgment in Section II(b)(1) is to match the facts to the reasonable expectations of the Retirement Investor. Under the Final Amendment, Financial Institutions cannot acknowledge fiduciary status with respect to a recommendation, only to disclaim it in the fine print. The Final Amendment requires the Financial Institutions and Investment Professionals to acknowledge their fiduciary status with respect to *the* investment recommendation. This change prevents Financial Institutions from making the fiduciary acknowledgment and then including exclusions in fine print.

The Department believes that the requirement, as finalized, makes it unambiguously clear that the recommendation must be acknowledged as made in a fiduciary capacity under ERISA or the Code. It would not be sufficient, for example, to have an acknowledgement provide that ''Firm A acknowledges fiduciary status under ERISA with respect to the recommendation to the extent the recommendation is treated by ERISA or Department of Labor regulations as fiduciary'' because that statement does not explain when a recommendation would be treated as falling under the fiduciary requirements of ERISA and the Code. In contrast, the Department's model language below says, ''We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts.''

A few commenters noted that neither Regulation Best Interest nor the NAIC Model Regulation requires a fiduciary acknowledgment. The Department recognizes that this is a difference between the requirements of this exemption and other sources of law. The point of the acknowledgment under PTE 2020–02 is to ensure that both the fiduciary and the Retirement Investor are clear that the particular recommendation is in fact made in a fiduciary capacity under ERISA or the Code, as defined under the regulation. The Retirement Investor should have no doubt as to the nature of the relationship or the associated compliance obligations. Anything short of that clear acknowledgment fails the exemption condition. It is not enough to alert the Retirement Investor to the fact that there may or may not be fiduciary obligations in connection with a particular recommendation, without stating that, in fact, the recommendation is made in the requisite fiduciary capacity.

Some commenters expressed concern with the timing of the acknowledgment. These commenters stated that Financial Institutions and Investment Professionals might have to acknowledge fiduciary status before they actually receive compensation and know that they are fiduciaries. Some commenters asked whether this acknowledgment might itself be a misleading statement that would be impermissible under Section II(a)(3) of the exemption. To address this concern, the Department has revised the language in Section II(b)(1) of the Final Amendment to further clarify that the disclosure must be provided ''[a]t or before the time a covered transaction occurs, as defined in Section I(b).'' In response to a specific comment, the Department is further clarifying that, ''[f]or purposes of the disclosures required by Section II(b)(1)-(4), the Financial Institution or Investment Professional is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Financial Institution or Investment Professional becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.'' This is revised from the Proposed Amendment, which would have required the disclosure to acknowledge fiduciary status ''when making an investment recommendation.''

The Department is making these clarifications to confirm that the Financial Institution does not have to provide a fiduciary acknowledgment at its first meeting with the Retirement

Investor. Instead, the fiduciary acknowledgment must be made at or before the time the covered transaction occurs.

One commenter opined that the fiduciary acknowledgement condition constitutes ''compelled'' and ''viewpoint-based'' speech in violation of the First Amendment and warrants application of a 'strict scrutiny' standard of review. As discussed in greater detail in the Regulation, neither the Regulation nor the Final Amendment prohibits speech based on content or viewpoint in any capacity. Instead, the Department simply imposes fiduciary duties on covered parties, and insists on adherence to Impartial Conduct Standards.

The Department also received many comments regarding whether the proposed fiduciary acknowledgment and statement of Best Interest standard amounted to an enforceable contract with the Retirement Investor to adhere to the requirements of PTE 2020–02. As several commenters noted, however, PTE 2020–02 does not impose any contract or warranty requirements on Financial Institutions or Investment Professionals. Instead, it simply requires up-front clarity about the nature of the relationship and services being provided. In marked contrast to the 2016 rulemaking, the Department has imposed no obligation on Financial Institutions or Investment Professionals to enter into enforceable contracts with or to provide enforceable warranties to their customers. The only remedies for violations of the exemption's conditions, and for engaging in a non-exempt prohibited transaction, are those provided by Title I of ERISA, which specifically provides a right of action for fiduciary violations with respect to ERISA-covered plans, and Title II of ERISA, which provides for imposition of the excise tax under Code section 4975. Nothing in the exemption compels Financial Institutions to make contractually enforceable commitments, and as far as the exemption provides, they could expressly disclaim any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions.

For that reason, arguments that the fiduciary acknowledgment requirement is inconsistent with the Fifth Circuit's opinion in *Chamber of Commerce* v. *United States Department of Labor,* 885 F.3d 360, 384–85 (5th Cir. 2018) (*Chamber*) are unsupported. In that case, the Fifth Circuit faulted the Department for having effectively created a private cause of action that Congress had not provided.[38] Under this exemption the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Requiring clarity as to the nature of the services and relationship is a far cry from the creation of a whole new cause of action or remedial scheme. The Department does not compel fiduciary status or create new causes of action. It merely conditions the availability of the exemption, which is only necessary for plan fiduciaries to receive otherwise prohibited compensation, on Financial Institutions and Investment Professionals providing clarity that the transaction, in fact, involves a fiduciary relationship. In addition, the Department does not purport to bind other State or Federal regulators in any way or to condition relief on the availability of remedies under other laws. It no more creates a new cause of action than any other exemption condition or regulatory requirement that requires full and fair disclosures of services and fees. Moreover, the requirement promotes compliance and supports investor choice by requiring clarity as to the fiduciary nature of the relationship that the Financial Institution or Investment Professional is undertaking with the Retirement Investor.

The Department has a statutory obligation to ensure that any exemptions from the prohibited transaction provisions are ''administratively feasible,'' ''in the interests of,'' and ''protective'' of the ''rights'' of Retirement Investors. The fiduciary acknowledgment provides critical support to the Department's ability to make these findings. The Department notes that conditions requiring entities to acknowledge their fiduciary status have become commonplace in recently granted exemptions over the past two years. In this regard, in 2022 and 2023, the Department granted over a dozen exemptions to private parties in which an entity was required to acknowledge its fiduciary status in writing as a requirement for exemptive relief.[39] Written acknowledgement of fiduciary status was required by the Department as early as 1984, when the Department published PTE 84–14,[40] requiring an entity acting as a ''qualified professional asset manager'' (a QPAM) to have ''acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.''[41] Fiduciary investment advice providers to IRAs have always been subject to suit in State courts on State-law theories of liability, and this rulemaking does not alter this reality. This rulemaking does not alter the existing framework for bringing suits under State law against IRA fiduciaries and does not aim to do so. State regulators remain free to structure legal relationships and liabilities as they see fit to the extent not inconsistent with Federal law.

Model Disclosure

To assist Financial Institutions and Investment Professionals in complying with these conditions of the exemption, the Department confirms the following model language will satisfy the disclosure requirement in Section II(b)(1) and (2):

> We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money or otherwise are compensated creates some conflicts with your financial interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.

[38] *Id.* at 384–85. *But see Nat'l Ass'n for Fixed Annuities* v. *Perez,* 217 F. Supp. 3d 1, 37 (D.D.C. 2016) (upholding the challenged provision and noting that ''courts . . . have permitted IRA participants and beneficiaries to bring state law claims for breach of contract'' (citing *Grund* v. *Del. Charter Guar. & Tr. Co.,* 788 F. Supp. 2d 226, 243–44 (S.D.N.Y. 2011))).

[39] *See, e.g.,* PTE 2023–03, Blue Cross and Blue Shield Association Located in Chicago, Illinois (88 FR 11676, Feb. 23, 2023); PTE 2023–04, Blue Cross and Blue Shield of Arizona, Inc., Located in Phoenix, Arizona (88 FR 11679, Feb. 23, 2023); PTE 2023–05, Blue Cross and Blue Shield of Vermont Located in Berlin, Vermont (88 FR 11681, Feb. 23, 2023); PTE 2023–06, Hawaii Medical Service Association Located in Honolulu, Hawaii (FR 88 11684, Feb. 23, 2023); PTE 2023–07, BCS Financial Corporation Located in Oakbrook Terrace, Illinois (88 FR 11686, Feb. 23, 2023); PTE 2023–08, Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company Located in Flowood, Mississippi (88 FR 11689, Feb. 23, 2023); PTE 2023–09, Blue Cross and Blue Shield of Nebraska, Inc. Located in Omaha, Nebraska (88 FR 11691, Feb. 23, 2023); PTE 2023–10, BlueCross BlueShield of Tennessee, Inc. Located in Chattanooga, Tennessee (88 FR 11694, Feb. 23, 2023); PTE 2023–11, Midlands Management Corporation 401(k) Plan Oklahoma City, OK (88 FR 11696, Feb. 23, 2023); PTE 2023–16, Unit Corporation Employees' Thrift Plan, Located in Tulsa, Oklahoma (88 FR 45928, July 18, 2023); PTE 2022–02, Phillips 66 Company Located in Houston, TX (87 FR 23245, Apr. 19, 2022); PTE 2022–03, Comcast Corporation Located in Philadelphia, PA (87 FR 54264, Sept. 2, 2022); PTE 2022–04, Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees Located in Philadelphia, PA. (87 FR 71358, Nov. 22, 2022).

[40] 49 FR 9494 (March 13, 1984).

[41] PTE 84–14, Part V, Section (a).

Under this special rule's provisions, we must:

- Meet a professional standard of care when making investment recommendations (give prudent advice) to you;
- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge no more than what is reasonable for our services; and
- Give you basic information about our conflicts of interest.

While some commenters requested additional model language, the Department is not providing a model for the specific disclosures in Section II(b)(3), (4), and (5) because those disclosures will need to be tailored to the specific Financial Institution's business model. Although the model language above broadly applies to all the advice provider's recommendations, nothing in the exemption would prohibit the advice provider from limiting its fiduciary acknowledgment to specific recommendations or classes of recommendations if it was not acting as a fiduciary in other contexts. The exemption, however, will only cover recommendations that were subject to such an acknowledgment.

Relationship and Conflict of Interest Disclosure

In response to comments, the Department is amending the disclosure requirements of PTE 2020–02. As finalized, Section II(b)(3)–(4) requires the Financial Institution to disclose in writing all material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(3)(A) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts;

(3)(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to them; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

This final pre-transaction disclosure is based on the SEC's Regulation Best Interest disclosure requirements.[42] The Department received many comments on the proposed disclosure obligations that focused, in particular, on differences between the SEC's Regulation Best Interest disclosures and the Department's proposed PTE 2020–02 disclosures. Some commenters also asserted that the proposed disclosure requirements of PTE 2020–02 would have imposed a burden on Financial Institutions without providing sufficient incremental benefits to Retirement Investors, above and beyond those provided by Regulation Best Interest. In the view of many commenters, Regulation Best Interest and the SEC's client relationship summary (also called Form CRS) already provided sufficient disclosure in the context of securities recommendations and could serve as the model for a more uniform set of disclosure requirements applicable to Retirement Investors without as much additional cost and burden.

Other commenters expressed support for the Department's proposed amendments that would have clarified and tightened the existing PTE 2020–02 disclosure requirements. These commenters supported ensuring that investors have sufficient information to make informed decisions about the costs of an investment advice transaction and about the significance and severity of the investment advice fiduciary's conflicts of interest. Some commenters also supported the proposed requirement for the disclosures to be written in plain English.

The Department's determination to base the Final Amendment's disclosure obligations on the SEC's Regulation Best Interest disclosure obligations is intended to ensure that Retirement Investors receive critical information that they need to make informed investment decisions, while reducing compliance burdens by establishing disclosure requirements that are consistent with the SEC's requirements. This is also responsive to several comments the Department received that highlighted disclosure requirements that commenters argued were more burdensome than the SEC's Regulation Best Interest disclosure requirements. Although this condition does not specifically require the disclosure be in ''plain English'' the Department notes the importance of plain language principles to ensure the Retirement Investors understand the information they receive.[43]

Some commenters were particularly concerned about the proposed requirement that Retirement Investors have the ''right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas'' upon request based on the potential burden of such disclosures. Others supported the requirement, including one commenter stating that such information is necessary for Retirement Investors to make an informed judgment as to the costs of a transaction. After consideration of the comments, the Department has determined that the requirements to disclose material fees, costs, conflicts of interest, and services should be sufficient to permit the Retirement Investor to assess both the costs of transactions and the scope and severity of conflicts, without imposing an additional ''upon request'' disclosure obligation.

In finalizing these disclosures based on the Regulation Best Interest disclosure obligation, however, the Department intends to monitor the effectiveness and utility of the disclosures closely to ensure they serve their intended purpose and give Retirement Investors full and fair notice of services, costs, charges, and conflicts of interest. Based upon its ongoing review of compliance and efficacy, the Department may revisit the scope and content of the disclosure obligations as part of future notice and comment rulemaking. At this time, the Department has concluded the best course of action is to align the disclosure conditions with the requirements of Regulation Best Interest, in order to provide a uniform and cost-effective approach to disclosures, consistent with the Department's statutory obligation to protect the interests of Retirement Investors.

Rollover Disclosure

The Department has also decided to make revisions to the rollover disclosure requirements. Under Section II(b)(5), before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA, or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a

[42] Similar obligations exist for investment advisers. ''Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.'' 2019 Fiduciary Interpretation (84 FR 33671); *see also SEC* v. *Cap. Gains Rsch. Bureau, Inc.,* 375 U.S. at 200 (''the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive'').

[43] In finalizing Regulation Best Interest, the SEC encouraged broker-dealers to use plain English in preparing any disclosures they make. The SEC provided examples such as the use of short sentences and active voice, and avoidance of legal jargon, highly technical business terms, or multiple negatives, 84 FR 33368–69.

Plan that is covered by Title I, the Financial Institution and Investment Professional must consider and document the bases for their recommendation to engage in the rollover, and must provide that documentation to the Retirement Investor. Relevant factors to be considered must include, to the extent applicable, but in any event are not limited to: (A) the alternatives to a rollover, including leaving the money in the Plan, if applicable; (B) the fees and expenses associated with the Plan and the recommended investment or account; (C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and (D) the different levels of services and investments available under the Plan and the recommended investment or account. The Proposed Amendment specified that this requirement extended to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (*e.g.,* from a commission-based account to a fee-based account).

In support of the rollover disclosure provision under the Proposed Amendment, one commenter highlighted the significance of a rollover decision and said that a ''careful analysis'' is needed, along with information about fees, expenses, and other investment options, in order to provide Retirement Investors with a ''well-supported'' recommendation. Another commenter suggested that the Department add consideration of a Retirement Investor's Social Security benefits.

Several commenters expressed concerns over the burden of the rollover documentation and disclosure requirements. Some suggested that the requirements should be limited to the rollovers from Title I Plans to IRAs, rather than including IRA-to-IRA or account-to-account transactions. These commenters argued that the additional requirement would be of limited value to the Retirement Investors while imposing significant costs on the Financial Institutions. Commenters requested that certain types of transactions be excluded, such as those involving a ''required minimum distribution'' (RMD), an inherited IRA or 401(k) account, investment education, or IRA-to-IRA transfers. Commenters suggested Retirement Investors already receive enough information, and asked if the requirements of this disclosure would be relevant.

The Department continues to believe that the information required to be included in the rollover disclosure is relevant to Retirement Investors. A Retirement Investor should understand what they are giving up in their employer's plan, as well as what they may gain from rolling over their retirement savings to an IRA. While the Department is not specifically adding a blanket requirement to document consideration of a Retirement Investor's Social Security benefit, it also agrees that the Retirement Investor's Social Security benefit may be an important component of the overall analysis to ensure any recommendation will meet the Care Obligation and Loyalty Obligation.

In response to comments about the challenges posed by the documentation requirements outside the plan context, the Department is narrowing the required rollover disclosure requirement in Section II(b)(5) so that it only applies to recommendations to rollovers from Title I Plans. Under the Final Amendment, PTE 2020–02 no longer will require disclosures regarding advice for a Retirement Investor to roll over its account from one IRA to another IRA or to change account type. The Department is also clarifying the language to confirm that the disclosure only applies to advice to engage in a rollover recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I. The rollover disclosure requirement does not apply when a Financial Institution or Investment Professional does not make a recommendation, even if it does provide investment education.

The Department received comments expressing concern that the information required for the rollover disclosure will not be available to Financial Institutions. A few commenters urged the Department to address this by requiring plans covered by Title I of ERISA to make more information publicly available on their Forms 5500. Other commenters simply stated that Investment Professionals and Financial Institutions would not be able to comply. As the Department explained in the preamble to the Proposed Amendment, however, Investment Professionals and Financial Institutions should make diligent and prudent efforts to obtain information about the fees, expenses, and investment options offered in the Retirement Investor's Plan account to comply with the amended rollover documentation and disclosure requirement of Section II(b)(5).

As the Department also explained in the preamble to the Proposed Amendment, the necessary information should be readily available to the Retirement Investor as a result of Department regulations mandating disclosure of plan-related information to the Plan's participants and beneficiaries that is found at 29 CFR 2550.404a–5. If the Retirement Investor refuses to provide such information, even after a full explanation of its significance, and the information is not otherwise readily available, the Financial Institution and Investment Professional should make a reasonable estimate of a Plan's expenses, asset values, risk, and returns based on publicly available information. The Financial Institution and Investment Professional should document and explain the assumptions used in the estimate and their limitations. In such cases, the Department confirms that the Financial Institution and Investment Professional could rely on alternative data sources, such as the Plan's most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of the Plan that holds the Retirement Investor's assets.

Moreover, while the Department is not imposing the same documentation and disclosure requirements on rollovers from IRA-to-IRA or from one account type to another, it is not relieving the fiduciary of its obligation under the Care Obligation and Loyalty Obligation to make prudent efforts to obtain information about the fees, expenses, and investment options offered in the different accounts or IRAs. It is hard to see how a fiduciary can make a prudent and loyal recommendation, without careful consideration of the financial merits of the alternative approaches. As the SEC has similarly observed with respect to Regulation Best Interest, although the Department has not imposed a specific documentation requirement comparable to the obligation for Plan to IRA rollovers, it is likely to be difficult for a firm to demonstrate compliance with its obligations, or to assess the adequacy of its policies and procedures, without documenting the basis for such recommendations.[44]

Good Faith and Disclosures Prohibited by Law Exceptions

The Department's Proposed Amendment would have added a new Section II(b)(6), which provides that

[44] See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligations, Q16, available at *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

Financial Institutions will not fail to satisfy their disclosure obligations under Section II(b) solely because they make an error or omission in disclosing the required information while acting in good faith and with reasonable diligence. The Financial Institution must disclose the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Similarly, Section II(b)(7) allows Investment Professionals and Financial Institutions to rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate. Under Section II(b)(8), the Financial Institution is not required to disclose information pursuant to Section II(b) if such disclosure is otherwise prohibited by law.

The Department did not receive substantive comments on these provisions and is finalizing these provisions as proposed.

Policies and Procedures

Under Section II(c), Financial Institutions must establish, maintain, and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions. The Financial Institution's policies and procedures must mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests, or those of any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Department proposed to amend section II(c) to provide that Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. In addition, the Proposed Amendment would require Financial Institutions to provide their complete policies and procedures to the Department upon request within 10 business days of request.

The Department received many comments on the proposed amendments to the policies and procedures. Some of these commenters expressed support for the Department's clarifications, emphasizing the risks inherent in conflicted compensation. The Department also received comments in favor of the proposed requirement that Financial Institutions furnish to the Department complete policies and procedures within 10 business days, asserting that such a requirement would be a meaningful incentive for reasonably designed policies and procedures. Others asserted that the conditions were unworkable. Some commenters were particularly concerned about the requirement that Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

Some commenters read the Proposed Amendment as banning differential compensation. One commenter characterized it as an attack on educational meetings and asserted that it conflicted with Regulation Best Interest and Financial Industry Regulatory Authority (FINRA) rules. The Department disagrees with the commenters' characterizations. The provision neither bans differential compensation, nor prohibits educational meetings. Although ERISA prohibits conflicted transactions between a plan and a fiduciary, the Department has granted this exemption specifically to allow Financial Institutions to receive compensation that varies based on the products they sell and that otherwise would be prohibited under ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). However, in order to do so, the Financial Institution must pay attention to the conflicts that are inherent in its compensation system and must take special care to ensure that it does not create or implement compensation practices that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. Based on the foregoing, the Department is finalizing Section II(c) as proposed with minor edits made for clarity.

Some commenters argued that the Department should rely on other regulators' policies and procedures requirements. Other commenters expressed concern that other regulators are not sufficiently protective in this area. For example, although the NAIC Model Regulation technically requires that producers manage material conflicts of interest, it excludes cash and non-cash compensation from the definition of material conflicts of interest. Thus, the following forms of cash compensation are excluded from the NAIC Model Regulation as sources of conflicts of interest: any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer; and the following types of ''non-cash compensation,'' are excluded: health insurance, office rent, office support and retirement benefits. In contrast, the SEC expressly requires investment advisers and broker-dealers to manage such conflicts, including commissions and other forms of compensation.[45] The Department believes that a more uniform approach is appropriate so that all Retirement Investors are protected from conflicts of interest, and to ensure that investment recommendations are driven by the best interest of the Retirement Investor and not the competing interests of the Investment Professional in conflicted compensation arrangements, irrespective of the type of investment product recommended to them (*e.g.,* a fixed indexed annuity as opposed to a security).

Accordingly, the Department is maintaining the language largely as proposed. While the Department acknowledges that many firms have already built protective structures based on SEC's Regulation Best Interest, the Investment Advisers Act of 1940,[46] or PTE 2020–02, they should be able to build or rely upon existing systems of supervision and compliance to meet their obligations, rather than build whole new structures, as the SEC

[45] Regulation Best Interest explicitly requires that broker-dealers establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate conflicts of interest at the associated person level. *See generally* 84 FR 33318, 33388; *see* Exchange Act rule 15*l*–1(a)(2)(iii)(B). With regards to investment advisers, the SEC has stated that ''an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.'' Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669, 33671 (July 12, 2019). The SEC staff has also said, ''[w]hile compensation practices for financial professionals are an important potential source of conflicts of interest, the staff reminds firms that mitigating conflicts associated with these practices is just one aspect of how firms satisfy their conflict obligations.'' See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, available at *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[46] 15 U.S.C. 80b–1 *et seq.*

observed with respect to broker-dealers' implementation of Regulation Best Interest.[47] Like the SEC, in adopting the policies and procedures requirement for conflict management, the Department has deliberately chosen not to take a highly prescriptive and inflexible approach. Instead, the Final Amendment permits compliance with policies and procedures that accommodate a broad range of business models, so long as they meet the overarching goals of ensuring adherence to the Care and Loyalty Obligations. The Final Amendment's requirement for Financial Institutions' policies and procedures to mitigate Conflicts of Interest is essential for the Department to satisfy its obligations under ERISA section 408(a) and Code section 4975(c)(2). The policies and procedures condition provides Financial Institutions with the flexibility to have different business models based on their specific business needs, while still ensuring that the fiduciary investment advice they provide to Retirement Investors meets the Impartial Conduct Standards.

The Department believes that Retirement Investors will best be protected by the objective standard provided under PTE 2020–02, which provides a strong benchmark for assessing policies and procedures. The exemption's principles-based standard focuses on whether a reasonable person would conclude that the Financial Institution's policies and procedures are likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. This standard is consistent with Regulation Best Interest and provides an appropriate yardstick for assessing compliance while lending additional clarity and rigor to the obligation to manage adverse incentives. In addition, SEC-registered investment advisers are required to ''adopt and implement written policies and procedures reasonably designed to prevent violations, by [the adviser] and [its] supervised persons, of the [Advisers] Act and the rules that the Commission has adopted under the [Advisers Act].'' [48] The approach in PTE 2020–02 provides the flexibility necessary for Financial Institutions to insulate Investment Professionals from conflicts of interest under the wide array of business and compensation models followed in today's marketplace.

The Department understands that many Financial Institutions, particularly insurance companies, rely on educational conferences, and stresses that this provision does not prohibit them. The exemption merely requires reasonable guardrails for conferences, especially if they involve travel. These conferences must be structured in a manner that ensures they are not likely to lead Investment Professionals to make recommendations that do not meet the exemption's Care Obligation or Loyalty Obligation. In addition, the Department notes that properly designed incentives that are simply aimed at increasing the overall amount of retirement saving and investing, without promoting specific products, would not violate the policies and procedures requirement. Similarly, notwithstanding contrary language in the preamble to the Proposed Amendment, the Department recognizes that it can be appropriate to tie attendance at conferences to sales thresholds in certain circumstances (for example, insurance companies could not reasonably be expected to provide training for independent agents who are not recommending their products).

On the other hand, Financial Institutions must take special care to ensure that training conferences held in vacation destinations are not designed to incentivize recommendations that run counter to Retirement Investor interests. Firms should structure training events to ensure that they are consistent with the Care and Loyalty Obligations. Recommendations to Retirement Investors should be driven by the interests of the investor in a secure retirement. Certainly, Financial Institutions should avoid creating situations where the training is merely incidental to the event, and an imprudent recommendation to a Retirement Investor is the only thing standing between an Investment Professional and a luxury getaway vacation.

Similarly, the Department does not require Financial Institutions to categorically eliminate all sales quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, sales contests, quotas, or bonuses. Rather, Financial Institutions are only required to eliminate such incentives that are ''intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.''

While the SEC limited its categorical prohibition on sales contests to time-limited contests, as one commenter observed, the SEC has emphasized that the limited prohibition in Regulation Best Interest should not be read as automatically permitting other activities. Instead, the SEC stressed that ''prohibiting certain incentives does not mean that all other incentives are presumptively compliant with Regulation Best Interest.'' [49] The SEC noted that ''other incentives and practices that are not explicitly prohibited are permitted *provided that the broker-dealer establishes reasonably designed policies and procedures to disclose and mitigate the incentives created, and the broker-dealer and its associated persons comply with the Care Obligation and the Disclosure Obligation*'' (emphasis added).[50] In fact, the SEC recognized that if a ''firm determines that the conflicts associated with these practices are too difficult to disclose and mitigate, the firm should consider carefully assessing whether it is able to satisfy its best interest obligation in light of the identified conflict and in certain circumstances, may wish to avoid such practice entirely.'' [51]

The Department's conflict-mitigation language was not newly introduced in the Proposed Amendment; it has been part of the Department's interpretation of PTE 2020–02 since the Department issued the 2021 FAQs.[52] For example, in Q16 of the FAQs, the Department asked what Financial Institutions should do to satisfy the standard of mitigation so that a reasonable person reviewing their policies and procedures and incentive practices as a whole would conclude that they do been not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interest of the Retirement Investor.

In the FAQ, the Department wrote that Financial Institutions must take special care in developing and monitoring compensation systems to ensure that their Investment Professionals satisfy the fundamental obligation to provide advice that is in the Retirement Investor's best interest. By carefully designing their compensation structures, Financial Institutions can avoid incentive structures that a reasonable person would view as creating incentives for Investment Professionals to place their interests ahead of the Retirement

[47] See Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031, 84 FR 33318, 33327 (June 5, 2019) (''Reg BI Adopting Release''). (recognizing that ''some broker-dealers may rely on existing policies and procedures that address conflicts through methods such as compliance and supervisory systems that are consistent with the Conflict of Interest Obligation'' under Regulation Best Interest).

[48] See Rule 206(4)–7 (17 CFR 275.206(4)–7).

[49] Reg BI Adopting Release at 33397.

[50] *Id.* at 33327.

[51] *Id.* at 33397.

[52] See *supra* note 19.

Investor's interests. Accordingly, Financial Institutions must be careful not to use quotas, bonuses, prizes, or performance standards as incentives that a reasonable person would conclude are likely to encourage Investment Professionals to make recommendations to Retirement Investors that do not meet the Care Obligation and Loyalty Obligation of the Final Amendment. The Financial Institution should aim to eliminate such conflicts to the extent possible, not create them.

The FAQs went on to clarify that the Department recognizes firms cannot eliminate all conflicts of interest, however, and the exemption accordingly stresses the importance of mitigating such conflicts. For example, as one means of compliance, a firm could ensure level compensation for recommendations to invest in assets that fall within reasonably defined investment categories, and exercise heightened supervision as between investment categories to the extent that it is not possible for the institution to eliminate conflicts of interest between these categories. In this regard, the Department stresses that it is not imposing an obligation on firms to eliminate all differential compensation, but rather to manage any conflicts of interest caused by such differentials so that the interest of the Retirement Investor is paramount, rather than misaligned relative to the financial interests of the Investment Professional or Financial Institution. The Department also stresses that any transitional efforts to move to other compensation models or policies and procedures should be careful to avoid harm to existing investors' holdings. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the Investment Professional's competing financial interests. If, for example, a Retirement Investor had previously invested in front-end load shares, but the Financial Institution decided to move away from recommending such shares as part of its effort to better manage Conflicts of Interest, the Financial Institution and Investment Professional would need to pay close attention to the Care Obligation and Loyalty Obligation before advising the Retirement Investor to exchange or liquidate existing holdings in such shares after having already borne the front-end expense.

Similarly, the Department disagrees with the few commenters who suggested that the conflict-mitigation requirement would necessarily prevent Financial Institutions and Investment Professionals from recommending such specific investments as Class A share mutual fund investors. One commenter specifically expressed concern that Retirement Investors may want to pay up front for certain additional rights that Class A shares can include, such as rights of appreciation (ROA) and/or rights of exchange (ROE). While the Department is not endorsing any particular products, the Department confirms that the exemption does not preclude the recommendation of such shares when the recommendation satisfies the Care Obligation and Loyalty Obligation for a particular Retirement Investor.

More generally, Financial Institutions' policies and procedures must include supervisory oversight of investment recommendations, particularly in areas in which differential compensation remains. For example, Financial Institutions' policies and procedures could provide for increased monitoring of Investment Professional recommendations at or near compensation thresholds, recommendations at key liquidity events for investors (*e.g.,* rollovers), and recommendations of investments that are particularly prone to conflicts of interest, such as proprietary products and principal-traded assets. However, in many circumstances, supervisory oversight is not an effective substitute for meaningful mitigation or elimination of dangerous compensation incentives. The Department continues to believe that its principles-based approach to conflict management is the right one. It properly focuses Financial Institutions on conflict mitigation, recognizes the practical impossibility of eliminating all conflicts, and stresses Financial Institutions' fundamental responsibility to ensure that their policies and procedures for managing conflicts of interest are such that a reasonable person would conclude that the Financial Institution is avoiding incentives that are likely to encourage Investment Professionals to make recommendations to Retirement Investors that do not meet the Final Amendment's Care Obligation and Loyalty Obligation. While PTE 2020–02 does not require eliminating all conflicts, it does require Financial Institutions to take special care when addressing the conflicts that are present.

Proprietary Products

In the Proposed Amendment, the Department requested comment on whether it should provide additional guidance regarding when a Financial Institution or Investment Professional, acting as a fiduciary, recommends its proprietary products to a Retirement Investor, and, if so, the type of guidance that would be most useful. A few commenters asserted that, despite the Department specifically stating that the exemption allows for investment advice on proprietary products or investments that generate third-party payments, the Department's additional guidance undermined that confirmation. One commenter took the opposite approach, and suggested the Department prohibit Financial Institutions and Investment Professionals from receiving third-party payments or require any third-party payments to be offset or rebated to the Retirement Investor.

The Department is not prohibiting any types of compensation, and once again confirms that PTE 2020–02 does not preclude Financial Institutions from providing fiduciary investment advice on proprietary products or investments that generate third-party payments, or advice based on investment menus that are limited to such products, in part or whole. The principles-based nature of the exemption is applicable to all transactions. The Department further disagrees with comments that stated the Department imposed additional conditions on proprietary products. Instead, the Department has provided an example of how Financial Institutions may choose to comply with the exemption when recommending such products. The standards established by the exemption are the same for all Financial Institutions and Investment Professionals, and firms are given substantial leeway in developing policies and procedures that suit their business model, provided that those policies and procedures are crafted in such a way that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interests of the Retirement Investor.

As described in the preamble to the Proposed Amendment, to the extent a recommendation of proprietary products is fiduciary investment advice under the Regulation, one way that a Financial Institution could meet the terms of the Proposed Amendment (and the Final Exemption) is by prudently doing the following:

• Document in writing its limitations on the universe of recommended investments, the Conflicts of Interest associated with any contract, agreement, or arrangement providing for its receipt of third-party payments or associated with the sale or promotion of proprietary products.

• Document any services it will provide to Retirement Investors in exchange for third-party payments, as well as any services or consideration it will furnish to any other party, including the payor, in exchange for the third-party payments.

• Reasonably conclude that the limitations on the universe of recommended investments and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to receive compensation in excess of reasonable compensation for Retirement Investors as set forth in Section II(a)(2).

• Reasonably conclude that these limitations and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to recommend imprudent investments; and document in writing the bases for its conclusions.

• Inform the Retirement Investor clearly and prominently in writing that the Financial Institution limits the types of products that it and its Investment Professionals recommend to proprietary products and/or products that generate third-party payments.

○ In this regard, the notice should not simply state that the Financial Institution or Investment Professional ''may'' limit investment recommendations based on whether the investments are proprietary products or generate third-party payments, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis.

• Clearly explains its fees, compensation, and associated Conflicts of Interest to the Retirement Investor in plain language.

• Ensure that all recommendations are based on the Investment Professional's considerations of factors or interests such as investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

• Ensure that, at the time of the recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the Investment Professional, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

• Ensure that the Investment Professional's recommendation reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor; and the Investment Professional's recommendation is not based on the financial or other interests of the Investment Professional or the Investment Professional's consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

An SEC Staff Bulletin entitled *Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest* additionally provides guidance on how to manage conflicts to ensure compliance with obligations of care and conflict management. The SEC staff Bulletin provides strong guidance on how firms and Investment Professionals can build policies and procedures properly aligned with the Care and Loyalty Obligations set forth in the Final Exemption.[53]

Providing Policies and Procedures to the Department

The Department proposed Section II(c)(3) would have required Financial Institutions to provide their complete policies and procedures to the Department within 10 business days of request. One commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Another commenter strongly urged the Department to eliminate this condition and instead rely on its subpoena authority, if necessary. One comment requested more time to provide the certification to the Department. In response to these comments, although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement in the Final Amendment to give Financial Institutions Insurers 30 days to provide the documentation.

[53] See *supra* note 44, Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, available at *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

Retrospective Review

The Department is finalizing the proposed retrospective review requirement, with some ministerial changes for clarity. Section II(d) requires the Financial Institution to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of this exemption's requirements, including adherence to the Impartial Conduct Standards and establishing and implementing policies and procedures that govern compliance with the exemption's conditions. The Financial Institution must update its policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that its policies and procedures remain prudently designed, effective, and compliant with Section II(c). The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Financial Institution.

Under Section II(d)(3) the Senior Executive Officer must certify annually that the officer has reviewed the retrospective review report, that the Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975(a) or (b). The certification must also include that the Financial Institution has written policies and procedures that meet the requirements set forth in Section II(c), and that the Financial Institution has established a prudent process to modify such policies and procedures as required by Section II(d)(1).

Under Section II(d)(4), the review, report, and certification must be completed no later than six months after the end of the period covered by the review. Section II(d)(5) requires that the Financial Institution retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 30 days of request to the extent permitted by law (including 12 U.S.C. 484 regarding limitations on visitorial powers for national banks).

The Department received many comments on the retrospective review conditions. Some commenters

supported the requirement for Financial Institutions to undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption.

Other commenters raised concern that the retrospective review requirement imposes significant burdens on Financial Institutions, while providing limited benefits to Retirement Investors. One commenter expressed specific concern that the Department's use of the terms ''effective'' and ''compliant'' are undefined, creating unwarranted uncertainty for firms.

This condition, as drafted, provides important protections for Retirement Investors. The obligation to periodically review the effectiveness of policies and procedures and to determine compliance is critical to ensuring that they achieve their intended protective purposes and are not mere window dressing. Without such periodic assessments, it would be hard for a Financial Institution to have confidence that its oversight structures are working to ensure compliance with the Impartial Conduct Standards. By uniformly requiring retrospective review, the exemption promotes fiduciaries' uniform compliance with the Impartial Conduct Standards, which is an important aim of this rulemaking. Furthermore, the Department has provided guidance on how Financial Institutions can structure their policies and procedures, which should assist Senior Executive Officers in making the required certifications.

Several commenters specifically raised concerns with the proposed requirement that the Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975(a) or (b). Some commenters argued the Department is exceeding the scope of its regulatory authority by conditioning relief on compliance with certain Code requirements.

However, the Department notes that it is within its authority to ensure Financial Institutions engaging in otherwise prohibited transactions comply with the law, including by paying the excise taxes owed on non-exempt prohibited transactions. The amended Retrospective Review requirement is consistent with the Fifth Circuit's reasoning in *Chamber.* The Department is not creating new remedies or causes of action for violations of Title II of ERISA, but merely ensuring that parties comply with the excise taxes Congress specifically imposed on such violations. This approach is wholly consistent with the Fifth Circuit's observation that ''ERISA Title II only punishes violations of the 'prohibited transactions' provision by means of IRS audits and excise taxes.'' [54]

One commenter additionally argued this condition overstates the obligation to file Form 5330 because there is no obligation to file if a transaction is self-corrected and no excise tax is due. The commenter misreads the exemption, however. The Department is not imposing any additional requirements to file Form 5330; rather, it is merely requiring that transactions that are reportable to the IRS are in fact reported. The Department notes that while self-correction is permitted, such correction must be made in a permissible manner and within the allowable time frame.

One commenter expressed concern about including this obligation as part of the Senior Executive Officer's certification. The Department notes, however, that it is the Financial Institution's obligation to correct the prohibited transaction, file IRS Form 5330, and pay the prohibited transaction excise tax, and so it is appropriate for the Senior Executive Officer to include this in the certification. The Department is including the excise tax requirement in the Final Amendment as proposed. The excise tax is the congressionally imposed sanction for engaging in a non-exempt prohibited transaction and provides a powerful incentive for compliance. Requiring certification by the Senior Executive Officer reinforces the importance of compliance, provides an important safeguard for compliance with the tax obligation when violations occur, and focuses the Institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction.

Another commenter suggested that the Department modify the conditions to expressly provide that these certifications and other obligations should be limited to an obligation of good faith and reasonable diligence in complying with the retrospective review required under Section II(d) of the Proposed Amendment and good faith calculation of any excise taxes payable with respect to such prohibited transactions. The Department is not making the commenter's requested specific text edits but notes that compliance with the Retrospective Review requirement of Section II(d) does not require perfection. For example, Section II(e) specifically allows Financial Institutions to correct violations that they find as part of their retrospective review.

Careful retrospective review of the effectiveness of a Financial Institution's policies and procedures is essential to ensuring compliance with the Impartial Conduct Standards, and necessary for the Department to make its statutory findings to grant this exemption. The review must occur at least annually and must be performed carefully enough that the Senior Executive Officer can make the required certification. In this connection, the Department notes that findings of violations, in litigation or otherwise, do not necessarily mean that the Financial Institution's policies and procedures are inadequate, or that its retrospective review was insufficient. While such findings mean that the specific transaction at issue failed to meet the terms of the exemption, violated the prohibited transaction rules, and would be subject to the excise taxes and any available remedies under ERISA, it does not follow that the Financial Institution's policies and procedures are necessarily deficient. Rather, such violations should be reviewed for lessons learned and to determine if broader corrections are necessary to avoid recurrence. Even strong policies and procedures cannot be perfectly effective in avoiding isolated violations. Another commenter expressed concern that the retrospective review is too focused on the review of the policies and procedures and rather than impose a new, separate requirement, the Department should rely on other regulators' retrospective review requirements, or even turn those requirements into safe harbors. However, such requirements are not universal, and to the extent other regulators at self-regulatory organizations, such as FINRA, require retrospective review, the Financial Institutions would not need to develop whole new systems, but rather could build upon their existing review system to the extent it did not already fully satisfy the requirements of this exemption. The purpose of retrospective review is to assess the compliance of Financial Institutions and Investment Professionals with the specific

[54] *Chamber of Commerce* v. *U.S. Dep't of Labor,* 885 F.3d 360, 384 (5th Cir. 2018). For additional information regarding correcting prohibited transactions, see Voluntary Fiduciary Correction Program Under the Employee Retirement Income Security Act of 1974,71 FR 20262 (Apr. 19, 2006).

conditions of this exemption, ERISA, and the Code, as opposed to their compliance with different regulatory regimes, and to ensure corrective changes when necessary. These purposes would not be served by relying entirely on other regulators' review requirements, although the additional compliance burden should be minimal to the extent firms have built strong retrospective review procedures pursuant to such requirements.

Some commenters addressed the requirement that Financial Institutions provide the retrospective review report, certification, and supporting data to the Department within 10 business days of request. One commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Others expressed concern. One commenter suggested Financial Institutions should have 30 days to provide the report, certification, and supporting data, consistent with the requirement to provide the Department's policies and procedures upon request. Although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement to give Financial Institutions 30 days to provide the documentations.

Self-Correction

Section II(e) of the Final Amendment provides that a non-exempt prohibited transaction will not occur due to a violation of this exemption's conditions with respect to a covered transaction if the following requirements are met: (1) either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses; (2) the Financial Institution corrects the violation (3) the correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and (4) the Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2). The Department is finalizing the self-correction provision as proposed, except, in response to several comments, the Department is removing the requirement to notify the Department of each violation.

Some commenters questioned the utility of this self-correction provision to advice providers seeking to comply. One commenter expressed specific concern that firms will be inclined to relax their approach to compliance based on the knowledge that, if violations occur and are detected, they can likely invoke the self-correction process and avoid sanctions. Another commenter requested clarification regarding how a Financial Institution would make a Retirement Investor whole for any resulting losses related to a violation of the conditions of the exemption. For example, if a condition has been violated and a rollover occurred, how would a Retirement Investor be made whole? In response to these comments, the Department notes that Financial Institutions are not required to use the self-correction provision. However, if a Financial Institution chooses to self-correct, it must make the Retirement Investor whole for any and all resulting losses. If a rollover recommendation out of a Title I Plan cannot be undone, the Financial Institution should calculate the amount of resulting losses, including estimated investment and tax losses, and restore the Retirement Investor to the position they would have occupied but for the breach.

Some commenters raised concerns about the lack of a materiality threshold, and the requirement that all mistakes be reported and remediated, no matter how minor or inadvertent. In the Department's view, however, the self-correction provisions are measured and proportional to the nature of the injury. They simply require timely correction of the violation of the law and notice to the person responsible for retrospective review of the violation, so that the significance and materiality of the violation can be assessed by the appropriate person responsible for assessing the effectiveness of the firm's compliance oversight. In addition, to address commenters' concern about the burden associated with the self-correction provision, the Department deleted the requirement to report each correction to the Department in this Final Amendment. This change should ease the compliance burden. Furthermore, to the extent Financial Institutions would have been wary of utilizing the self-correction provision because they would have to report each self-correction to the Department, they should feel more comfortable correcting each violation they find that is eligible for self-correction after this modification. The Department notes, however, that it retains the authority to require Financial Institutions to provide evidence of self-corrections as part of its investigation program through the recordkeeping provisions in Section IV.

ERISA Section 3(38) Investment Managers

Several commenters requested broad exceptions to the exemption for investment advice that is provided to sophisticated investors or from advice providers that receive level compensation. The Department is not granting that sort of exception to the general conditions of PTE 2020–02. As discussed above, the amended exemption is broad and flexible and provides Financial Institutions with the flexibility to develop policies and procedures would allow a reasonable person reviewing its incentive practices as a whole to conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the Retirement Investors' interests. Financial Institutions that provide fiduciary investment advice can determine for themselves how they will comply with all the conditions of the exemption.

Several commenters asked the Department to clarify whether they would become fiduciaries when marketing their services, and specifically whether responding to a request for proposal (RFP) to provide ongoing services as a fiduciary under ERISA section 3(38) would count as providing fiduciary investment advice if the other provisions of the Regulation are satisfied. The Department discussed in the preamble to the Regulation that merely touting the quality of, and providing information about, one's own advisory or management services would not be a covered recommendation (as defined in paragraph (f)(10) of the Regulation) that could lead to fiduciary status. However, to the extent a covered recommendation is made as part of hiring communications, it would be evaluated under all the parts of the Regulation.

A few commenters on the Proposed Amendment expressed concern that if providing a covered recommendation in the context of an RFP could lead to fiduciary status, they might need to comply with PTE 2020–02 merely to get hired, which they believed was unduly burdensome. In this regard, if a covered recommendation is made as part of an RFP process and all parts of the Regulation are satisfied, including the receipt of a ''fee or other compensation, direct or indirect,'' as a result of the fiduciary investment advice provided in

the context of the RFP, a prohibited transaction would occur.

In response to these comments, the Department added a new section II(f) to the Final Amendment. The provision states that to the extent a Financial Institution or Investment Professional provides fiduciary investment advice to a Retirement Investor as part of its response to an RFP to provide investment management services as an ERISA section 3(38) investment manager and subsequently is hired to act as an investment manager to the Retirement Investor, it may receive compensation as a result of the advice under this exemption if it complies solely with the Impartial Conduct Standards set forth in Section II(a).

ERISA Section 3(38) investment managers are fiduciaries because by definition they must have the power to manage, acquire, or dispose of a plan's assets, and they are required by statute to acknowledge their fiduciary status. To respond to the concern expressed by the commenters, the Department has determined that parties that are ultimately hired to provide investment management services pursuant to an RFP should be able to rely on this exemption for the provision of investment advice in the hiring process as long as they comply with the Impartial Conduct Standards. The Department notes that ERISA 3(38) investment managers have discretion with respect to the investment of plan assets; therefore, they could not rely on PTE 2020–02 for the ongoing provision of investment management services after they are hired. Section II(f) is limited to the prohibited transaction associated with providing fiduciary investment advice in connection with the hiring process and does not relieve the investment manager from its obligation to refrain from engaging in any non-exempt prohibited transactions in the ongoing performance of its activities as an investment manager.

Eligibility

The Department proposed to modify the eligibility provisions in Section III, which identify circumstances under which an Investment Professional or Financial Institution will become ineligible to rely on the exemption for a 10-year period. The Department proposed expanding ineligibility to include Financial Institutions that are Affiliates, rather than members of the more limited ''Controlled Group'' as defined in PTE 2020–02, and the Proposed Amendment also enumerated specific crimes (including foreign crimes) that could cause ineligibility in Section III(a). The Department also proposed to broaden the scope of the crimes that would have caused ineligibility by providing that a Financial Institution or Investment Professional becomes ineligible upon conviction of any of the specific enumerated crimes including foreign crimes, regardless of the underlying conduct, as opposed to only ''crimes arising out of such person's provision of investment advice to Retirement Investors'' as provided in PTE 2020–02.

In the Proposed Amendment, the Department also proposed to add new ineligibility triggers that would make a Financial Institution or Investment Professional ineligible to rely on the exemption due to a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

The Department also proposed making clarifying changes to the timing of the ineligibility provision that is set forth in Section III(b). The Department proposed that all entities would have become ineligible six months after the conviction date, the date the Department issued a written determination regarding a foreign conviction, or the date the Department issued a written ineligibility notice regarding other misconduct. As proposed, this six-month period would have replaced the one-year winding down period (referred to as the Transition Period in this Final Amendment). Furthermore, the Department clarified in the Proposed Amendment that ineligibility remains in effect until the occurrence of the earliest of the following events: (A) a subsequent judgment reversing a person's conviction, (B) 10 years after the person became ineligible or is released from imprisonment, if later, or (C) the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

The Department also proposed changes to Section III(c), which provided an opportunity to be heard. These proposed changes would have removed the separate opportunity to be heard by the Department that would have been granted following conviction by a U.S. Federal or State court and proposed providing an opportunity to be heard when the conviction is by a foreign court pursuant to proposed Section III(c)(1).

Section III(c)(2) of the Proposed Amendment provided that the Department would have issued a written warning letter regarding the conduct and thereafter would have allowed Financial Institutions and Investment Professionals that have engaged in conduct described in proposed Section III(a)(2) to have had the opportunity to cure the behavior and to be heard in an evidentiary hearing by the Department. Following the proposed hearing, the Department would have decided whether to issue a written ineligibility notice for conduct described in proposed Section III(a)(2).

Lastly, the Department proposed adding the heading ''Alternative exemptions'' in Section III(d), which is now Section III(c) in this Final Amendment, that would have described how a Financial Institution may continue business after becoming ineligible. The Final Amendment specifies that a Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. Several commenters asserted that the proposed changes to the eligibility provisions of the exemption would have: greatly altered the ability of fiduciaries to reasonably rely on PTE 2020–02; substantially broadened the conditions under which a fiduciary would be ineligible for reliance on PTE 2020–02; resulted in reduced choice and access for Retirement Investors; caused market disruption; been punitive; and provided the Department with the sole ability, for which it lacks the authority, to make Financial Institutions and Investment Professionals ineligible from providing fiduciary investment advice. A few commenters pointed to the Department's experience with ineligibility under PTE 84–14 Section I(g), though some argued that the Department did not sufficiently analyze the difference between the parties affected by PTE 84–14 and retail investors receiving investment advice. A few commenters argued the ineligibility provisions exceeded the Department's authority. One commenter claimed that Congress did not intend for the Department to have this degree of power. Another claimed the Department was granting to itself the ability to impose a ''death penalty'' on Financial Institutions. Generally, commenters requested that the Department not finalize the proposed amendments to the ineligibility provision; alternatively, they requested that the Department apply the changes only prospectively if

the Department moves forward with them.

As explained further below, the Department continues to believe these eligibility provisions ensure that Financial Institutions provide strong oversight of Investment Professionals and that both the Financial Institution and the Investment Professional can be expected to ensure compliance with the exemption. Because of its supervisory responsibilities, and its control over the design and implementation of the policies and procedures, the Financial Institution's commitment to compliance is critical to the success of this exemption. While an occasional violation of the exemption will not result in disqualification for 10 years, Section III helps ensure that the Financial Institutions and Investment Professionals are willing and able to comply with the conditions of this exemption and protect investors from misconduct.

As required by ERISA section 408(a) and Code section 4975(c)(2), the Department may only grant exemptions that are protective of and in the interests of plan participants and beneficiaries. As the Department explained when it originally granted PTE 2020–02, ''[t]he Department has determined that limiting eligibility in this manner serves as an important safeguard in connection with this very broad grant of relief from the self-dealing prohibitions of ERISA and the Code in this exemption.'' [55] Therefore, after consideration of the comments the Department has determined to retain the eligibility provision of Section III with several important modifications discussed below.

Scope of Ineligibility

Several commenters claimed the Proposed Amendment's expansion of the conditions for ineligibility to encompass not only the fiduciary but also any affiliate regardless of that affiliate's relationship with the fiduciary or its activity is regulatory overreach by the Department that unnecessarily exposes every fiduciary to an additional compliance risk. Some commenters argued that the exemption's definition of the term ''Affiliate'' is overly broad and creates an unreasonably large network of persons, most of whom will have absolutely no connection to the recommendations provided to Retirement Investors. These commenters were concerned that the actions of these Affiliates can cause ineligibility and drive financial services workers and companies out of business to the detriment of the Retirement Investors relying on their investment advice services. Other commenters stated that the proposed expansion of the scope of the ineligibility provisions is problematic and would have led to unintended consequences.

Some commenters additionally stated the ineligibility provisions lack a proper nexus between the circumstances of the offense and the fiduciary services performed for the affected plans and requested the Department to concentrate the determination for ineligibility exclusively on the activities of the fiduciary itself and on any entity that is controlled by the fiduciary. Some commenters requested that the Department use the term ''Control Group'' in the ineligibility provisions of the Final Amendment, because it is less confusing and more well-defined than the term ''Affiliate.'' Another commenter recommended that the eligibility provisions focus on criminal conduct that involves the investment management of retirement assets and which exclusively involves (i) the fiduciary and (ii) any affiliate that the fiduciary controls or over which the fiduciary exercises a controlling influence. One commenter provided specific examples of how broadly ''Affiliate'' could be interpreted.

One commenter claimed that the Department has not expressed any justification for imposing ineligibility when an investment advice entity's affiliate is convicted of a crime unrelated to the transactions covered by the exemption. This commenter stated that ERISA section 411 does not impute convictions to affiliates or relatives and only provides for the disqualification of persons convicted of specified crimes from serving as a ''fiduciary'' or as a ''consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan.''

After consideration of these comments, the Department has determined to return to the use of the term ''Controlled Group'' in the Final Amendment for purposes of determining ineligibility under the exemption and has revised Section III(a) accordingly. The Final Amendment also adds Section III(a)(3) to the exemption, which defines Controlled Group by stating that an entity is in the same Controlled Group as a Financial Institution if the entity (including any predecessor or successor to the entity) would be considered to be in the same ''controlled group of corporations'' as the Financial Institution or ''under common control'' with the Financial Institution as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder).

However, the Department is retaining in the Final Amendment the proposed broader definition of crimes that cause ineligibility, because the Department remains concerned that the limitation of ''arising out of . . . provision of investment advice'' is too narrow. The crimes listed as disqualifying are extraordinarily serious. Implicit in some of the comments is the notion that the Department and Retirement Investors need not be concerned about serious crimes if they involved non-plan assets or non-advisory financial activities, such as asset management. In the Department's view, however, the commission of a serious crime, such as a felony involving embezzlement, price fixing, or criminal fraud, calls into question the parties' commitment to compliance with the law, loyalty to their customers, and insistence on appropriate oversight structures. In such circumstances, it would be imprudent for the Department to disregard the previous felonies on the basis that the crimes were aimed at another class of customers or parties. When Financial Institutions and Investment Professionals engage in such crimes, there is ample cause for concern, and little reason for either the Department or the Retirement Investor to be sanguine about future compliance with the terms of the exemption. In such circumstances, it is appropriate to insist that the parties seek an individual exemption at that point, which permits the Department to consider the specific facts of the crime, the possible need for additional exemption conditions, or the loss of the exemption, without grant of a new individual exemption.

Foreign Convictions

Several commenters claimed that the Department has no basis for expanding the ineligibility provisions to include conduct by foreign affiliates and that including foreign affiliates is overbroad and will create unintended consequences, especially because the conduct that could lead to ineligibility does not need to relate directly to the provision of investment advice. These commenters claimed that disqualification would occur even where the only connection between the investment advice entity and the entity convicted of a foreign crime is a small, indirect ownership interest. The commenters stated that ineligibility will occur for conduct that is completely unrelated to the provision of fiduciary investment advice and for conduct in

[55] 85 FR 82841

which the fiduciary has not participated and about which it has no knowledge. One commenter asserted that a Financial Institution should not be disqualified for foreign activities unless such activities are convictions for disqualifying crimes under ERISA section 411.

Several commenters focused on the inclusion of foreign crimes and stated that the proposed changes to the ineligibility provisions raise serious questions of fairness, national security, and U.S. sovereignty. These commenters claimed that ineligibility could result from the conviction of an affiliate in a foreign court for violation of foreign law without due process protections or the same level of due process afforded in the United States. Some commenters expressed concern that the proposed change sets up a false equivalence between and among foreign jurisdictions and that it is not credible to assume that the judicial systems of certain countries will be impartial and have criminal procedures and due process safeguards as afforded in U.S. Federal and State courts. Some commenters stated that it is not clear that the Department is equipped to make the ''substantially equivalent'' determination and could result in inconsistency and unfairness as well as, in some cases, a lack of due process. One commenter agreed that investment transactions that include retirement assets are increasingly likely to involve entities that may reside or operate in jurisdictions outside the U.S. and that reliance on PTE 2020–02 therefore must appropriately be tailored to address criminal activity, whether occurring in the U.S. or in a foreign jurisdiction but this commenter nonetheless had concerns with the potential lack of due process in foreign jurisdictions.

Other commenters were concerned that some foreign courts could become vehicles for hostile governments to achieve political ends as opposed to dispensing justice and potentially hostile foreign governments could interfere in the retirement marketplace for supposed wrongdoing that is wholly unrelated to managing retirement assets and these governments could potentially assert political influence over fiduciary advice providers that want to avoid a criminal conviction. One commenter recommended that the Proposed Amendment's foreign crime ''substantially equivalent'' standard be amended so that ineligibility for a foreign criminal conviction applies only when the factual record of such conviction, when applied to United States Federal criminal law, would highly likely lead also to a criminal conviction in the U.S., as determined under appropriate regulatory authority by the Department's Office of the Solicitor.

The Department notes these commenters' concerns, and as noted above, has reduced the scope of any possible disqualification by limiting the provision to the Controlled Group. However, the Department is retaining the inclusion of foreign convictions in the Final Amendment. Financial Institutions increasingly have a global reach, in their affiliations and in their investment transactions. Retirement assets are often involved in transactions that take place in entities that operate in foreign jurisdictions therefore making the criminal conduct of foreign entities relevant to eligibility under PTE 2020–02. An ineligibility provision that is limited to U.S. Federal and State convictions would ignore these realities and provide insufficient protection for Retirement Investors. Moreover, foreign crimes of the type enumerated in the exemption call into question a firm's culture of compliance just as much as domestic crimes and are signs of potential serious compliance and integrity failures, whether prosecuted domestically or in foreign jurisdictions.

The Department does not expect that questions regarding ''substantially equivalent'' will arise frequently, and even less so with the Final Amendment's use of the term ''Controlled Group'' instead of ''Affiliate,'' as discussed above. But, when these questions do arise, impacted entities may contact the Office of Exemption Determinations for guidance, as they have done for many years in connection with the eligibility provisions under the QPAM Exemption, PTE 84–14.[56] As discussed in more detail below, the one-year Transition Period that has been added to the exemption and the ability to apply for an individual exemption provide affected parties with both the time and the opportunity to address with the Department any issues about the relevance of any specific foreign conviction and its applicability to ongoing relief pursuant to PTE 2020–02. Financial Institutions and Investment Professionals should interpret the scope of the eligibility provision broadly with respect to foreign convictions and consistent with the Department's statutorily mandated focus on the protection of Plans in ERISA section 408(a) and Code section 4975(c)(2). In situations where a crime raises particularly unique issues related to the substantial equivalence of the foreign Criminal Conviction, the Financial Institutions and Investment Professionals may seek the Department's views regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. Federal or State crime. However, any Financial Institution and Investment Professional submitting a request for review should do so promptly, and whenever possible, before a judgment is entered in a foreign conviction.

In the context of the PTE 84–14 Qualified Professional Asset Manager (QPAM) exemption, which has similar disqualification provisions, the Department is not aware of any potentially disqualifying foreign convictions having occurred in foreign nations that are intended to harm U.S.-based Financial Institutions and believes the likelihood of such an occurrence is rare. Further, the types of foreign crimes of which the Department is aware from recent PTE 84–14 QPAM individual exemption requests for relief from convictions have consistently related to the subject Financial Institution's management of financial transactions and/or culture of compliance. The underlying foreign crimes in those individual exemption requests have included: aiding and abetting tax fraud in France (PTE 2016–10, 81 FR 75147 (October 28, 2016) corrected at 88 FR 85931 (December 11, 2023), and PTE 2016–11, 81 FR 75150 (October 28, 2016) corrected at 89 FR 23612 (April 4, 2024)); attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023–13, 88 FR 26336 (April 28, 2023)); illicit solicitation and money laundering for the purposes of aiding tax evasion in France (PTE 2019–01, 84 FR 6163 (February 26, 2019)); and spot/futures-linked market price manipulation in South Korea (PTE 2015–15, 80 FR 53574 (September 4, 2015)).[57]

[56] PTE 84–14 contains a similar eligibility provision which has long been understood to include foreign convictions. Impacted parties have successfully sought OED guidance regarding this eligibility provision whenever individualized questions or concerns arise. *See, e.g.,* Prohibited Transaction Exemption (PTE) 2023–15, 88 FR 42953 (July 5, 2023); 2023–14, 88 FR 36337 (June 2, 2023); 2023–13, 88 FR 26336 (Apr. 28, 2023); 2023–02, 88 FR 4023 (Jan. 23, 2023); 2023–01, 88 FR 1418 (Jan. 10, 2023); 2022–01, 87 FR 23249 (Apr. 19, 2022); 2021–01, 86 FR 20410 (Apr. 19, 2021); 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE 2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004).

[57] On December 12, 2018, Korea's Seoul High Court for the 7th Criminal Division (the Seoul High Court) reversed the Korean Court's decision and declared the defendants not guilty; subsequently, Korean prosecutors appealed the Seoul High Court's decision to the Supreme Court of Korea., On

However, to address the concern expressed in the public comments that convictions have occurred in foreign nations that are intended to harm U.S.-based Financial Institutions, the Department has revised Section III(a)(1)(B) in the Final Amendment to exclude foreign convictions that occur within foreign jurisdictions that are included on the Department of Commerce's list of ''foreign adversaries.'' [58] Therefore, the Department will not consider foreign convictions that occur under the jurisdiction of the listed ''foreign adversaries'' as an ineligibility event. To reflect this change, the Department has added the phrase ''excluding convictions and imprisonment that occur within foreign countries that are included on the Department of Commerce's list of 'foreign adversaries' that is codified in 15 CFR 7.4'' to Section III(a)(1)(B).

Due Process

The Department received several comments regarding the conduct described in Section III(a)(2) as involving ''engaging in a systematic pattern or practice'' that can cause ineligibility and the ineligibility notice process. Generally, the comments argued that the Department had given itself too much authority to disqualify parties based on its own factual determinations without affording them sufficient due process protections and had also reserved for itself the sole authority to determine ineligibility without external review and without ensuring due process.

A few commenters claimed that the Proposed Amendment has a procedural due process flaw that renders it unconstitutional under Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment. These commenters assert that courts have found that the sanction of depriving an entity of its ability to engage in its business is analogous to a criminal penalty and that only after sufficient due process can an individual be barred from engaging in an otherwise legal practice. These commenters express doubts about the ability of an administrative agency, like the Department, to assert this power without substantial additional procedural protections. Other commenters contended that the proposed process would have resulted in disqualification without any judicial recourse and that, by leaving too much discretion to the Department, would create uncertainty and adversely affect the availability of Retirement Investors to get sound advice. Some commenters asserted that the Department's ineligibility process was insufficient because it did not provide a chance for a hearing before an impartial administrative judge or Article III judge, no express right of appeal, and no formal procedures to present evidence, and provided the Department the sole discretion to prohibit the Investment Professional or Financial Institution from relying on PTE 2020–02.

Some commenters also stated that while the six-month notice period provided in the Proposed Amendment may be adequate time to send a notice to Retirement Investors, it is insufficient time for a Financial Institution to determine an alternative means of complying with ERISA in order to continue to provide advice to Retirement Investors. These commenters requested that the Department modify the Proposed Amendment to provide for at least 12 months to wind-down advice or to find an alternative means of complying with ERISA following a finding of ineligibility. One commenter additionally claimed that it was problematic that the opportunity to be heard and to challenge a disqualification based upon a domestic conviction had been eliminated. Another commenter urged the Department to eliminate the opportunity to cure misconduct from the exemption. This commenter claimed that this provision undermines compliance and accountability by reassuring Investment Professionals and firms that, even if they engage in a ''systemic pattern or practice'' of violating the conditions of the exemption, or even provide materially misleading information to the Department related to their conduct under the exemption, they will have the opportunity to cure and continue to rely on the exemption. The commenter asserted that Investment Professionals and firms who have engaged in these types of conduct will not desist from such misconduct during the lengthy cure period and, as a result, this provision threatens to expose Retirement Investors to continued harm. The commenter also requested that the Department eliminate any provision allowing Investment Professionals who are found ineligible to rely on PTE 2020–02 to nevertheless rely on other prohibited transaction exemptions or seek an individual transaction exemption from the Department. The commenter claimed that these provisions conflict with a proper regulatory approach that should seek to protect the public and deter misconduct by foreclosing exemptive relief to those Investment Professionals and firms who are demonstrably unfit to enjoy it.

After consideration of the comments and to address commenters' due process concerns, the Department has determined to modify Section III(a)(2) of the ineligibility provisions. As amended, Section III(a)(2) of the Final Amendment describes disqualifying conduct, which will be subject to a one-year Transition Period, instead of the six-month period originally proposed. The changes to the disqualifying conduct provisions of the exemption will remove the discretion of the Department from the ineligibility determination process regarding the occurrence of the Prohibited Misconduct under Section III(a)(2) while adding protections to the exemption by conditioning disqualification on determinations in court proceedings. Ineligibility under amended Section III(a)(2) will result from a Financial Institution or an Investment Professional being found in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the SEC, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of

December 21, 2023, the Supreme Court of Korea affirmed the reversal of the Korean Conviction, and it dismissed all judicial proceedings against DSK.

[58] 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicolás Maduro (Maduro Regime). The Secretary of Commerce's determination is based on multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Section III(a)(1)(B) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general in connection with the conditions of this exemption.

In making this change to the Final Amendment, the Department has kept the same four triggers that it proposed in Section III(a)(2) of the Proposed Amendment. Rather than relying solely on the Department to determine whether a covered entity had engaged in one of these four triggers, however, the Department has determined that it is appropriate to limit eligibility to instances where a court has determined that a Financial Institution or Investment Professional has engaged in certain identified conduct. This underlying conduct is unchanged from the proposal. The Department agrees that relying on a determination from a court more appropriately balances the due process concerns raised by some comments. The Department also agrees with other commenters who emphasized that this identified conduct is a significant cause for concern, and that it is appropriate to condition ineligibility on a determination the Financial Institution or Investment Professional have engaged in this behavior.

Under this Final Amendment, ineligibility under Section III(a)(2) will operate in a similar manner to ineligibility for a criminal conviction defined in Section III(a)(1), as ineligibility will be immediate, subject to the timing and scope of the ineligibility provisions in Section III(b), including the One-Year Transition Period. Specifically, a Financial Institution or an Investment Professional will only become ineligible after it has been determined in a final judgment or a court-approved settlement that the conduct set forth in Section III(a)(2) has occurred. By removing the Opportunity to be Heard and Ineligibility Notice process and providing that ineligibility is triggered only after a conviction, a court's final judgment, or a court-approved settlement, the Financial Institution, an entity in the same Controlled Group as the Financial Institution, or an Investment Professional will have the due process that is afforded in formal legal proceedings. Additionally, having ineligibility occur only after a conviction, court's final judgment, or court-approved settlement provides those entities and persons confronting ineligibility with ample notice and time to prepare for their ineligibility and operations during the ensuing One-Year Transition Period discussed below. An ineligible Financial Institution or Investment Professional would again become eligible to rely on this exemption if there is a subsequent judgment reversing the conviction or final judgment.

Timing of Ineligibility and One-Year Transition Period

Several commenters expressed concern that the ineligibility provisions would apply retrospectively and urged the Department to confirm that ineligibility under the exemption would occur only on a prospective basis after finalization of the amended exemption. Additionally, some commenters asserted that the six-month period provided in the Proposed Amendment following ineligibility would be insufficient for Financial Institutions and Investment Professionals to prepare for any inability to provide retirement investment advice for a fee, determine an alternative means of complying with ERISA, and to prepare and submit an individual exemption application. One commenter argued that the change in the Proposed Amendment from a one-year transition period to six months was unduly punitive and contended that shortening the period would only mean that Retirement Investors would lose access to a trusted adviser sooner rather than later, generally for reasons entirely unrelated to the services provided to the Retirement Investor. Another commenter stated that providing a longer 12-month period would enable Financial Institutions to find alternative compliant means to help Retirement Investors and would enable Retirement Investors to continue to receive investment recommendations in their best interest.

One commenter claimed that the sudden real or impending loss of significant numbers of providers, or even a handful of the largest among them, as the result of their disqualification would cause chaos among plans, which would have no more than six months to find suitable replacements and impose harm on the Retirement Investors who had hired a disqualified firm. Another commenter argued that reducing the timing of ineligibility from one year to six months after a finding of ineligibility would make it more unlikely that the disqualified person could timely obtain an individual prohibited transaction exemption. The commenter stated that the result was especially significant because the Department was simultaneously proposing to eliminate alternative paths for exemptive relief for providing fiduciary investment advice under other class exemptions, making PTE 2020–02 the only available class exemption.

In response to these comments, the Department confirms that ineligibility under Section III will be prospective and only convictions, final judgments, or court-approved settlements occurring after the Applicability Date of the Final Amendment exemption will cause ineligibility. The proposed six-month period before ineligibility begins has been removed from the amended exemption and amended Section III(b) requires ineligibility for the Financial Institution or Investment Professional to begin immediately upon the date of conviction, final judgment, or court-approved settlement that occurs on or after the Applicability Date of the exemption. The Department has replaced the six-month lag period for beginning of ineligibility with a One-Year Transition Period in Section III(b)(2) to provide Financial Institutions and Investment Professionals ample time to prepare for loss of the exemptive relief of PTE 2020–02, determine alternative means for compliance, prepare and protect Retirement Investors, and apply to the Department for an individual exemption.

The Final Amendment provides that relief under the exemption during the One-Year Transition Period is available for a maximum period of one year after the Ineligibility Date if the Financial Institution and the Investment Professional provides notice to the Department at *IIAWR@dol.gov* within 30 days after ineligibility begins under Section III(b)(1). No relief will be available for any transactions (including past transactions) affected during the One-Year Transition Period unless the Financial Institution and the Investment

Professional complies with all the conditions of the exemption during such one-year period. The Department notes that it included the One-Year Transition Period in the Final Amendment to reduce the costs and burdens associated with the possibility of ineligibility, and to give Financial Institutions and Investment Professionals ample opportunity to apply for individual exemptions with appropriate protective conditions.

Financial Institutions and Investment Professionals may continue to rely on the exemption, as long as they comply with all of the exemption's conditions during that year. The One-Year Transition Period begins on the date of the conviction, the final judgment (regardless of whether that judgment remains under appeal), or court approved settlement. Financial Institutions or Investment Professionals that become ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption if one is available or may seek an individual prohibited transaction exemption from the Department. In circumstances where the Financial Institution or Investment Professional becomes ineligible, the Department believes the interests of Retirement Investors are best protected by the procedural protections, public record, and notice and comment process associated with individual exemption applications. Through the process of an individual exemption application, the Department has unique authority to efficiently gather evidence, consider the issues, and craft protective conditions that meet the statutory standard. If the Department concludes, consistent with the statutory standards set forth in ERISA section 408(a) and Code section 4975(c)(2), that an individual exemption is appropriate, Retirement Investors remain free to make their own independent determinations whether to engage in transactions with the Financial Institution or Investment Professional.

As provided under Section III(c), a Financial Institution or Investment Professional that is ineligible to rely on this exemption may request an individual prohibited transaction exemption from the Department. The Department encourages any Financial Institution or Investment Professional facing allegations that could result in ineligibility to begin the individual exemption application process as soon as possible. If the applicant becomes ineligible and the Department has not granted a final individual exemption, the Department will consider granting retroactive relief, consistent with its policy as set forth in 29 CFR 2570.35(d), which may require retroactive exemptions to include additional prospective conditions.

Form 5330

The Department received several comments arguing that the imposition of ineligibility under Section III(a)(2)(C) based on the Financial Institution's failure to timely report any non-exempt prohibited transaction on IRS Form 5330 filing requirements and paying the associated excise tax payment is unworkable. These commenters generally stated that the provision constituted overreach by the Department because it has no statutory or regulatory enforcement authority to base ineligibility on the IRS' Form 5330 filing requirements. Other commenters claimed that Congress did not intend to give this kind of authority to the Department when it gave the Department the authority to grant prohibited transaction exemptions. The commenters stated that the Department has no legitimate need for this information and if Congress intended to give the Department this authority, it would have done so directly. One commenter questioned whether it would be a violation of the exemption if a Financial Institution or Investment Professional did not file a Form 5330 based on advice of an accountant or attorney.

After considering these comments, the Department is retaining Section III(a)(2)(C)'s provisions for ineligibility based on the Financial Institution's or Investment Professional's engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B). The excise tax is the Congressionally imposed sanction for engaging in non-exempt prohibited transaction and provides a powerful incentive for compliance with the participant-protective terms of this exemption. Insisting on compliance with the statutory obligation to pay the excise tax provides an important safeguard for compliance with the tax obligation when violations occur and focuses the Institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction. Moreover, the failure to satisfy this condition calls into question the Financial Institution's or Investment Professional's commitment to regulatory compliance, as is critical to ensuring adherence to the conditions of this exemption including the Impartial Conduct Standards.

By including this provision in the Final Amendment, the Department does not claim authority to impose taxes under the Code, and leaves responsibility for collecting the excise tax and managing related filings to the IRS. The Department merely asserts its clear authority to grant conditional or unconditional exemptions under ERISA section 408(a) and Code section 4975(c). Since an obligation already exists to file the Form 5330 when parties engage in non-exempt prohibited transactions, the Department is merely conditioning relief in the exemption on their compliance with existing law. The condition provides important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

As discussed above, this Final Amendment provides that ineligibility under Section III(a)(2)(C) occurs following a court's finding or determination that Financial Institutions or Investment Professionals engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975. Triggering a Financial Institution or an Investment Professional's ineligibility only after a court has found the conduct occurred removes the Department from the determination process and provides the Financial Institution and Investment Professional with the due process protections inherent in the judicial process. Ineligibility grounded on failures under this condition call into question the Financial Institution or an Investment Professional's ability to provide advice for a fee that complies with the obligations of this exemption, including the Care Obligation and the Loyalty Obligation.

Alternative Exemptions

A Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a

condition of providing retroactive relief. A few commenters expressed concern that the Alternative Exemptions process was not sufficient. One commenter in particular expressed concern with the length and expense of seeking to obtain an individual exemption, claiming this would result in harm to Plans.

As discussed above, the violations that would trigger ineligibility are serious, call into question the parties' willingness or ability to comply with the obligations of the exemption, and have been determined in court supervised proceedings. In such circumstances, it is important that the parties seek individual relief from the Department if they would like to continue to have the benefit of an exemption that permits them to engage in conduct that would otherwise be illegal. As part of such an on the record process, they can present evidence and arguments on the scope of the compliance issues, the additional conditions necessary to safeguard Retirement Investor interests, and their ability and commitment to comply with protective conditions designed to ensure prudent advice and avoid the harmful impact of dangerous conflicts of interest.

Recordkeeping

Section IV provides that the Financial Institution must maintain for a period of six years following the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

While the Department proposed a broader recordkeeping condition in the Proposed Amendment, the Department has determined to maintain the recordkeeping condition as it is currently in PTE 2020–02. The Department is clarifying the language to confirm that records must be made available to authorized employees of the Internal Revenue Service as part of the Department of the Treasury. This clarification was in the preamble to the December 2020 grant of PTE 2020–02, and the Department is now adding it to the operative text.

Although the proposed broader recordkeeping condition is consistent with other exemptions, the Department understands commenters' concerns that broader access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Investment Professionals. Although the Final Amendment narrows the recordkeeping obligation, uses this narrower recordkeeping, the Department intends to monitor Financial Institutions' compliance with the exemption closely and may revisit this to expand the recordkeeping requirement as appropriate. Future amendments would be preceded by notice and an opportunity for public comment.

Executive Order 12866 and 13563 Statement

Executive Orders 12866 [59] and 13563 [60] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[61] entitled "Modernizing Regulatory Review," section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the amendment's costs, benefits, and transfers, and OMB has reviewed the rulemaking.

[59] 58 FR 51735 (Oct. 4, 1993).

[60] 76 FR 3821 (Jan. 21, 2011).

[61] 88 FR 21879 (Apr. 6, 2023).

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

ICRs are available at *RegInfo.gov* (*https://www.reginfo.gov/public/do/PRAMain*). Requests for copies of the ICR or additional information can be sent to the PRA addressee:

By mail	James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210.
By email	*ebsa.opr@dol.gov.*

The Department is amending PTE 2020–02 to revise the required disclosures to Retirement Investors receiving advice and to provide more guidance for Financial Institutions and Investment Professionals complying with the Impartial Conduct Standards and implementing the policies and procedures. This rulemaking is intended to align with other regulators' rules and standards of conduct. These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.[62]

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel would perform the tasks associated with the ICRs at an hourly wage rate of $65.99 for clerical personnel, $165.71 for a legal professional, and $228.00 for a financial advisor.[63]

[62] For a more detailed discussion of the marginal costs associated with the amendments to PTE 2020–02, refer to the Regulatory Impact Analysis (RIA) in the Notice of Final Rulemaking published elsewhere in today's edition of the **Federal Register**.

[63] Internal Department calculation based on 2023 labor cost data and adjusted for inflation to reflect

In the proposal, the Department received several comments on the Department's labor cost estimate, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.

For the purposes of this analysis, the Department assumes that the percent of Retirement Investors who are in employer-sponsored plans receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2002 and 2020 electronic disclosure safe harbors.[64] Accordingly, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically, and the remaining 3.9 percent will be sent by mail.[65]

One commenter suggested that this assumption overstates the use of electronic disclosures for IRA owners and that 60 percent would be more appropriate. The Department is not able to substantiate that suggestion but understands that IRA owners could be different than plan participants in regard to electronic delivery of documents. In response, the Department reevaluated its estimate. In this analysis, the Department assumes that approximately 71.8 percent of IRA owners will receive disclosures electronically, and the remaining 28.2 percent sent by mail.[66]

Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one Financial Institution to another) will be 100 percent electronic.

For disclosures sent by mail, the Department estimates that entities will incur a cost of $0.68 [67] for postage and $0.05 per page for material and printing costs.

1.2 Affected Entities

The Department expects the same 18,632 entities that are affected by the existing PTE 2020–02 will be affected by the amendments to the PTE. The number of entities by type and size are summarized in the table below.[68]

TABLE 1—AFFECTED ENTITIES BY TYPE AND SIZE

	Small	Large	Total
Broker-Dealer	431	1,489	1,920
Retail	302	1,018	1,319
Non-Retail	129	471	600
Registered Investment Adviser	2,989	13,409	16,398
SEC	228	7,806	8,035
Retail	85	4,859	4,944
Non-Retail	144	2,947	3,091
State	2,760	5,603	8,363
Retail	2,192	4,450	6,642
Non-Retail	568	1,153	1,721
Insurer	71	13	84
Robo-Adviser	10	190	200
Non-Bank Trustee	31	0	31
Total	3,531	15,101	18,632

Note: Values displayed are rounded to whole numbers; therefore, parts may not sum.

In addition, the amendments may affect banks and credit unions selling non-deposit investment products. There are 4,614 federally insured depository institutions in the United States, consisting of 4,049 commercial banks and 565 savings institutions.[69] Additionally, there are 4,645 federally insured credit unions.[70] In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.[71] Based on this estimate, the Department estimates that there are approximately 95 credit unions with private deposit insurance and 4,740 credit unions in total.[72]

In the proposal, the Department estimated that no banks or credit unions would be impacted by the amendments to PTE 2020–02. The Department requested comment on what other types

2024 wages. For a description of the Department's methodology for calculating wage rates, see *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[64] 67 FR 17263 (Apr. 9, 2002); 85 FR 31884 (May 27, 2020).

[65] The Department estimates that 58.3 percent of Retirement Investors receive electronic disclosures under the 2002 electronic disclosure safe harbor and that an additional 37.8 percent of Retirement Investors receive electronic disclosures under the 2020 electronic disclosure safe harbor. In total, the Department estimates 96.1 percent (58.3 percent + 37.8 percent) of Retirement Investors receive disclosures electronically.

[66] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration internet Use Survey which indicated that 85.5 percent of adults 65 and over use email on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) × (85.5% are internet fluent) = 71.8% are internet fluent and find electronic delivery acceptable.

[67] United States Postal Service, *First-Class Mail,* United States Postal Service (2023), *https://www.usps.com/ship/first-class-mail.htm.*

[68] For more information on how the number of each type and size of entity is estimated, refer to the Affected Entity section of the RIA in the Notice of Final Rulemaking published elsewhere in today's edition of the **Federal Register**.

[69] Federal Deposit Insurance Corporation, *Statistics at a Glance—as of September 30, 2023, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.*

[70] National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q3, https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q3.pdf.*

[71] GAO, *Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, But Rules Should be Clarified,* (March 29, 2017), *https://www.gao.gov/products/gao-17-259.*

[72] The total number of credit unions is calculated as: 4,645 federally insured credit unions/(100%–2% of credit unions that are privately insured) = 4,740 total credit unions. The number of private credit unions is estimated as: 4,740 total credit unions − 4,645 federally insured credit unions = 95 credit unions with private deposit insurance.

of activities banks or credit unions may engage in that would require reliance on PTE 2020–02. The Department did not receive any comments on this topic. However, the Department revisited a comment it received on PTE 2020–02 in 2020. This comment suggested that banks may be providing investment advice outside of networking arrangements, such as recommendations to roll over assets from a plan or IRA or advice to invest in deposit products.[73] The Department agrees that, if the recommendation meets the facts and circumstances test for individualized best interest advice, or the adviser acknowledges fiduciary status, such transactions will require banks to comply with PTE 2020–02. The Department notes that some banks may need to comply with PTE 2020–02. However, the Department believes that in such cases, the banks, or their separately identifiable department or division, would be registered investment advisers and already included in the estimate of affected entities.[74]

The Department recognizes that the rulemaking may change the number of Financial Institutions who choose to rely on PTE 2020–02. Consistent with its initial analysis in 2020, the proposal assumed that all entities eligible to rely on the existing PTE 2020–02 were relying on it. However, one commenter indicated that some entities eligible to use PTE 2020–02 had determined that their business practices did not trigger fiduciary status or modified their business practices to avoid relying upon it. The definitional changes in this rulemaking may now require these entities to now rely on PTE 2020–02. These entities will incur the full compliance costs of PTE 2020–02. In response to this concern, this analysis assumes that 30 percent of currently eligible entities would begin to rely on PTE 2020–02 in response to the rulemaking.[75]

1.3 Costs Associated With Disclosures for Investors, Production and Distribution

1.3.1 Costs Associated With Drafting and Modifying Relationship and Conflict of Interest Disclosure

Section II(b) currently requires Financial Institutions to provide certain disclosures to Retirement Investors before engaging in a transaction pursuant to the exemption. These disclosures include:

- a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries;
- a written description of the services to be provided and any material conflicts of interest of the Investment Professional and Financial Institution; and
- documentation of the Financial Institution and its Investment Professional's conclusions as to whether a rollover is in the Retirement Investor's best interest, before engaging in a rollover or offering recommendations on post-rollover investments.

The Department is finalizing the disclosure conditions from the proposal with some modifications. In the proposal, the Department proposed requiring a written statement informing the investor of their right to obtain a written description of the Financial Institution's written policies and procedures and information regarding costs, fees, and compensation. The Department received several comments regarding its estimate of the number of annual requests per firm, and the cost burdens associated with the Provision of Disclosures. After reviewing the comments and existing disclosures associated with the rulemaking, the Department has removed this requirement. The modifications to the disclosure requirements included in the final rulemaking are described below.

The following estimates reflect the ongoing paperwork burdens of the affected entities. Broker-dealers, registered investment advisers, and insurance companies that relied on the existing exemption were required to prepare certain disclosures under the existing PTE 2020–02. The estimates below reflect the paperwork burden these entities would incur to modify the current disclosures. This analysis does not include the transition costs already incurred for the existing PTE 2020–02 exemption.

Written Acknowledgement of Fiduciary Status

Of the 70 percent of the broker-dealers, registered investment advisers, and insurance companies assumed to be currently reliant on the existing exemption, the Department assumes that 10 percent will need to update their disclosures and that it will take a legal professional at a Financial Institution, on average, 10 minutes to update existing disclosures.

Robo-advisers, non-bank trustees, and newly reliant broker-dealers, registered investment advisers, and insurance companies will need to draft the acknowledgement. The Department estimates that it will take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in an estimated hour burden of 3,090 hours with an equivalent cost of $512,106.[76]

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Create Disclosure (Legal)	2,876	$476,531	0	$0

[73] Comment letter received from the American Bankers Association on the *Notification of Proposed Class Exemption: Improving Advice for Workers & Retirees,* (August 2020).

[74] For more information on the Department's consideration of banks and credit unions, refer to the Affected Entity section of the RIA in the Notice of Final Rulemaking published elsewhere in today's edition of the **Federal Register**.

[75] The Department is not aware of any source to determine the percent of firms currently eligible, but not using PTE 2020–02, but which now need to use the exemption. In response to the lack of information the Department selected a meaningful percent of firms that would be in this category, in order to provide an estimate of the cost to comply with PTE 2020–02. As a point of reference, each percentage point change to this assumption results in a 0.28 percentage point change in the estimated total cost of compliance for PTE 2020–02.

[76] The number of Financial Institutions needing to update their written acknowledgement is estimated as: (1,920 broker-dealers × 10% × (100% − 30%)) + (8,035 SEC-registered investment advisers × 10% × (100% − 30%)) + (8,363 State-registered investment advisers × 10% × (100% − 30%)) + (84 insurers × 10% × (100% − 30%)) = 1,288 Financial Institutions updating existing disclosures. The number of Financial Institutions needing to draft their written acknowledgement is estimated as: 200 robo-advisers + 31 non-bank trustees + (1,920 broker-dealers × 30%) + (8,035 SEC-registered investment advisers × 30%) + (8,363 State-registered investment advisers × 30%) + (84 insurers × 30%) = 5,751 Financial Institutions drafting new disclosures. The burden is estimated as: (1,288 Financial Institutions × (10 minutes ÷ 60 minutes hours)) + (5,751 Financial Institutions × (30 minutes ÷ 60 minutes hours) = 3,090 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 3,090 burden hours × $165.71 = $512,106. Note: Due to rounding, values may not sum.

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT—Continued

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Update Disclosure (Legal)	215	35,575	0	0
Total	3,090	512,106	0	0

Written Statement of the Care Obligation and Loyalty Obligation

As amended, PTE 2020–02 requires Financial Institutions to provide investors with a Written Statement of the Care Obligation and Loyalty Obligation disclosure. As presented in more detail in the preamble, this disclosure defines the Care Obligation and Loyalty Obligation as related to the investor's relationship with the Investment Professional.

Most registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects will satisfy these requirements.[77]

The Department expects that the written statement of Care Obligation and Loyalty Obligation will not take a significant amount of time to prepare and will be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment adviser, on average, will take 30 minutes to modify existing disclosures and that it will take insurers, robo-advisers, and non-bank trustees, on average, one hour to prepare the statement. This results in an hour burden of 9,474 hours with an equivalent cost of $1,569,868.[78]

TABLE 3—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE STATEMENT OF THE CARE AND LOYALTY OBLIGATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	9,474	$1,569,868	0	$0
Total	9,474	1,569,868	0	0

Relationship and Conflict of Interest Disclosure

The rulemaking also revises on the existing requirement for a written description of the services provided to also require a statement on whether the Retirement Investor would pay for such services, directly or indirectly, including through third-party payments. This disclosure is consistent with the disclosure requirements under Regulation Best Interest. Accordingly, the Department expects that retail broker-dealers will not incur a cost to satisfy this requirement.

For all other Financial Institutions which relied on the existing exemption (*i.e.* 70 percent of non-retail broker-dealers, registered investment advisers, and insurance companies), the Department assumes it will take a legal professional 30 minutes to update existing disclosures to include this information. Robo-advisers, non-bank trustees, and newly reliant non-retail broker-dealers, registered investment advisers, and insurance companies will need to draft the Relationship and Conflict of Interest disclosure, which the Department estimates will take a legal professional at a large institution five hours and a legal professional at a small institution one hour, on average, to prepare such a draft.[79] This results in an estimated hour burden of 28,738 hours with an equivalent cost of $4,762,239.[80]

[77] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

[78] The burden is estimated as: [(1,920 broker-dealers + 16,398 registered investment advisers) × (30 minutes ÷ 60 minutes hours)] + [(84 insurers + 200 robo-advisers + 31 non-bank trustees) × hour] = 9,474 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 9,474 burden hours × $165.71 = $1,569,868. Due to rounding values may not sum.

[79] The Department estimates that 10 robo-advisers and 31 non-bank trustees are considered small entities.

[80] The number of Financial Institutions needing to update their written description of services to comply with the Relationship and Conflict of Interest disclosure is estimated as: 84 insurers + ((16,398 registered investment advisers + 600 non-retail broker-dealers) × (100%-30%)) = 11,983 Financial Institutions updating existing disclosures. The number of Financial Institutions needing to draft their Relationship and Conflict of Interest disclosure is estimated as: (200 robo-advisers + 31 non-bank trustees) + ((600 non-retail broker-dealers + 16,398 registered investment advisers) × 30%) = 5,330 Financial Institutions drafting new disclosures. Of these entities, there are 976 small entities and 4,354 large entities. The hours burden is calculated as: ((11,563 entities updating × 30 minutes) + ((976small entities drafting × 1 hour) + (4,354 large entities drafting × 5 hours)) = 28,738 burden hours. The labor rate is applied as: 28,738 burden hours × $165.71 = $4,762,239. Due to rounding values may not sum.

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RELATIONSHIP AND CONFLICT OF INTEREST DISCLOSURE

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	28,738	$4,762,239	0	$0
Total	28,738	4,762,239	0	0

1.3.2 Costs Associated With the Provision of Relationship and Conflict of Interest Disclosures

As discussed above, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically and that approximately 72 percent of IRA owners will receive disclosures electronically.

The Department estimates that approximately 44.6 million Plan participants and 67.8 million IRA owners will receive disclosures annually, of which, 20.9 million (1.7 million Retirement Investors and 19.1 million IRA owners) will receive paper disclosures.[81] The Department estimates that preparing and sending each disclosure would take a clerical worker, on average, five minutes, resulting in an hour burden of 1,737,781 hours with an equivalent cost of $114,676,201.[82]

TABLE 5—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED PREPARING AND SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	1,737,781	$114,676,201	1,737,781	$114,676,201
Total	1,737,781	114,676,201	1,737,781	114,676,201

The Department assumes that the disclosures would require four pages in total, resulting in a material and postage cost of $18,350,973.[83]

TABLE 6—MATERIAL AND POSTAGE COST ASSOCIATED WITH SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material Cost	4	$18,350,973	4	$18,350,973
Total	4	18,350,973	4	18,350,973

1.3.3 Costs Associated With the Rollover Disclosures

The proposal proposed requiring disclosures for all rollovers, including those from plans to IRAs, from IRAs to other IRAs and from plans to plans. In the Final Amendment, the rollover disclosure will only be required for rollovers from a Plan that is covered by Title I, or recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I. According to Cerulli Associates, in 2022, almost 4.5 million defined contribution (DC) plan accounts with $779 billion in assets were rolled over to an IRA.[84]

As a best practice, the SEC already encourages firms to record the basis for significant investment decisions, such as rollovers, although doing so is not required under Regulation Best Interest or the Advisers Act. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest's effective date of June 30, 2020. Just over half (52 percent) of the broker-dealers surveyed indicated they will require their financial advisers to provide the rationale documentation for rollover recommendations.[85]

The Department estimates that documenting each rollover

[81] This is estimated as (44,593,228 × 3.9%) + (67,781,000 × 28.2%) = 20,853,378 paper disclosures. Due to rounding values may not sum.

[82] This burden is estimated as: [(20,853,378 disclosures × (5 minutes ÷ 60 minutes hours)] = 1,737,781 hours. The labor cost is estimated as: [(20,853,378 disclosures × (5 minutes ÷ 60 minutes hours)] × $65.99 = $114,676,201. Due to rounding values may not sum.

[83] The material and postage cost is estimated as: (20,853,378 disclosures × 4 pages × $0.05) + (20,853,378 disclosures × $0.68 postage) = $18,350,973. Due to rounding values may not sum.

[84] According to Cerulli, in 2022, there were 4,485,059 DC plan-to-IRA rollovers and 707,104 DC plan-to-DC plan rollovers. (*See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.02. The Cerulli Report.) These account estimates may include health savings accounts, Archer medical savings accounts, or Coverdell education savings accounts.

[85] Deloitte, *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package,* Deloitte, (Mar. 6, 2020).

[86] The burden is estimated as: (4,485,059 rollovers × 48% × 49% × (30 minutes ÷ 60 minutes

recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover documentations and five minutes for financial advisers whose firms already require them to do so. This results in a labor cost estimate of $142.0 million.[86]

TABLE 7—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ROLLOVER DOCUMENTATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Adviser	622,676	$141,970,058	622,676	$141,970,058
Total	622,676	141,970,058	622,676	141,970,058

These rollover disclosures are expected to be two pages in length and accompany other documentation associated with the transactions at no additional postage cost. The materials cost is estimated as $0.05 per page, totaling $8,571 annually.[87]

TABLE 8—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE ROLLOVER DISCLOSURE

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material Cost	2	$8,571	2	$8,571
Total	2	8,571	2	8,571

1.4 Costs Associated With Annual Report of Retrospective Review

PTE 2020–02 currently requires Financial Institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of, and achieve compliance with, the conditions of this exemption, the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The retrospective review must include a discussion of any self-corrections of violations.

Many of the entities affected by PTE 2020–02 likely already have retrospective review requirements. Broker-dealers are subject to similar annual review and certification requirements under FINRA Rule 3110,[88] FINRA Rule 3120,[89] and FINRA Rule 3130;[90] SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)–7; and insurance companies in many states are already subject to state insurance law based on the NAIC Model Regulation.[91] Accordingly, in this analysis, the Department assumes that these entities will incur minimal costs to meet this requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[92] The Department assumes that State-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent, or 1,312 investment advisers advising retirement plans will incur costs associated with producing a retrospective review report.

The Department assumes that only 0.8 percent of registered investment advisers and ten percent of all other Financial Institutions will incur the total costs of producing the retrospective review report. This is estimated to take a legal professional five hours for small firms and 10 hours for large firms. This results in an annual hour burden of 3,156 hours and an equivalent cost burden of $522,907.[93]

Financial Institutions that already produce retrospective review reports voluntarily or in accordance with other regulators' rules likely will spend additional time to fully comply with this exemption condition such as revising their current retrospective review reports. This is estimated to take a financial professional one hour for small firms and two hours for large firms. This results in an annual hour

hours)) + (4,485,059 rollovers × 52% × 49% × (5 minutes ÷ 60 minutes hours)) = 622,676 hours. A labor rate of $228.00 is used for a personal financial adviser. The labor rate is applied in the following calculation: 622,676 burden hours × $228.00 = $141,970,058. Due to rounding values may not sum.

[87] The material and postage cost is estimated as: (4,485,059 rollovers × 49% involving advice × 3.9% disclosures mailed × $0.05 per page × 2 pages = $8,571. Note, the total values may not equal the sum of the parts due to rounding.

[88] *Rule 3110. Supervision,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3110.*

[89] *Rule 3120. Supervisory Control System,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3120.*

[90] *Rule 3130. Annual Certification of Compliance and Supervisory Processes,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3130.*

[91] NAIC Model Regulation, Section 6.C.(2)(i) (The same requirement is found in the NAIC Suitability in Annuity Transactions Model Regulation (2010), Section 6.F.(1)(f).)

[92] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[93] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 10% × 5 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee) × 10% × 10 hours] = 3,156 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 10% × 5 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee) × 10% × 10 hours]} × $165.71 = $522,907.

burden of 33,103 hours and an equivalent cost burden of $5,485,436.[94]

In addition to conducting the audit and producing a report, Financial Institutions also will need to review the report and certify the exemption. This is estimated to take the certifying officer two hours for small firms and four hours for large firms. This results in an hour burden of 67,467 and an equivalent cost burden of $13,375,426.[95]

TABLE 10—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	36,258	$6,008,343	36,258	$6,008,343
Senior Executive Staff	67,467	13,375,426	67,467	13,375,426
Total	103,726	19,383,769	103,726	19,383,769

1.5 Costs Associated With Written Policies and Procedures

Under the original exemption, Financial Institutions were already required to maintain their policies and procedures. Financial Institutions who are not covered under the existing exemption may need to develop policies and procedures. The Department estimates that, for entities newly reliant upon PTE 2020–02 due to this rulemaking, this requirement will take legal professionals 40 hours at a large firm and 20 hours at a small firm in the first year.[96] Retail broker-dealers and all registered investment advisors should have policies and procedures in place to satisfy other regulators that can be amended to comply with this rulemaking. The Department estimates it will take 10 hours for small firms and 20 hours for large firms to amend their policies and procedures. The Department estimates the requirement to result in an hour burden of 111,864 with an equivalent cost of $18,536,977 in the first year.[97]

TABLE 11—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH DEVELOPING POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	111,864	$18,536,977	0	$0
Total	111,864	18,536,977	0	0

[94] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 90% × 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) × 90% × 4 hours] = 33,103 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 90% × 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) × 90% × 4 hours]} × $165.71 = $5,485,436.

[95] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 2 hours] + [(1,488 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) × 4 hours] = 67,467 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) × 4 hours]} × $198.25 = $13,375,426.

[96] The Department estimates that 3,531 entities, consisting of 302 retail broker-dealers, 129 non-Retail broker-dealers, 85 SEC-registered Retail registered investment advisers, 144 SEC-registered non-Retail registered investment advisers, 2,192 state registered Retail registered investment advisers, 568 state registered Non-Retail registered investment advisers, 71 insurers and insurance agents, 10 robo-advisers, and 31 non-bank trustees, are considered small entities.

[97] The burden is estimated as follows: [(302 small retail broker-dealers + 85 small SEC-registered retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small state registered retail registered investment advisers + 568 small state registered non-retail registered investment advisers) × 30% newly reliant on the PTE × 10 hours] + {[(1,018 large retail broker-dealers + 129 small non-retail broker-dealers + 4,859 large SEC-registered retail registered investment advisers + 2,947 large SEC-registered non-retail registered investment advisers + 4,450 large state registered retail registered investment advisers + 1,153 large state registered non-retail registered investment advisers + 71 insurers) × 30% newly reliant on the PTE] + (10 small robo-advisers + 30 small non-bank trustees) × 20 hours} + {[(471 large non-retail broker-dealers + 13 large insurers) × 30% newly reliant on the PTE] + 190 large robo-advisers + 1 large non-bank trustee) × 40 hours]} = 111,864 hours. The labor rate is applied in the following calculation: 111,864 burden hours × $165.71 = $18,536,977. Note, the total values may not equal the sum of the parts due to rounding.

The Final Amendment requires Financial Institutions to review policies and procedures at least annually and to update them as needed to ensure they remain prudently designed, effective, and current. This includes a requirement to update and modify the policies and procedures, as appropriate, after considering the findings in the retrospective review report. For entities currently covered by PTE 2020–02, the Department estimates that it will take a legal professional an additional five hours for all entities covered under the existing and amended exemption. The Department expects that in the first year, only entities already reliant on PTE 2020–02 will satisfy this requirement but all entities will be required to satisfy it in subsequent years. The Department estimates this will result an estimated first year hour burden of 65,559 with an equivalent cost of $10,863,864. In subsequent years, this will result in an annual hour burden of 93,161 hours with an equivalent cost of $15,437,780 in subsequent years.[98]

TABLE 12—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH REVIEWING AND UPDATING POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	65,559	$10,863,864	93,161	$15,437,780
Total	65,559	10,863,864	93,161	15,437,780

The amendments will require Financial Institutions to provide their complete policies and procedures to the Department upon request. Based on the number of cases in the past and current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department estimates that it will take a clerical worker 15 minutes to prepare and send their complete policies and procedures to the Department resulting in an hourly burden of approximately 41 hours in the first year, with an equivalent cost of $2,722.[99] In subsequent years, the Department estimates that the requirement would result in an hour burden of approximately 13 hours with an equivalent cost of $825.[100] The Department assumes Financial Institutions would send the documents electronically and thus would not incur costs for postage or materials.

TABLE 13—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVIDING POLICIES AND PROCEDURES TO THE DEPARTMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	41	$2,722	13	$825
Total	41	2,722	13	825

1.6 Overall Summary

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Fiduciary Transaction Exemption.

OMB Control Number: 1210–0163.

Affected Public: Business or other for-profit institution.

Estimated Number of Respondents: 18,632.

Estimated Number of Annual Responses: 114,609,171.

Frequency of Response: Initially, Annually, and when engaging in exempted transaction.

Estimated Total Annual Burden Hours: 2,599,221.

Estimated Total Annual Burden Cost: $18,359,543.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[101] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b)

[98] The burden is estimated as follows: The first-year cost of updating policies and procedures for plans that currently have policies & procedures: [(302 small Retail broker-dealers + 85 small SEC-registered Retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small state registered retail registered investment advisers + 568 small state registered non-retail registered investment advisers) × 30% newly reliant on the PTE ×× 10 hours] + {[(1,018 large Retail broker-dealers + 129 small Non-Retail broker-dealers + 4,859 large SEC-registered Retail registered investment advisers + 2,947 large SEC-registered Non-Retail registered investment advisers + 4,450 large state registered Retail registered investment advisers + 1,153 large state registered non-retail registered investment advisers + 71 insurers) × 30% newly reliant on the PTE] + (10 small robo-adviser) × 20 hours} + {[(471 large Non-Retail broker-dealers + 13 large insurers) × 70% already reliant on the PTE] + 190 large robo-advisers) = 14,143 entities × 5 hours = 65,559 hours. The labor rate is applied in the following calculation: 65,559 hours × $165.71 = $10,863,864. In subsequent years the cost of updating is calculated as: (All 18,632 affected entities × 5 hours) = 93,161 burden hours. The labor rate is applied in the following calculation: 93,161 burden hours × $165.71 burden hours = $15,437,780. Note, the total values may not equal the sum of the parts due to rounding.

[99] The burden is estimated as: (165 × (15 minutes ÷ 60 minutes hours)) = 41 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (165 × (15 minutes ÷ 60 minutes hours)) × $65.99 = $2,722. Note, the total values may not equal the sum of the parts due to rounding.

[100] The burden is estimated as: (50 × (15 minutes ÷ 60 minutes hours)) = 13 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (50 × (15 minutes ÷ 60 minutes hours)) × $65.99 = $825. Note, the total values may not equal the sum of the parts due to rounding.

[101] 5 U.S.C. 601 *et seq.*

of the Administrative Procedure Act or any other law.[102] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [103] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector.

For purposes of the Unfunded Mandates Reform Act, this exemption is expected to have an impact on the private sector. For the purposes of the exemption the regulatory impact analysis published with the final rule shall meet the UMRA obligations.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final Regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and in the preamble to PTE 84–24, there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that ''ERISA leaves room for complementary or dual federal or state regulation'' of insurance.[104] The Department designed the final Regulation and exemptions to complement State insurance laws.[105]

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this class exemption has federalism implications because it has no 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.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and/or Code section 4975(c)(2) does not relieve a fiduciary, or other Party in Interest with respect to a Plan or IRA, from certain other provisions of ERISA and the Code, including but not limited to any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge their duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirements of Code section 401(a), including that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries;

(2) In accordance with ERISA section 408(a) and Code section 4975(c)(2), and based on the entire record, the Department finds that this exemption is administratively feasible, in the interests of Plans, their participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners;

(3) The Final Amendment is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The Final Amendment is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is granting the following amendment on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[106]

Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees

Section I—Transactions

(a) In General

ERISA Title I (Title I) and the Internal Revenue Code (the Code) prohibit

[102] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

[103] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

[104] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[105] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to ''impair'' a State law is to hinder its operation or ''frustrate [a] goal of that law.'' *Humana Inc. V. Forsyth,* 525 U.S. 299, 308 (1999).

[106] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, subpart B (89 FR 4662 (January 24, 2024)).

fiduciaries, as defined therein, that provide investment advice to Plans and individual retirement accounts (IRAs) from receiving compensation that varies based on their investment advice and compensation that is paid from third parties. Title I and the Code also prohibit fiduciaries from engaging in purchases and sales with Plans or IRAs on behalf of their own accounts (principal transactions). This exemption permits Financial Institutions and Investment Professionals who comply with the exemption's conditions to receive otherwise prohibited compensation when providing fiduciary investment advice to Retirement Investors and engaging in principal transactions with Retirement Investors, as described below.

Specifically, this exemption provides relief from the prohibitions of ERISA section 406(a)(1)(A), (D), and 406(b), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E), and (F), to Financial Institutions and Investment Professionals that provide fiduciary investment advice and engage in the conditions described in Section I, in accordance with the conditions set forth in Section II and are eligible pursuant to Section III, subject to the definitional terms and recordkeeping requirements in Sections IV and V. This exemption is available to allow Financial Institutions and Investment Professionals to receive reasonable compensation for recommending a broad range of investment products to Retirement Investors, including insurance and annuity products.

(b) Covered Transactions

This exemption permits Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, to engage in the following transactions, including as part of a rollover, as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, of reasonable compensation; and

(2) The purchase or sale of an investment product to or from a Retirement Investor, and the receipt of payment, including a mark-up or mark-down.

(c) Exclusions

This exemption is not available if:

(1) The Plan is covered by Title I of ERISA and the Investment Professional, Financial Institution, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided, however, that a named fiduciary or administrator or their Affiliate, including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3–44, may rely on the exemption if it is selected to provide investment advice by a fiduciary who is Independent of the Financial Institution, Investment Professional, and their Affiliates; or

(2) The transaction involves the Investment Professional or Financial Institution acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii)) and Code section 4975(e)(3)(B) and regulations thereunder.

Section II—Investment Advice Arrangement

Section II(a) requires Investment Professionals and Financial Institutions to comply with Impartial Conduct Standards, including a Care Obligation and Loyalty Obligation, when providing fiduciary investment advice to Retirement Investors. Section II(b) requires Financial Institutions to acknowledge fiduciary status under Title I and/or the Code, and provide Retirement Investors with a written statement of the Care Obligation and Loyalty Obligation, a written description of the services they will provide and all material facts relating to Conflicts of Interest that are associated with their recommendations, and a rollover disclosure (if applicable). Section II(c) requires Financial Institutions to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section II(d) requires the Financial Institution to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section II(e) allows Financial Institutions to correct certain violations of the exemption conditions and continue to rely on the exemption for relief.

(a) Impartial Conduct Standards

The Financial Institution and Investment Professional must comply with the following ''Impartial Conduct Standards'':

(1) Investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. As defined in Section V(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section V(h), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to their own. For example, in choosing between two commission-based investments offered and available to the Retirement Investor on a Financial Institution's product menu, it would be impermissible for the Investment Professional to recommend the investment that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution. Similarly, in recommending whether a Retirement Investor should pursue a particular investment strategy through a brokerage or advisory account, the Investment Professional must base the recommendation on the Retirement Investor's financial interests, rather than any competing financial interests of the Investment Professional. For example, an Investment Professional generally could not recommend that the Retirement Investor enter into an arrangement requiring the Retirement Investor to pay an ongoing advisory fee to the Investment Professional, if the Retirement Investor's interests were better served by the payment of a one-time commission to buy and hold a long-term investment. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the Investment Professional's competing financial interests.

(2)(A) The compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their services must not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (B) as required by the Federal securities laws,

the Financial Institution and Investment Professional must seek to obtain the best execution of the investment transaction reasonably available under the circumstances; and

(3) The Financial Institution's and its Investment Professionals' statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time statements are made. For purposes of this paragraph, the term ''materially misleading'' includes omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.

(b) Disclosure

At or before the time a covered transaction occurs, as described in Section I(b) of this exemption, the Financial Institution must provide, in writing, the disclosures set forth in paragraphs (1)–(4) below to the Retirement Investor. For purposes of the disclosures required by Section II(b)(1)–(4), the Financial Institution or Investment Professional is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Financial Institution or Investment Professional becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

(1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) A written statement of the Care Obligation and Loyalty Obligation, described in Section II(a), that is owed by the Investment Professional and Financial Institution to the Retirement Investor;

(3) All material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(A) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts; and

(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to them; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

(5) *Rollover disclosure.* Before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA, or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA, the Financial Institution and Investment Professional must consider and document the bases for their recommendation to engage in the rollover, and must provide that documentation to the Retirement Investor. Relevant factors to consider must include, to the extent applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the fees and expenses associated with the Plan and the recommended investment or account;

(C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and

(D) the different levels of services and investments available under the Plan and the recommended investment or account.

(6) The Financial Institution will not fail to satisfy the conditions in Section II(b) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, provided that the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

(7) Investment Professionals and Financial Institutions may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate.

(8) The Financial Institution is not required to disclose information pursuant to this Section II(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures

(1) The Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions.

(2) The Financial Institution's policies and procedures must mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Financial Institution or Investment Professional to place their interests, or those of any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

(3) Financial Institutions must provide their complete policies and procedures to the Department upon request within 30 days of request.

(d) Retrospective Review

(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that the policies and procedures remain prudently designed, effective, and compliant with Section II(c).

(2) The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Financial Institution.

(3) The Senior Executive Officer must certify, annually, that:

(A) The Senior Executive Officer has reviewed the retrospective review report;

(B) The Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975(a) or (b);

(C) The Financial Institution has written policies and procedures that meet the requirements set forth in Section II(c); and

(D) The Financial Institution has a prudent process to modify such policies and procedures as required by Section II(d)(1).

(4) The review, report, and certification must be completed no later than six months after the end of the period covered by the review.

(5) The Financial Institution must retain the report, certification, and

supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 30 days of request to the extent permitted by law (including 12 U.S.C. 484 regarding limitations on visitorial powers for national banks).

(e) Self-Correction

A non-exempt prohibited transaction will not occur due to a violation of this exemption's conditions with respect to a covered transaction, provided:

(1) Either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses;

(2) The Financial Institution corrects the violation;

(3) The correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and

(4) The Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2).

(f) ERISA Section 3(38) Investment Managers

To the extent a Financial Institution or Investment Professional provides fiduciary investment advice to a Retirement Investor as part of its response to a request for proposal to provide investment management services under section 3(38) of ERISA, and is subsequently hired to act as investment manager to the Retirement Investor, it may receive compensation as a result of the advice under this exemption, provided that it complies with the Impartial Conduct Standards as set forth in Section II(a). This paragraph does not relieve the Investment Manager, however, from its obligation to refrain from engaging in any non-exempt prohibited transactions in the ongoing performance of its activities as an Investment Manager.

Section III—Eligibility

(a) General

Subject to the timing and scope of ineligibility provisions set forth in subsection (b), an Investment Professional or Financial Institution will become ineligible to rely on this exemption with respect to any covered transaction, if on or after September 23, 2024, the Financial Institution, an entity in the same Controlled Group as the Financial Institution, or an Investment Professional has been:

(1) Convicted by either:

(A) a U.S. Federal or State court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of ''foreign adversaries'' that is codified in 15 CFR 7.4 as amended); or

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

(A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(C) engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B); or

(D) provided materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general in connection with the conditions of this exemption.

(3) Controlled Group. An entity is in the same Controlled Group as a Financial Institution if the entity (including any predecessor or successor to the entity) would be considered to be in the same ''controlled group of corporations'' as the Financial Institution or ''under common control'' with the Financial Institution as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder),

(b) Timing and Scope of Ineligibility

(1) Ineligibility shall begin upon either:

(A) the date of a conviction, which shall be the date of conviction by a U.S. Federal or State trial court described in Section III(a)(1) (or the date of the conviction of any trial court in a foreign jurisdiction that is the equivalent of a U.S. Federal or State trial court) that occurs on or after September 23, 2024, regardless of whether that conviction remains under appeal; or

(B) the date of a final judgment (regardless of whether the judgment remains under appeal) or a court-approved settlement described in Section III(a)(2) that occurs on or after September 23, 2024.

(2) One-Year Transition Period. A Financial Institution or Investment Professional that becomes ineligible under Section III(a) may continue to rely on this exemption for up to 12 months after its ineligibility begins as determined under subsection (1) if the Financial Institution or Investment Professional provides notice to the Department at *IIAWR@dol.gov* within 30 days after ineligibility begins.

(3) A person will become eligible to rely on this exemption again only upon the earliest occurrence of the following:

(A) the date of a subsequent judgment reversing such person's conviction or other court decision described in Section III(a);

(B) 10 years after the person became ineligible under Section III(b)(1) or, if later, 10 years after the person was released from imprisonment as a result

of a crime described in Section III(a)(1); or

(C) the effective date of an individual prohibited transaction exemption (under which the Department may impose additional conditions) permitting the person to continue to rely on this exemption.

(c) Alternative Exemptions

A Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief.

Section IV—Recordkeeping

The Financial Institution must maintain for a period of six years following the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

Section V—Definitions

(a) ''Affiliate'' means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Investment Professional or Financial Institution. (For this purpose, ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the Investment Professional or Financial Institution; and

(3) Any corporation or partnership of which the Investment Professional or Financial Institution is an officer, director, or partner.

(b) Advice meets the ''Care Obligation'' if, with respect to the Retirement Investor, such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

(c) A ''Conflict of Interest'' is an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not distinterested.

(d) ''Financial Institution'' means an entity that is not suspended, barred or otherwise prohibited (including under Section III of this exemption) from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that employs the Investment Professional or otherwise retains such individual as an independent contractor, agent or registered representative, and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)));

(3) An insurance company qualified to do business under the laws of a state, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding five years, and (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority;

(4) A broker or dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);

(5) A non-bank trustee or non-bank custodian approved under Treasury Regulation 26 CFR 1.408–2(e) (as amended), but only to the extent they are serving in these capacities with respect to Health Savings Accounts (HSAs), or

(6) An entity that is described in the definition of Financial Institution in an individual exemption granted by the Department after the date of this exemption that provides relief for the receipt of compensation in connection with investment advice provided by an investment advice fiduciary under the same conditions as this class exemption.

(e) For purposes of subsection I(c)(1), a fiduciary is ''Independent'' of the Financial Institution and Investment Professional if:

(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;

(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by this exemption; and

(3) the fiduciary does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for its own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year.

(f) ''Individual Retirement Account'' or ''IRA'' means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(g) ''Investment Professional'' means an individual who:

(1) Is a fiduciary of a Plan or an IRA by reason of the provision of investment advice defined in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the assets of the Plan or IRA involved in the recommended transaction;

(2) Is an employee, independent contractor, agent, or representative of a Financial Institution; and

(3) Satisfies the Federal and State regulatory and licensing requirements of insurance, banking, and securities laws (including self-regulatory organizations) with respect to the covered transaction, as applicable, and is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization and by the Department under Section III of this exemption).

(h) Advice meets the ''Loyalty Obligation'' if, with respect to the Retirement Investor, such advice does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Investment Professional, Financial Institution or

any Affiliate, Related Entity, or other party.

(i) ''Plan'' means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(j) A ''Pooled Plan Provider'' or ''PPP'' means a pooled plan provider described in ERISA section 3(44).

(k) A ''Related Entity'' means any party that is not an Affiliate and (i) has an interest in an Investment Professional or Financial Institution that may affect the exercise of the fiduciary's best judgment as a fiduciary, or (ii) in which the Investment Professional or Financial Institution has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary.

(l) ''Retirement Investor'' means a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

(m) A ''Senior Executive Officer'' is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution.

Section VI—Phase-In Period

During the one-year period beginning September 23, 2024, Financial Institutions and Investment Professionals may receive compensation under Section I of this exemption if the Financial Institution and Investment Professional comply with the Impartial Conduct Standards set forth in Section II(a) and the fiduciary acknowledgment requirement set forth in Section II(b)(1).

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

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Part VI

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2550

Amendment to Prohibited Transaction Exemption 84–24; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12060]

ZRIN 1210–ZA33

Amendment to Prohibited Transaction Exemption 84–24

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Amendment to Prohibited Transaction Exemption 84–24.

SUMMARY: This document contains a notice of amendment to Prohibited Transaction Exemption (PTE) 84–24, an exemption from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendment affects participants and beneficiaries of plans, individual retirement account (IRA) owners, and certain fiduciaries of plans and IRAs.

DATES: The amendment is effective September 23, 2024.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, (202) 693–8540 (not a toll-free number), Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

SUPPLEMENTARY INFORMATION:

Background

The Employee Retirement Income Security Act of 1974 (ERISA) provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent they render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so. Title I of the ERISA (referred to herein as Title I), which generally applies to employer-sponsored plans, includes this provision in ERISA section 3(21)(A)(ii).[1] ERISA's Title II (referred to herein as the Code), includes a parallel provision in Code section 4975(e)(3)(B), which defines a fiduciary of a tax-qualified plan, including individual retirement accounts (IRAs).

In addition to fiduciary obligations, ERISA and the Code ''categorically bar[]'' plan fiduciaries from engaging in transactions deemed ''likely to injure the pension plan.''[2] These prohibitions broadly forbid a fiduciary from ''deal[ing] with the assets of the plan in his own interest or for his own account,'' and ''receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.''[3] Congress also gave the Department of Labor (the Department) authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[4]

On October 31, 2023, the Department released the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary, along with proposed amendments to PTE 2020–02 and other administrative prohibited transaction exemptions available to investment advice fiduciaries.[5] The proposed rule was designed to ensure that the protections established by Titles I and II of ERISA would uniformly apply to all advice that Retirement Investors (receive concerning investment of their retirement assets in a way that ensures that Retirement Investors' reasonable expectations are honored when they receive advice from financial professionals who hold themselves out as trusted advice providers (Retirement Investors are defined to include Plans, Plan participants and beneficiaries, IRAs, IRA owners and beneficiaries, Plan fiduciaries within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciaries within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA).

At the same time, the Department released the proposed amendment to PTE 84–24 (the Proposed Amendment) and invited all interested persons to submit written comments.[6] The Department also proposed amendments to PTEs 75–1, 77–4, 80–83, 83–1, 86–128, and 2020–02.

The Department received written comments on the Proposed Amendment, and on December 12 and 13, 2023, held a virtual public hearing at which witnesses provided commentary on the Proposed Amendment. After carefully considering the comments it received and the testimony presented at the hearing, including representations Insurers have made to the Department regarding impediments they have confronted in complying with the current conditions of PTE 2020–02 when distributing annuities through independent agents (Independent Producers), the Department is granting this amendment to PTE 84–24 as provided herein (the ''Final Amendment'') on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with its exemption procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[7] Elsewhere in this edition of the **Federal Register**, the Department is finalizing (1) its proposed rule defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan for purposes of the definition of a ''fiduciary'' in ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (the ''Regulation''), and (2) amendments to several existing prohibited transaction exemptions (PTEs)—namely PTEs 75–1, 77–4, 80–83, 83–1, 86–128, and 2020–02—that apply to the provision of fiduciary investment advice.

PTE 2020–02

As described elsewhere in this edition of the **Federal Register**, the Department is also adopting amendments to PTE 2020–02. That exemption remains

[1] Section 3(21)(A)(ii) of the Act is codified at 29 U.S.C. 1002(3)(21)(A)(ii). As noted above, Title I of the Act was codified in Title 29 of the U.S. Code. As a matter of practice, this preamble refers to the codified provisions in Title I by reference to the sections of ERISA, as amended, and not by its numbering in the U.S. Code.

[2] *Harris Trust Sav. Bank* v. *Salomon Smith Barney Inc.,* 530 U.S. 238, 241–42 (2000) (citation and quotation marks omitted).

[3] ERISA section 406(b)(1), (3), 29 U.S.C. 1106(b)(1), (3).

[4] ERISA section 408(a), 29 U.S.C. 1108(a). Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984, Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984), Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975. 5 U.S.C. App. (2018).

[5] The proposals were released on the Department's website on October 31, 2023. They were published in the **Federal Register** on November 3, 2023, at 88 FR 75890, 88 FR 75979, 88 FR 76004, and 88 FR 76032.

[6] The Proposed Amendment was released on October 31, 2023, and was published in the **Federal Register** on November 3, 2023. 88 FR 75979.

[7] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, subpart B (89 FR 4662 (January 24, 2024)).

generally available for all investment advice, including recommendations of insurance products. The Department maintains its long-held position that insurance companies can effectively exercise fiduciary oversight with respect to Independent Producers' recommendations of the insurance company's own products under PTE 2020–02. PTE 2020–02 offers a broad, flexible, and principles-based approach that applies across different financial sectors and business models and provides relief for multiple categories of financial institutions and investment professionals, including insurance companies selling their products through Independent Producers. As fully discussed below, however, the Department is amending PTE 84–24 to provide a specially tailored, alternative exemption allowing an Independent Producer to receive commissions from an insurance company with respect to annuity recommendations of the insurance company's products.

Comments and Overview of the Amendment to PTE 84–24

Overview of Amended Exemption

The Department is amending PTE 84–24 to exclude sales and compensation received as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder from the existing relief provided in Section II, which the Department has redesignated as Section II(a). The amendment adds new Section II(b), which provides relief from the restrictions of ERISA sections 406(a)(1)(A), (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(A), (D), (E) and (F) for Independent Producers that provide fiduciary investment advice and engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and

(2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of ''security'' under Federal securities laws.

The exemption is subject to certain conditions. These conditions are similar to the conditions contained in amended PTE 2020–02, but the Department has tailored the conditions to protect Retirement Investors from the specific conflicts that can arise when Independent Producers that are compensated through commissions and other compensation provide investment advice to Retirement Investors regarding the purchase of an annuity. The amended exemption includes an eligibility provision in Section VIII for investment advice transactions and a new recordkeeping condition in Section IX that is similar to the recordkeeping provision in PTE 2020–02.

The Department's Role Related to the Sale of Insurance Products to Retirement Investors

Several commenters raised concerns with the Department's approach to amending PTE 84–24 and insurance recommendations more generally. Some commenters argued that the Federal Government should not be regulating the sales of insurance products. They argued that the McCarran-Ferguson Act assigns to the States, not the Federal Government, primary authority to regulate the business of insurance. Furthermore, several commenters pointed out that many States have adopted the 2020 National Association of Insurance Commissioners (NAIC) Suitability In Annuity Transactions Model Regulation 275 (the NAIC Model Regulation), which imposes a ''best interest'' standard on insurance producers. Some commenters argued that the Department should rely entirely on the NAIC Model Regulation instead of relying on the specific standards in ERISA and the Code.

However, many of these same commenters also noted that Insurers have long relied on the relief provided in PTE 84–24, thereby implicitly acknowledging that the Department has long regulated the business of insurance with respect to the sale of insurance products to Retirement Investors. ERISA and the Code broadly regulate Plan and IRA investments, including investments in insurance. As the Supreme Court held in *Hancock* v. *Harris Trust,*[8] Congress enacted ERISA with the broad purpose of protecting retirement benefits, including benefits supported by insurance contracts. During the more than 45 years that has passed since the Department issued PTE 77–9, the predecessor to PTE 84–24, it has consistently imposed conditions on insurance companies and agents receiving commissions and other compensation that would otherwise be prohibited under ERISA. Indeed, the interaction between the NAIC Model Regulation and the fiduciary protections under Title I and Title II of ERISA is explicitly recognized in the NAIC Model Regulation's safe harbor, which provides that recommendations and sales of annuities in compliance with comparable standards to the NAIC Model Regulation satisfy its requirements, including those applicable to fiduciaries under ERISA section 3(21) and Code section 4975(e)(3).[9]

In recent years, many States have increased investor protections with respect to recommendations to purchase annuities. These increased protections reflect a recognition by the States of the increased importance of ensuring that investors receive sound investment advice, as insurance products have grown in complexity and individuals have increasingly become dependent upon receiving sound advice from investment professionals, including insurance agents. The amendments to this exemption and related amendments to PTE 2020–02 supplement those State-law protections by ensuring that trusted professionals' recommendations of insurance products to Retirement Investors are subject to the same stringent standards of conduct that apply to recommendations of other investment products.

Titles I and II of ERISA reflect a strong Federal interest in the regulation and protection of retirement investments and Retirement Investors. Critical to this Federal regulatory system are the prohibited transaction provisions, which preclude fiduciaries from engaging in a wide range of conflicted transactions with Retirement Investors, unless there is an applicable statutory exemption or the Department grants an administrative exemption with protective conditions carefully designed to protect Retirement Investors from injury associated with unregulated conflicts of interest. As compared to State insurance law, ERISA and the Code place greater emphasis on the stringent regulation of conflicts of interest and impose fiduciary obligations on persons who engage in important activities related to investment management or advice. PTE 84–24, together with PTE 2020–02, reflects the Department's independent statutory authority and obligation under ERISA section 408(a) and Code section 4975(c)(2) to ensure that it only grants exemptive relief for prohibited transactions that is protective of the rights of plan participants and

[8] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 96 (1993) (noting ERISA's ''broadly protective purposes'' regarding retirement benefits and that fiduciary status applies to ''persons whose actions affect the amount of benefits retirement plan participants will receive'').

[9] NAIC Model Regulation at section 6.E.4.c.

beneficiaries and in their interests. The Department is finalizing this amendment consistent with its statutory obligation.

Taken together, amended PTE 84–24 and PTE 2020–02 ensure that when trusted advisers,[10] including Independent Producers, recommend insurance products to Retirement Investors, they will adhere to fundamental standards of fiduciary conduct subject to supervision by a responsible financial institution. Under the core standards of both amended exemptions investment professionals advice must:

- acknowledge their fiduciary status [11] in writing to the Retirement Investor;
- disclose their services and material conflicts of interest to the Retirement Investor;
- adhere to Impartial Conduct Standards requiring them to:
  - investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (the ''Care Obligation'');
  - never place their own interests ahead of the Retirement Investor's interest or subordinate the Retirement Investor's interests to their own (the ''Loyalty Obligation'');
  - charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding ''best execution''; and
  - avoid making misleading statements about investment transactions and other relevant matters;
- adopt firm-level policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards;
- document and disclose the specific reasons for any rollover recommendations; and
- conduct an annual retrospective compliance review.

As discussed in greater detail below, the Department has concluded that amended PTEs 84–24 and 2020–02 flexible and workable exemptions that provide a sound and uniform framework for financial institutions and investment professionals to provide fiduciary investment advice to Retirement Investors. Taken together, these amended exemptions are broadly available for fiduciary investment advice, without regard to business model, fee structure, or type of product recommended, subject to financial institutions' and investment professionals' compliance with the fundamental standards for the protection of Retirement Investors set forth above. To the extent the terms of the exemptions are honored, Retirement Investors will benefit from the application of a common standard, applicable to all fiduciary recommendations to Retirement Investors, that ensures prudent and loyal investment recommendations from fiduciary investment advice providers competing on a level playing field that is protective of Retirement Investors. The chief difference between amended PTEs 2020–02 and 84–24, as discussed below, is that the Department amended PTE 84–24 to provide a pathway to compliance with the prohibited transaction rules for Independent Producers who recommend the products of multiple Insurers to Retirement Investors, without requiring those Insurers to assume or acknowledge their fiduciary status under ERISA and the Code.

Applicability Date

This Final Amendment is applicable to transactions pursuant to investment advice provided on or after September 23, 2024 (the ''Applicability Date''). For transactions pursuant to investment advice provided before the Applicability Date, the prior version of PTE 84–24 will remain available for all insurance agents and insurance companies that currently rely on the exemption.[12] Also, no party would be held to the amended conditions in Sections VII, VIII, IX or XI for a transaction that occurred before the Applicability Date of the amended exemption.

Several commenters stated that the Proposed Amendment's Applicability Date, which was set for 60 days after publication, did not provide sufficient time for parties to fully comply with the new conditions for receipt of reasonable compensation for investment advice. In response to these comments, the Department is adding a new Section XI, which provides a phase-in period for the one-year period beginning September 23, 2024. Thus, an Independent Producer may receive compensation under Section II(b) during the phase-in period if it complies with the Impartial Conduct Standards condition in Section VII(a) and the fiduciary acknowledgment condition under Section VII(b)(1). This one-year phase-in period is the same as the one-year compliance period the Department provided when it originally granted PTE 2020–02.

Excluding Investment Advice

The amended PTE 84–24 excludes sales and compensation received as a result of the provision of investment advice from relief for the transactions described in Section III(a) through (f) of the exemption. However, relief remains available under those provisions for non-advice transactions. Investment advice fiduciaries must comply with the conditions in Sections VI–VIII that are tailored specifically for investment advice transactions. For clarity, the Department has included this limitation in each subsection of Section III(a) through (f) by adding the phrase ''if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder)'' to the end of each subsection in Section III(a) through (f). The Department also is revising the disclosure conditions in Section V to reflect that these sections are not available for the receipt of compensation as a result of the provision of fiduciary investment advice.

The Department notes that many types of fiduciaries are already excluded from the transactions in Sections III(a)–(d) of PTE 84–24. After the Applicability Date of the Final Amendment, the relief provided in these sections would remain available for non-fiduciaries and nondiscretionary trustees.[13]

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[10] When using the term ''adviser,'' the Department does not refer only to investment advisers registered under the Investment Advisers Act of 1940 or under state law, but rather to any person rendering fiduciary investment advice under the Regulation. For example, as used herein, an adviser can be an individual who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

[11] For purposes of this disclosure, and throughout the exemption, the term ''fiduciary status'' is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption uses some of the same terms that are used in the SEC's Regulation Best Interest and/or in the Investment Advisers Act of 1940 and related interpretive materials issued by the SEC or its staff, the Department retains interpretive authority with respect to satisfaction of this exemption.

[12] To the extent a party receives ongoing compensation for a recommendation that was made before the Applicability Date, including through a systematic purchase payment or trailing commission, the amended PTE 84–24 would not apply unless and until new investment advice is provided.

[13] Nondiscretionary trustees were added in 1984, in response to a request from the Investment Company Institute listing typical nondiscretionary or trustee services. In an April 21, 1980 letter, ''ICI states nondiscretionary trustees and custodians:

(a) Open and maintain plan accounts and, in the case of defined contribution plans, individual participant accounts, pursuant to the employer's instructions that those providing investment advice

The relief for the transaction described in Section III(e) remains available for any insurance company that is a fiduciary or service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-Approved Plan, if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder. The relief for the transactions described in Section III(f) remains available for any insurance company, Principal Underwriter, or investment company adviser that is a fiduciary or service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-Approved Plan; or (2) the provision of nondiscretionary trust services to the plan; or (3) both (1) and (2), if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.[14]

within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) would be excluded under Section II(a).

(b) Receive contributions from the employer and credit them to individual participant accounts in accordance with the employer's instructions;

(c) Invest contributions and other plan assets in shares of a mutual fund or funds or other products such as insurance or annuity contracts designated by the employer, plan trustee, or participants, and reinvest dividends and other distributions in such investments;

(d) Redeem, transfer, or exchange mutual fund shares or surrender insurance or annuity contracts as instructed by the employer, plan trustee, or participant;

(e) Provide or maintain ''designation of beneficiary'' forms and make distributions from the trust or custodial account to participants or beneficiaries in accordance with the instructions of the employer, plan trustee, participants, or beneficiaries;

(f) Deliver to participants or their employer all notices, prospectuses, and proxy statements, and vote proxies in accordance with the participants' instructions.

(g) Maintain records of all contributions, investments, distributions, and other transactions and report them to the employer and participants;

(h) Make necessary filings with the Internal Revenue Service and other government agencies;

(i) Keep custody of the plan's assets;

(j) Reply to and prepare correspondence, either directly or through the mutual fund distributor or adviser, regarding the investment account and the operation and interpretation of a master or prototype plan sponsored by the complex to which the nondiscretionary trustee or custodian belongs.

In some situations, the trustee or custodian is empowered to amend the master or prototype plan; in others, this power resides in the sponsor of the master or prototype plan. ICI further describes the duties of the nondiscretionary trustees as ''ministerial'' and indicates that such trustees possess no decisional authority with respect to a plan's funding medium or subsequent purchases or sales.''

[14] The Department is not amending Section III(f) to remove the phrase ''investment company adviser,'' but notes that this relief is not available if the purchase is a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

Description of Changes to Existing PTE 84–24

Section II of existing PTE 84–24 provides exemptive relief for the covered transactions described in Section III(a) through (f), which, as amended, does not include relief for the receipt of otherwise prohibited compensation in connection with the provision of investment advice. In the Proposed Amendment, the Department requested comments on whether parties will continue to use the relief in proposed section II(a) for the transactions outlined in Section III(a)–(f) and whether parties are currently relying on Section III(f) for Pre-Approved Plans. The Department received some comments indicating that Section III(f) is still relied on in the marketplace. Commenters described this relief as important for Pre-Approved Plan providers in connection with the purchase of mutual fund shares with plan assets when the principal underwriter of the mutual fund acts as the sponsor of the ''Pre-Approved Plan'' document that is utilized by the plan, or the pre-approved provider plan provides nondiscretionary trustee services to the plan. These commenters claim that the loss of Section III(f) relief would make it difficult to continue to offer these products to the marketplace and urge the Department to retain the provision. After consideration of these comments, the Department is retaining Section III(f) in the Final Amendment with a revision that changes references to a ''master or prototype plan'' to a ''Pre-Approved Plan,'' which is consistent with a change in terminology the IRS adopted in IRS Rev. Proc. 2017–41.

The Department also received several comments on the terms Mutual Fund Commission and Insurance Sales Commission that the Department used in the Proposed Amendment. These commenters generally asserted that the proposed definition of Insurance Sales Commission was unduly narrow and should have included a broader range of compensation, as permitted under State insurance laws and, they argued, the Department's prior interpretations of PTE 84–24. These commenters argued that other forms of compensation were commonplace, and could be reasonable, beneficial to Retirement Investors, and fully disclosed.

Some commenters asserted that the Proposed Amendment's definition of Insurance Sales Commission would prohibit the use of services provided by independent marketing organizations in connection with annuity sales marketing support, lead generation, technological assistance, back office and compliance support, and practice building and that, in the absence of these services, many Independent Producers would not survive. Some other commenters claimed that various benefits subject to continuing production and service requirements, such as health and retirement plan coverage and contributions, office allowances, travel expense reimbursements, and other benefits customary in the industry may not be allowed given the narrowness of these definitions.

After consideration of the comments, the Department has removed the terms ''Mutual Fund Commission'' and ''Insurance Sales Commission'' from the exemption. To achieve consistency with existing PTE 84–24, the Department has reverted to using the term ''sales commission'' in Section III(a) through (f) of the Final Amendment, which is the same term that the Department used in PTE 84–24 before this amendment. Additionally, the Department clarifies the disclosures required by Section V(b)(1) for transactions under Section III(a) through (f) involving IRAs may be provided to the IRA owner instead of an unrelated fiduciary.

Finally, the Department is making minor editorial changes by capitalizing defined terms where they are used in the existing sections of PTE 84–24, and moving the definitions from existing Section VI to new Section X. As amended, Section III(a)–(f) reads:

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract, if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(b) The receipt of a sales commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or

securities issued by an investment company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-Approved Plan if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-Approved Plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2); and the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

The Department notes that references to ''plan assets'' in Section III(a)–(f) include IRA assets and are not limited to ''Plans'' as defined in ERISA section 3(3) and described in Code section 4975(e)(1)(A).

Recordkeeping

The Department proposed revising all the recordkeeping provisions for PTE 84–24 by adding a new Section IX that would have required additional parties to be able to access the records. Many commenters expressed concern that the amended recordkeeping provisions would create unnecessary burden for Independent Producers. In response to these comments, the Department has scaled back the amended recordkeeping conditions in the exemption in a similar manner to changes the Department made to PTE 2020–02. In this Final Amendment, the Department is retaining the existing recordkeeping language in Section V(e) for transactions that do not involve the provision of fiduciary investment advice. The Department also is making minor editorial changes to this section for clarity, but generally is keeping the substantive requirements the same.

In a new Section IX, the Department is adding recordkeeping language for Independent Producers providing fiduciary investment advice. Under this provision, the Independent Producer must maintain for a period of six years records demonstrating that it has complied with the conditions of this exemption and make such records available, to the extent permitted by law, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service (IRS). This condition is consistent with the recordkeeping requirement in amended PTE 2020–02.

Fiduciary Investment Advice Exemption

The Department is finalizing its Proposed Amendment for investment advice fiduciaries who are independent insurance agents, with certain changes discussed below, based on the comments. The conditions for investment advice are similar to those in PTE 2020–02, but take into account the unique compliance challenges faced in the independent agent distribution channel, while promoting a level playing field for all investment advice professionals.

Several commenters criticized the Department's emphasis on uniformity. One commenter in particular stated that the Department was creating disadvantages for the insurance industry by amending PTE 84–24. Several commenters argued that because insurance companies and producers have been relying on PTE 84–24 for 40 years, they should be able to continue doing so. Some of these same commenters also questioned the Department's authority to regulate the business of insurance in this manner.

The Department disagrees with these commenters. Retirement Investors are no less in need of the protective conditions simply because the individual who is advising them relies on a different business model. Additionally, as discussed above, the Department has authority to regulate the business of insurance with respect to investment advice provided to Retirement Investors and has carefully tailored the conditions of this exemption to address the specific conflicts that can arise for Independent Producers that are compensated through commissions and other compensation when providing investment advice to Retirement Investors regarding the purchase of an annuity. Furthermore, the Department is providing additional time for insurance companies and producers that were relying on PTE 84–24 to come into compliance with the new conditions of this exemption or PTE 2020–02.

As required by ERISA section 408(a) and Code section 4975(c)(2), the Department may only issue an exemption if it is protective and in the interests of Retirement Investors. This Final Amendment ensures that Retirement Investors receive advice subject to the same core fiduciary obligations when the investments are insurance products recommended by Independent Producers, as when they receive advice about other competing investment alternatives. In the Department's view, Retirement Investors are best protected by a uniform standard assuring them that recommendations by fiduciaries are prudent, loyal, and free from misrepresentations or excessive compensation. Retirement Investors equally need these fiduciary protections and safeguards against dangerous conflicts of interest, whether the trusted Investment Professional is recommending an insurance product or a security. And there is no reason to believe that an insurance agent is any less susceptible to conflicts of interest than other categories of investment professionals.

The relief for fiduciary investment advice in Section II(b) for the covered transactions described in Section III(g) is generally similar to the relief provided in PTE 2020–02. Section VI provides conditions for transactions described in Section III(g) and requires the advice to be provided by an Independent Producer that is authorized to sell annuities from two or more unrelated Insurers. However, while PTE 2020–02 is available for almost any fiduciary investment advice provider, the conditions in amended PTE 84–24 Sections VII–IX are tailored for investment advice that is provided to a Retirement Investor by an Independent Producer who works with multiple insurance companies to sell non-securities annuities or other insurance products that do not meet the definition of ''security'' under Federal securities laws.

Some commenters questioned the administrative feasibility of the exemption pursuant to ERISA Section 408(a)(1) and Code section 4975(c)(2), taking issue with the added or expanded conditions of proposed PTE 84–24. One commenter stated that the PTE's conditions would force covered entities to instead seek relief via individual exemptions and noted that the Department has been issuing fewer administrative exemptions in recent years.

The Department disagrees with these assertions. The core conditions of PTE 84–24, including all the Impartial Conduct Standards, reflect core

fiduciary obligations that have been in ERISA since its passage nearly fifty years ago. The Department is confident that Independent Producers, who satisfy the fiduciary definition, can recommend covered insurance products in accordance with basic standards of care and loyalty, and without overcharging or misleading retirement investors.

As described in detail below, the disclosure and conduct obligations imposed on Independent Producers are measured and achievable, and Insurers' oversight obligations are flexible, principles-based, and build on existing oversight responsibilities under State law. The Department has narrowed the scope of many of the amended PTE 84–24's conditions, also easing administration. These updates are discussed in detail in the sections to follow. The Department does not believe Independent Producers or Insurers will be unable to comply with PTE 84–24 or driven to seek individual exemptions. The amended PTE is not intended to push covered entities to apply for individual exemptions but is instead intended to require Independent Producers who provide investment advice for a fee to abide by a series of conditions uniquely crafted to mitigate conflicts of interest and protect Retirement Investor interests in these types of transactions.

Moreover, the Department has accommodated Insurers that rely upon independent agents by providing that the supervising Insurer does not have to assume fiduciary responsibility for investment recommendations by Independent Producers. Also, PTE 2020–02 remains available both to Independent Producers and Insurers for transactions that fall outside the scope of PTE 84–24, or to the extent the Insurer takes on fiduciary responsibility.

Retirement Investors

The Department is revising the definition of Retirement Investor in Section X(n) to be consistent with the definition in the final Regulation defining fiduciary investment advice. As revised, both the final Regulation and Final Amendment define Retirement Investor to mean a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA. The preamble to the final Regulation includes additional discussion of ''Retirement Investor,'' which is defined in the same terms in this Final Amendment to ensure its broad availability to investment advice fiduciaries.

Related Entity

The Department is clarifying the definition of ''Related Entity'' in Section X(m). Related Entity includes two components: (i) a party that has an interest in an Investment Professional or Financial Institution; and (ii) a party in which an Investment Professional or Financial Institution has an interest, in either case when that interest may affect the fiduciary's best judgment as a fiduciary. The Department has also made ministerial changes, such as changing ''described'' to ''defined'' in referencing ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B).

Independent Producers

The term ''Independent Producer'' is defined in Section X(d) as a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies and (1) is not an employee of an insurance company (including a statutory employee under Code section 3121(d)(3)); or (2) is a statutory employee of an insurance company that has no financial interest in the covered transaction. The Department is revising the definition of Independent Producer to clarify that the exemption is available only when the Independent Producer is not an employee of an insurance company (including a statutory employee under Code section 3121(d)(3)) or the Independent Producer is a statutory employee of an insurance company that has no financial interest in the covered transaction. Accordingly, the statutory employee would be treated as an Independent Producer, for purposes of this exemption, with respect to the recommended sale of an insurance product in which the statutory employer has no financial interest. To the extent, however, the statutory employee recommends products in which the employing insurance company has a financial interest, both the insurance company and the statutory employee would have to rely on PTE 2020–02 for relief from any resulting prohibited transactions.

The Proposed Amendment would have limited the definition to exclude statutory employees entirely, but the Department is revising the definition in response to comments. Many commenters expressed concern that the proposed definition was too limited, and several commenters specifically requested that the Department make PTE 84–24 available for statutory employees of insurance companies. Some of these commenters sought broad relief for all recommendations by statutory employees, including recommendations in which their employing insurance company had a financial interest. These commenters described the relationship that an insurance company has with its statutory employees as the equivalent of the relationship between insurance companies and wholly independent producers who are not statutory employees. These commenters argued that a statutory employer cannot supervise statutory employees under PTE 2020–02. The Department also received comments, however, arguing for a narrower clarification permitting statutory employees to rely upon PTE 84–24 as Independent Producers only to the extent they were recommending the products of other insurance companies that did not employ them as statutory employees.

In response to these comments, the Department has revised this definition to permit statutory employees to rely upon PTE 84–24 when they are recommending transactions in which the statutory employer does not have a financial interest. In such cases, the statutory employer is similarly situated to insurance companies that are working with wholly independent agents. The Final Amendment does not, however, allow statutory employees to rely on PTE 84–24 when they are recommending transactions with the insurance company that acts as their statutory employer. As reflected in the Treasury's implementing regulations,[15] the statutory employee's principal business activity involves the solicitation of contracts for that one insurance company which ordinarily provides facilities and support to the statutory employee for that purpose, and these statutory employees often receive

[15] 26 CFR 31.3121(d)–1(d)(3)(ii) Full-time life insurance salesman. An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman. Such a salesman ordinarily uses the office space provided by the company or its general agent, and stenographic assistance, telephone facilities, forms, rate books, and advertising materials are usually made available to him without cost. An individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman.

health and other benefits from the ''employing'' insurance companies. Accordingly, the employing insurance company has a degree of potential control and influence over the conduct of the statutory employee, and the statutory employee has a corresponding commitment to that company that is not necessarily the same as in a relationship between a wholly independent agent and other Insurers.

Given these differences, the Department has concluded that PTE 84–24 is insufficiently protective of Retirement Investors with respect to recommendations of products in which the statutory employer has a financial interest. In such cases, both the employing insurance company and the statutory employee must rely on PTE 2020–02 for relief for prohibited transactions, just as similarly situated Financial Institutions rely on PTE 2020–02 with respect to recommendations of their proprietary products. Accordingly, statutory employees and the insurance companies would need to meet all the protective conditions of PTE 2020–02, including the requirement that the insurance company, acting as the supervising financial institution, acknowledge its fiduciary status with respect to the recommendation. However, when a statutory employee recommends transactions with an unrelated and unaffiliated insurance company, the statutory employee can rely on PTE 84–24 and make the fiduciary acknowledgment as an Independent Producer. Consistent with the conditions of PTE 84–24, those transactions would be subject to the supervision of the unrelated insurance company. To the extent that statutory employers or other insurance companies believe that neither PTE 2020–02 nor PTE 84–24 is appropriate for their particular circumstances, they can also apply to the Department for an individual or class exemption, which may be subject to different or additional protective conditions.

Insurers

The term ''Insurer'' as defined in Section X(f) is similar to the term ''Financial Institution'' defined in PTE 2020–02, except it would be limited to insurance companies. Even though amended PTE 84–24 does not require Insurers to be fiduciaries, an Independent Producer cannot rely on the exemption unless it is subject to oversight by an Insurer that satisfies the conditions set out in this Final Amendment. As under the NAIC Model Regulation and discussed in the policies and procedures section below, the Independent Producer must be subject to oversight by the Insurer whose products it recommends to the Retirement Investor, if the Independent Producer wants to rely on the exemption. As stated in Section VI(b), the Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with this exemption's conditions. However, the Department cautions that Insurers selling insurance and annuity products through Independent Producers could become investment advice fiduciaries under ERISA and/or the Code through other actions they take. If the Insurers are fiduciaries, they could not rely on amended PTE 84–24 and would need to rely on a different prohibited transaction exemption, such as PTE 2020–02, for relief from ERISA section 406(b) and Code section 4975. The investment advice provisions of PTE 84–24 are solely available to the Independent Producer.

To facilitate compliance with the amended exemption, Independent Producers and Insurers may rely on factual representations from each other, as long as they are reasonable in doing so. For example, an Independent Producer may generally rely on an Insurer's written report generated as part of its retrospective review required by Section VII(d), unless the Independent Producer knows (or should know) that the report is inaccurate or incomplete.

Although the Department is creating a pathway for compliance for Independent Producers that permits insurance companies to oversee the conduct of Independent Producers under this Final Amendment without assuming fiduciary status, the Department remains concerned that without fiduciary status, insurance companies may not take the same measures to ensure that recommendations are sound and untainted by the Insurer's conflicts of interest. Accordingly, the Final Amendment does not provide prohibited transaction relief for the Insurer. If the Insurer itself is an investment advice fiduciary, it would instead have to rely on PTE 2020–02. In such a situation, the Independent Producer would still be able to receive compensation in connection with fiduciary investment advice related to the products of other Insurers, as long as those other Insurers complied with all conditions of amended PTE 84–24.

Exclusions

The advice provisions of PTE 84–24 have exclusions that are similar to those in PTE 2020–02. Under Section VI(c)(1), relief under PTE 84–24 is not available if the Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is (A) the employer of employees covered by the Plan, or (B) the Plan's named fiduciary or administrator. For example, an Independent Producer that sponsors a plan for its employees and provides investment advice to the Plan can only receive direct expenses and not reasonable compensation for the advice. However, there is an exception from this restriction in Section VI(c)(1)(B) that applies when the Plan's named fiduciary or administrator is selected by an independent fiduciary to provide investment advice to the Plan. Unlike PTE 2020–02, there is no specific exclusion for pooled employer plans in PTE 84–24, because the Department does not expect that pooled employer plans will need to rely on the limited relief provided in this exemption.

Section VI(c)(2) excludes from Section III(g) transactions when the Independent Producer is serving in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder).

Impartial Conduct Standards of Amended PTE 84–24

Similar to the final amendment to PTE 2020–02, amended PTE 84–24 requires Independent Producers to comply with the Impartial Conduct Standards, which include the Care Obligation, Loyalty Obligation, and obligations to receive no more than reasonable compensation and not make misleading statements to Retirement Investors. These standards form the core protections of both exemptions that are available to investment advice fiduciaries.

Care Obligation and Loyalty Obligation

The Department is adopting the substance of the Proposed Amendment's Best Interest standard. However, as in PTE 2020–02, the Department is replacing the term ''Best Interest'' with its two separate components: the Care Obligation and the Loyalty Obligation. Under the amended provision, investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. The Final Amendment specifically refers to each obligation separately, although they are unchanged in substance. Both the Care Obligation and the Loyalty Obligation must be satisfied when investment advice is provided. As defined in Section X(b), to meet the Care Obligation, an advice must reflect the care, skill, prudence, and diligence

under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section X(g), to meet the Loyalty Obligation, the Independent Producer must not place the financial or other interests of the Independent Producer, Insurer, or any Affiliate, Related Entity, or another party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer, or any Affiliate, Related Entity, or another party. For example, in choosing between annuity products offered by Insurers whose products the Independent Producer is authorized to sell, the Independent Producer may not recommend a product that is worse for the Retirement Investor but better or more profitable for the Independent Producer or Insurer.

As discussed in the preamble to the final amendment to PTE 2020–02, the Department is changing the way it refers to these two obligations in response to comments that the phrase ''best interest'' was used in many contexts throughout this rulemaking and by various regulators with possibly different shades of meaning. For example, in paragraph (c)(1)(i) of the Regulation, fiduciary status is based, in part, on whether a recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation ''may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.'' In the context of the Regulation, however, ''best interest'' is not meant to refer back to the elements of the precise regulatory or statutory definitions of prudence or loyalty, but rather to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests.

Several commenters stated that the Department does not have the authority to include the Impartial Conduct Standards in either PTE 84–24 or PTE 2020–02 because doing so would improperly expand Title I fiduciary standards to entities solely covered by Title II. The Department disagrees with these commenters. As previously stated in this grant notice as well as the grant notice for PTE 2020–02 published elsewhere in today's issue of the **Federal Register**, Congress expressly permits the Department to issue exemptions to prohibited transactions as per ERISA Section 408(a) and, pursuant to the Reorganization Plan No. 4 of 1978, Code section 4975(c)(2).[16] For a more detailed description of the comments received regarding the Department's authority to include the Impartial Conduct Standards in these prohibited transaction exemptions, please see the grant notice for PTE 2020–02 published elsewhere in today's issue of the **Federal Register**.

In addition to the general comments discussed in the preamble to the final amendment to PTE 2020–02, some commenters questioned the specific ability of Independent Producers to meet the proposed standards, and thus argued that the amendments to PTE 84–24 failed to meet the requirements laid out in ERISA section 408(a) and Code section 4975(c)(2). Many of these same commenters stated that the NAIC standard was sufficiently protective and should be relied upon rather than the standards in PTE 84–24. Some commenters also raised objections to the Department imposing these standards on IRAs. Other commenters expressed support for the proposed standards, and one commenter argued that the Department's Proposed Amendment was necessary because the NAIC Model Regulation imposes a ''best interest'' standard in name only.

The Department has considered these comments and determined that it is essential for Independent Producers to comply with the Care Obligation and Loyalty Obligation. The Department notes that these obligations are similar to the standard imposed by New York State in a rule issued by the New York Department of Financial Services entitled ''Suitability and Best Interest in Life Insurance and Annuity Transactions'' (referred to as Rule 187). Section 242.4(b) of Rule 187 provides that ''[t]he producer, or insurer where no producer is involved, acts in the best interest of the consumer when: (1) the producer's or insurer's recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing. Only the interests of the consumer shall be considered in making the recommendation.'' Although Rule 187 has not been in force for a long time, the Department has not found any evidence suggesting that insurance producers, including Independent Producers, cannot comply with this standard. Nor is the Department aware of any evidence suggesting that this standard has inappropriately limited or restricted access to advice or insurance products in New York.

The Department is confident that Independent Producers can comply with the Section VII(a) of amended PTE 84–24 and rejects any suggestion that Independent Producers cannot compete under the same framework of Impartial Conduct Standards that apply to other investment professionals and financial institutions under PTE 2020–02, including commission-based broker-dealers. Certainly, the Department believes that insurance products and annuities are often sound and valuable investments for Retirement Investors. There is nothing intrinsic to annuities or inherent in the Independent Producer distribution channel that suggests that Independent Producers cannot recommend annuities consistent with the Care Obligation and Loyalty Obligation, or that they cannot comply with the obligation to avoid overcharging or misleading Retirement Investors. To the contrary, Retirement Investors are best served by having recommendations governed by a common standard, applicable to all fiduciary investment advisers irrespective of investment product, that is focused on adherence to these basic obligations. By ensuring that fiduciary investment advice providers compete on a level playing field subject to a uniform standard, the Regulation and exemptions ensure that Retirement Investors' legitimate expectations of trust and confidence are honored, irrespective of the particular type of product recommended. Fiduciary recommendations to Retirement Investors should be uniformly driven by the investors' interests, rather than differences in regulatory stringency that give one class of investment professionals the unique ability to depart from basic standards of care and loyalty. Reasonable Compensation

The Department is revising the reasonable compensation standard in Section VII(a)(2). The Proposed Amendment would have limited the compensation that an Independent Producer could receive to an ''Insurance Sales Commission,'' defined to mean a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of

[16] Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984, Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984), Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975. 5 U.S.C. App. (2018).

recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees, but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees.

The Department received several comments supporting this proposed limitation. One commenter noted the ''particularly acute conflicts of interest'' associated with sales of non-security annuities and supported not only limiting the compensation that could be paid, but also supported enhanced disclosure so that the Retirement Investors can understand the amount of money that the Independent Producer will make on the transaction. Another commenter similarly supported the Department's tailored approach that addresses the unique circumstances and challenges presented by these ''lightly regulated salespeople'' when they provide investment recommendations to Retirement Investors. The same commenter noted that limiting PTE 84–24 in this way would also further ensure a level playing field because any producer receiving other types of compensation would rely on PTE 2020–02. Yet another commenter criticized the NAIC Model Regulation's approach because it does not require insurers and producers to mitigate their compensation-related conflicts of interest that often lead to consumers buying annuities that are not suitable for them.

Many insurance industry commenters described this definition as overly narrow, noting that State insurance law does not limit compensation to commissions. Some commenters pointed to the NAIC Model Regulation, which specifically permits assistance with marketing, office support, retirement benefits, or other reasonable compensation, and other non-cash compensation. One commenter described the impact of the proposed limitation as contrary to the NAIC's work to develop a best interest standard, suggesting that it would reduce the investor choice that the NAIC had intended to preserve.

Many commenters also objected to the limited compensation covered when compared to the broad relief provided in PTE 2020–02. These commenters asserted that it would be arbitrary for the Department to prohibit Independent Producers from receiving legal and disclosed compensation that would be permissible for a financial institution or investment professional to receive under PTE 2020–02. One specifically stated that this limitation was contrary to the Department's stated intent of creating a level playing field, arguing that with similar conditions in both exemptions, there was no valid reason for the Department to prohibit legal and disclosed compensation when received by independent insurance professionals, but not when it is received by other types of financial professionals.

Some commenters argued that the limited definition was inconsistent with the Department's statement in footnote 10 of the Proposed Amendment's preamble that third party intermediary marketing organizations (IMOs) could compensate Independent Producers, presumably with compensation other than insurance commissions, as narrowly defined. In response to this comment, the Department confirms that all compensation under PTE 84–24 may be paid directly to IMOs or field market organizations (FMOs) which then compensate the individual Independent Producer who has provided investment advice. The Department also notes that ERISA section 408(b)(2) and Code section 4975(d)(2) are available for intermediaries providing non-fiduciary services.

Another commenter stated that the proposed limitations on the types of compensation available for exemptive relief under PTE 84–24 would be so disruptive that it would call the continued availability of fixed annuity product distribution channels into question. This commenter stated that the compensation limits imposed by the Proposed Amendment would deprive investors of access to fixed annuities as a source of protection against the risks associated with market volatility and outliving one's assets. The commenter went on to state that, while the preamble language to the Proposed Amendment acknowledges the presence and vital role served by IMOs and FMOs in the training and support of Independent Producers, the Proposed Amendment would have provided no relief for any compensation received in connection with the sale of a recommended product other than so-called ''simple'' insurance commissions, directly paid by or on behalf of the insurance company.

According to this same commenter, IMOs and FMOs support Independent Producer success and productivity through a variety of cash and non-cash compensation structures, including revenue sharing and marketing allowances. This same commenter stated that non-cash compensation frequently includes the provision of value-added support including website construction and maintenance, sales leads, various forms of commercial advertising and computer software. According to this commenter, eligibility to receive such compensation is calibrated—at least to some extent—on Independent Producer productivity and on that basis is likely to be deemed by the Department under its new fiduciary definition as compensation received by an Independent Producer in connection with covered recommendations, necessitating prohibited transaction exemptive relief, but no such relief would be available under PTE 84–24 as it was proposed to be amended.

After consideration of the public comments on limiting covered compensation to Insurance Sales Commissions, the Department has removed the proposed limitation to Insurance Sales Commissions and expanded the scope of the exemption to cover compensation as broadly as PTE 2020–02, including cash and non-cash compensation. In the Department's view, the Impartial Conduct Standards and other conditions of the exemption should adequately safeguard Retirement Investors from abuse, irrespective of the specific type of compensation. At the same time, the Department emphasizes that all compensation the Independent Producer receives in connection with a transaction pursuant to PTE 84–24 must be reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2), and consistent with stringent policies and procedures designed to ensure Insurance Producers make recommendations to Retirement Investors that are consistent with the exemption's Care Obligation and Loyalty Obligation.

No Materially Misleading Statements

Section VII(a)(3) provides the same prohibition on misleading statements that is part of PTE 2020–02. The Department is also clarifying that the prohibition against misleading statements applies to both written and oral statements. This provision requires that an Independent Producer's statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time the statements are made. For purposes of this condition, the term ''materially misleading'' includes the omission of information that is needed to prevent the statement from being misleading to the Retirement Investors under the circumstances.

To the extent the Independent Producer provides materials, including marketing materials that are prepared and provided by the Insurer, this

condition also would require such materials not to be materially misleading to the Independent Producer's knowledge.

Disclosure

The Department is generally finalizing the disclosure conditions with some modifications to the Proposed Amendment that are discussed below. As discussed in the preamble to the final amendment to PTE 2020–02, while many commenters raised concerns about the burden imposed on financial institutions if the Department required additional disclosure, others expressed support for the Department imposing additional disclosure obligations. It is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations so that they have sufficient information to make fully informed investment decisions. Additionally, clear and accurate disclosures can deter fiduciary investment advice providers from engaging in otherwise abusive practices that they would prefer not to expose to the light of day. Likewise, requiring a clear disclosure of otherwise hidden fees and conflicts involved in the sale of insurance products may serve to dissuade certain Insurers and Independent Producers from engaging in abusive sales practices, resulting in lower overall costs to consumers.[17]

In the preamble to the Proposed Amendment, the Department requested comments regarding whether Insurers or Independent Producers should be required to provide additional disclosures on third-party compensation to Retirement Investors on a publicly available website. One potential benefit of such disclosure would be to provide information about conflicts of interest that could be used, not only by Retirement Investors, but by consultants and intermediaries who could, in turn, use the information to rate and evaluate various advice providers in ways that would assist Retirement Investors. Industry commenters generally opposed the condition, stating that it would impose significant costs to continuously maintain such a website without a commensurate benefit to the Retirement Investors.

After review of these comments, the Department has determined not to include a website disclosure requirement as an exemption condition at this time. While the Department may reconsider this decision at some future date based on its experience with the Regulation and related exemptions, any such future amendments would be subject to public notice and comment through a rulemaking process. Consistent with the Recordkeeping conditions in Section IX, the Department intends, however, to regularly request that Independent Producers provide their investor disclosures to the Department to ensure that they are providing sufficient information in a manner that the Retirement Investor can understand, and that the disclosures are serving their intended purpose.

Fiduciary Acknowledgment

The disclosures in PTE 84–24 are similar to those in PTE 2020–02. This ensures that all Retirement Investors receiving fiduciary investment advice have the same information before engaging in a transaction, irrespective of product type. PTE 84–24 requires Independent Producers to provide certain disclosures at or before the time an investment advice transaction occurs. Section VII(b)(1) requires a fiduciary acknowledgement, but unlike PTE 2020–02, only the Independent Producer (and not the Insurer) must acknowledge in writing that it is a fiduciary providing investment advice to the Retirement Investor under Title I or II of ERISA or both.[18] Section VII(b)(2) requires the Independent Producer to provide the Retirement Investor with a written statement of the Care Obligation and Loyalty Obligation that the Independent Producer owes to the Retirement Investor. For purposes of the disclosures required by Section II(b)(1)–(4), the Independent Producer is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Independent Producer becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

The fiduciary acknowledgment requirement is intended to make it unambiguously clear that the Independent Producer is making a recommendation to the Retirement Investor in a fiduciary capacity under ERISA or the Code. It would not be sufficient, for example, to have an acknowledgement say that ''I acknowledge fiduciary status under ERISA with respect the recommendation to the extent the recommendation is treated by ERISA or Department of Labor regulations as a fiduciary recommendation,'' because that statement does not inform the investor whether the Independent Producer is making the recommendation as a fiduciary. The point of the acknowledgment is to ensure that both the fiduciary and the Retirement Investor are clear that the particular recommendation is in fact made in a fiduciary capacity under ERISA or the Code, so that there is no doubt as to the nature of the relationship or the associated compliance obligations. Anything short of definitive fiduciary acknowledgment would fail the exemption condition. It is not enough to alert the Retirement Investor to the fact that there may or may not be fiduciary obligations in connection with a particular recommendation, without stating that, in fact, the Independent Producer is making the recommendation in the requisite fiduciary capacity.

As described in the preamble to PTE 2020–02, many commenters argued that the fiduciary acknowledgment requirement imposes contractual or warranty requirement on Independent Producers. Several other commenters noted, however, that neither PTE 84–24 nor PTE 2020–02 impose any contract or warranty requirements on fiduciary investment advice providers. Instead, the requirement simply ensures up-front clarity about the nature of the relationship and services being provided. The Department agrees with these commenters that this up-front clarity is important and does not impose any contract or warranty requirement. The fiduciary acknowledgment condition stands in marked contrast to the Department's 2016 rulemaking on fiduciary advice; the Department has imposed no obligation on fiduciary advice providers to enter into enforceable contracts with or to provide enforceable warranties to their customers. The only remedies for violations of the exemption's conditions, and engaging in a non-exempt prohibited transaction, are those provided by Title I of ERISA, which specifically provides a cause of action for fiduciary violations with respect to ERISA-covered Plans, and Title II of ERISA, which provides for imposition of the excise tax. Nothing in the exemption compels Independent Producers to make contractually enforceable commitments, and as far as the exemption provides, they could expressly disclaim any enforcement rights other than those specifically

[17] See, *e.g.,* Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market,* 99(1) The Review of Economics and Statistics 1–15, (2015), *https://doi.org/10.1162/REST_a_00625.*

[18] The Department cautions that an Insurer cannot insulate itself from fiduciary status merely by not making this acknowledgment. As noted above, an Insurer may become a fiduciary based on its actions.

provided by Title I of ERISA or the Code, without violating any of the exemption's conditions.

For that reason, arguments that the fiduciary acknowledgment requirement is inconsistent with the Fifth Circuit's opinion in *Chamber of Commerce* v. *United States Department of Labor,* 885 F.3d 360, 384–85 (5th Cir. 2018) (*Chamber*) are unsupported. In that case, the Fifth Circuit faulted the Department for having effectively created a private cause of action that Congress had not provided for violations of the exemptions' terms. Under this Final Amendment, the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Requiring clarity as to the nature of the services and relationship between Independent Producers and Retirement Investors is a far cry from the creation of a whole new cause of action or remedial scheme.

Rather than compel fiduciary status or create new causes of action, the Department merely conditions the availability of the exemption, which is only necessary for plan fiduciaries to receive otherwise prohibited compensation, on clarity that the transaction involves a fiduciary relationship. In addition, the Department does not purport to bind State or other Federal regulators in any way or to condition relief on the availability of remedies under other laws. It no more creates a new cause of action than any other exemption condition or regulatory requirement that requires full and fair disclosures of services and fees. Moreover, the requirement promotes and supports Retirement Investor choice by requiring clarity as to the precise nature of the relationship that the firm or advice professional is undertaking.

The Department additionally notes that conditions requiring entities to acknowledge their fiduciary status have become commonplace in recent exemptions the Department has granted over the past two years. For example, in 2022 and 2023, the Department granted over a dozen exemptions to private parties in which an entity was required to acknowledge its fiduciary status in writing as a requirement for exemptive relief.[19] Written acknowledgement of fiduciary status was first required by the Department as early as 1984, when the Department published PTE 84–14, requiring an entity acting as a ''qualified professional asset manager'' (a QPAM) to have ''acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.''[20]

One commenter additionally opined that the fiduciary acknowledgement condition constitutes ''compelled'' and ''viewpoint-based'' speech in violation of the First Amendment and warrants application of a 'strict scrutiny' standard of review. As discussed in greater detail in the preamble to the Regulation published elsewhere in today's **Federal Register**, neither the Regulation nor the final PTE amendments prohibit speech based on content or viewpoint in any capacity. Instead, the Regulation and PTEs simply impose fiduciary duties on covered parties, and insist on adherence to Impartial Conduct Standards.

Model Disclosure

To assist Independent Producers in complying with these conditions of the exemption, the Department confirms that the following model language will satisfy Section VII(b)(1) and (2).

We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money or otherwise are compensated creates some conflicts with your financial interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.

Under this special rule's provisions, we must:

- Meet a professional standard of care when making investment recommendations (give prudent advice) to you;
- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements to you about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge you no more than what is reasonable for our services; and
- Give you basic information about our conflicts of interest.

This model language generally applies to the Independent Producer's recommendations, however, the Independent Producer could also tailor the acknowledgment to limit it to an individual recommendation or subset of recommendations for which the Independent Producer is seeking prohibited transaction relief. However, Independent Producers can only rely on this exemption with respect to particular recommendations to the extent they have acknowledged their fiduciary status to Retirement Investors with respect to those recommendations.

While some commenters requested additional model language, the Department is not providing model language for the specific material facts relating to the scope and terms of the relationship, conflict of interest, and basis for determination to recommend the annuity disclosures in Section VII(b)(3), (4), and (5), because those disclosures will need to be tailored to the specific business model.

Relationship and Conflict of Interest Disclosure

Under Section VII(b)(3), the Independent Producer must disclose in writing all material facts relating to the scope and terms of the relationship with the Retirement Investor. This includes the material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts. The Independent Producer must also disclose the type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to the Retirement Investor. This description must include the products the Independent Producer is licensed and authorized to sell, inform the Retirement Investor in writing of any limits on the range of insurance products recommended, and identify the specific Insurers and specific

[19] *See, e.g.,* PTE 2023–03, Blue Cross and Blue Shield Association Located in Chicago, Illinois (88 FR 11676, Feb. 23, 2023); PTE 2023–04, Blue Cross and Blue Shield of Arizona, Inc., Located in Phoenix, Arizona (88 FR 11679, Feb. 23, 2023); PTE 2023–05, Blue Cross and Blue Shield of Vermont Located in Berlin, Vermont (88 FR 11681, Feb. 23, 2023); PTE 2023–06, Hawaii Medical Service Association Located in Honolulu, Hawaii (FR 88 11684, Feb. 23, 2023); PTE 2023–07, BCS Financial Corporation Located in Oakbrook Terrace, Illinois (88 FR 11686, Feb. 23, 2023); PTE 2023–08, Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company Located in Flowood, Mississippi (88 FR 11689, Feb. 23, 2023); PTE 2023–09, Blue Cross and Blue Shield of Nebraska, Inc. Located in Omaha, Nebraska (88 FR 11691, Feb. 23, 2023); PTE 2023–10, BlueCross BlueShield of Tennessee, Inc. Located in Chattanooga, Tennessee (88 FR 11694, Feb. 23, 2023); PTE 2023–11, Midlands Management Corporation 401(k) Plan Oklahoma City, OK (88 FR 11696, Feb. 23, 2023); PTE 2023–16, Unit Corporation Employees' Thrift Plan, Located in Tulsa, Oklahoma (88 FR 45928, July 18, 2023); PTE 2022–02, Phillips 66 Company Located in Houston, TX (87 FR 23245, Apr. 19, 2022); PTE 2022–03, Comcast Corporation Located in Philadelphia, PA (87 FR 54264, Sept. 2, 2022); PTE 2022–04, Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees Located in Philadelphia, PA. (87 FR 71358, Nov. 22, 2022).

[20] PTE 84–14, Part V, Section (a), (49 FR 9494, March 13, 1984).

insurance products available to the Independent Producer for recommendation to the Retirement Investor. Further, under Section VII(b)(4), the Independent Producer must also disclose all material facts relating to Conflicts of Interest that are associated with the recommendation.

One difference from PTE 2020–02 is that Independent Producers must also provide a notice describing the Retirement Investor's right to request additional information regarding cash compensation. If the Retirement Investor makes that request, the Independent Producer must give the investor a reasonable estimate of the amount of cash compensation to be received by the Independent Producer, which may be stated as a range of amounts or percentages; and whether the cash compensation will be provided through a one-time payment or through multiple payments, the frequency and amount of the payments, which may also be stated as a range of amounts or percentages. Although this is an additional obligation in PTE 84–24 that is not in PTE 2020–02, the Department notes this disclosure requirement closely parallels the obligations of an Independent Producer under Section 6.A.2.a.v and 6.A.2.b of the NAIC Model Regulation [21] and is similar to, but more limited than, the standard imposed by New York State in Section 30.3 of a rule issued by the New York Department of Financial Services entitled ''Producer Compensation Transparency'' (referred to as Rule 194).[22]

The Department thinks that this additional transparency is especially important in the context of PTE 84–24 because, in contrast to PTE 2020–02, the Insurer has not assumed fiduciary responsibility with respect to the recommendation or its compensation and incentive practices, and because of the importance of these financial incentives in driving investment recommendations. As noted above, it is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations so that they have sufficient information to make fully informed investment decisions. Additionally, clear and accurate disclosures can deter Independent Producers and Insurers from engaging in otherwise abusive practices that they would prefer not to expose to the light of day. Likewise, requiring a clear disclosure of otherwise hidden fees and conflicts involved in the sale of insurance products may serve to dissuade Insurers and Independent Producers from making imprudent recommendations that are driven by outsized financial incentives, rather than the Retirement Investor's best interests, resulting in lower overall costs to consumers.[23]

Best Interest Documentation and Rollover Disclosure

Section VII(b)(5) additionally requires Independent Producers to consider and document their basis for the determination to recommend an annuity product to the Retirement Investor before the recommended annuity is sold. The Independent Producer must also provide this documentation to both the Retirement Investor and to the Insurer. The Department notes that the NAIC Model Regulation also requires producers to make a written record of any recommendation and document the basis for the recommendation.[24]

Consistent with the changes the Department is making to PTE 2020–02, Section VII(b)(6) of the Final Amendment requires that, before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA the Independent Producer must consider and document the bases for its recommendation that the Retirement Investor engage in the rollover transaction and must provide that documentation to both the Retirement Investor and the Insurer. Relevant factors the Independent Producer must consider include, to the extent applicable but not limited to (A) the alternatives to a rollover, including leaving the money in the Plan, if applicable; (B) the fees and expenses associated with the Plan and the recommended investment; (C) whether an employer or other party pays for some or all of the Plan's administrative expenses under the Plan; and (D) the different levels of fiduciary protection, services, and investments available.

The Department received many comments on this condition. As discussed in the preamble to the final amendment to PTE 2020–02, the Department received support for the rollover disclosure provision. For example, one commenter highlighted the significance of a rollover decision and said that a ''careful analysis'' is needed, along with information about fees, expenses, and other investment options, in order to provide Retirement Investors with a ''well-supported'' recommendation. Some commenters supporting the condition noted the conflicts of interest inherent with respect to many annuity sales and that annuity transactions can be extremely difficult and costly to reverse. The written documentation requirement ensures that Independent Producers undertake a careful analysis and document their reasoning for recommending these transactions, which will help ensure that their recommendations are well-supported and comply with the Impartial Conduct Standards.

Other commenters expressed concern with the required rollover disclosure. For example, one commenter stated that it is unclear how an Independent Producer could compare fees and expenses of employer plans without an annuity option with a recommended annuity. According to this commenter, comparing annuities to other investment options are ''an apples-to-oranges comparison that would likely confuse a participant more than help.'' Another commenter characterized the condition as potentially requiring Independent

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[21] NAIC Model Regulation Section 6.A.2.a.v. provides that ''[p]rior to the recommendation or sale of an annuity, the producer shall prominently disclose to the consumer . . . (v) A notice of the consumer's right to request additional information regarding cash compensation described in Subparagraph (b) of this paragraph.'' Section 6.A.2.b states that ''[u]pon request of the consumer or the consumer's designated representative, the producer shall disclose: (i) A reasonable estimate of the amount of cash compensation to be received by the producer, which may be stated as a range of amounts or percentages; and (ii) Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages.''

[22] Section 30.3(a)(4) of Rule 194 provides that ''an insurance producer selling an insurance contract shall disclose the following information to the purchaser: . . . (4) that the purchaser may obtain information about the compensation expected to be received by the producer based in whole or in part on the sale, and the compensation expected to be received based in whole or in part on any alternative quotes presented by the producer, by requesting such information from the producer.'' If such a request is made, Section 30.3(b) requires the producer to provide the following information: ''(1) a description of the nature, amount, and source of any compensation to be received . . . ; (2) a description of any alternative quotes presented by the producer . . . ; (3) a description of any material ownership interest the insurance producer . . . has in the insurer . . . ; (4) a description of any material ownership interest the insurer . . . has in the insurance producer . . . ; and (5) a statement whether the insurance producer is prohibited by law from altering the amount of compensation received from the insurer based in whole or in part on the sale.''

[23] See, *e.g.,* Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market,* 99(1) The Review of Economics and Statistics 1–15, (2015), *https://doi.org/10.1162/REST_a_00625.*

[24] Section 6.A.4.

Producers to violate the law, because as described by the commenter Federal securities laws prohibit individuals from recommending or providing detailed information or advice about securities unless they have a securities license. Thus, according to the commenter, Independent Producers who do not have a securities license (as most do not) would be forced to either break the law to comply with this condition or undertake the expense and burden of obtaining the appropriate securities licenses.

The Department disagrees with this characterization of the exemption condition. While Independent Producers are required to consider alternatives to the rollover from the Title I Plan into an annuity, they are not required to recommend or provide detailed information or advice about securities. Nothing in the exemption requires or suggests that Independent Producers are obligated to make advice recommendations as to investment products they are not qualified or legally permitted to recommend. The Department notes that nothing in the exemption or the Impartial Conduct Standards prohibits investment advice by ''insurance-only'' agents or requires such insurance specialists to render advice with respect to other categories of assets outside their specialty or expertise. There may be circumstances when the best advice an Independent Producer can give an investor is to bring in or work with another Investment Professional who can make a recommendation that is consistent with the Impartial Conduct Standards. A rollover recommendation should not be based solely on the Retirement Investor's existing investment allocation without any consideration of other investment options in the Retirement Investor's Title I Plan. The Independent Producer must carefully consider the options available to the investor, including options other than the Retirement Investor's existing Plan investments, before recommending that the participant roll assets out of the Title I Plan. Similarly, if an Independent Producer limits its recommendations to annuities or to a limited menu of annuities provided by specific insurers, it could not justify a recommendation that was imprudent on the basis that it was the most appropriate alternative from the Independent Producer's range of available investment alternatives. If none of the available annuity options could be recommended, without violating the Independent Producer's Care Obligation or Loyalty Obligation, it would need to refrain from recommending any of the offerings, even though it would mean turning away business.

Other commenters expressed concern about the level of detail required and suggested that when enforcing this condition, the Department should take into account that fact that many Independent Producers are small businesses with minimal resources. Another commenter suggested that the Department should rely instead on language from the NAIC Model Regulation or the SEC's Regulation Best Interest.

While the Department acknowledges these comments, it has determined to retain the rollover disclosure in amended PTE 84–24. As identified by some commenters, this disclosure provides important protections and information to Retirement Investors. This condition, which also matches Section II(b)(5) of the final amendment to PTE 2020–02, reflects the clear importance of sound advice with respect to rollovers. Recommendations to roll assets out of an ERISA-covered Plan often involve a Retirement Investor's lifetime savings and are critical to the investor's retirement security. For many Retirement Investors, the recommendation to roll their savings out of the Plan and invest those savings in an annuity expected to provide income for the rest of their life is the single most important recommendation they will ever receive.

The importance of the rollover documentation and disclosure requirement is proportional to the importance of the advice, and rightly focuses the Independent Producer's attention on reasonable alternatives to the rollover and annuity purchase, comparative fees and expenses, and different levels of fiduciary protections, services, and investments available before and after the roll-over. Documenting the bases for the recommendations also enables the Insurer to verify compliance with its policies and procedures, and ensure they are adequate.

As discussed in the preamble to amended PTE 2020–02, the Department is making a significant change to the disclosure provisions in the final amendments to both PTE 2020–02 and PTE 84–24 in response to comments. The Proposed Amendment specified that the rollover documentation and disclosure requirement would have extended to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (*e.g.,* from a commission-based account to a fee-based account). In response to comments, the Department is narrowing the required rollover disclosure in the Final Amendment so that it only applies to rollovers from Title I Plans. Under amended PTE 84–24, Independent Producers are not required to document and disclose recommendations to roll assets over from one Title I Plan to another Title I Plan, from one IRA to another IRA or to change account types. Of course, these types of transactions may require Independent Producers' special attention, and as discussed further below, Insurers may wish to specify in their policies and procedures how they will manage these types of transactions.

Good Faith and Exception for Disclosures Prohibited by Law

The Department is adding clarifications in Section VII(b)(7) of the Final Amendment that an Independent Producer will not fail to satisfy the disclosure conditions in Section VII(b) solely because they make an error or omission in disclosing the required information while acting in good faith and with reasonable diligence, provided that the Independent Producer discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Similarly, Section VII(b)(8) allows Independent Producers to rely in good faith on information and assurances from each other and from other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate. Additionally, under Section VII(b)(9), the Independent Producer is not required to disclose information pursuant to Section VII(b) if such disclosure is otherwise prohibited by law. These provisions are consistent with PTE 2020–02. The Department did not receive substantive comments on these provisions and is finalizing them as proposed.

Policies and Procedures

While Independent Producers are free to recommend a variety of Insurers' products, they do not operate outside the control and influence of the Insurers whose products they recommend. To the contrary, these Insurers set the Independent Producers' compensation and incentives, provide training, oversee compliance with State law obligations and the Insurer's policies and procedures, and substantially determine how and whether an Independent Producer will be able to

recommend the Insurers' products. Because of their authority over the sale of their products and over the conduct of Independent Producers, the Insurers' actions and the financial incentives they create can promote or undermine participant interests.

Despite the central and obvious importance of the Insurers themselves to the Independent Producer distribution channel, the Department has decided not to condition relief under this exemption on Insurers' acknowledgment of fiduciary status with respect to Independent Producers' recommendations. This decision takes into account many Insurers' strong concerns about being held accountable as fiduciaries for the actions of Independent Producers who are not subject to their control in the same way that, for example, common law employees are subject to their employer's control. However, the Department's ability to structure the exemption to cover Independent Producers and protect the interests of Retirement Investors importantly depends on the Independent Producers' ability to make recommendations that are subject to careful compliance-oriented institutional oversight by Insurers that is focused on Retirement Investors' best interests, and on the mitigation and avoidance of conflicts of interest.

It is critically important to the success of this exemption that the Insurers, whose products Independent Producers recommend as fiduciaries, pay careful attention to any conflicts associated with Independent Producers' recommendations of their products, appropriately manage those conflicts of interest, and adopt and implement appropriate supervisory oversight mechanisms, as set forth below. Without these protections, the Department would be unable to conclude that this exemption is sufficiently protective of Retirement Investors and their interests and would have to consider imposing more stringent protective conditions or simply require Independent Producers and Insurers to rely on PTE 2020–02, which is broadly available to them even in the absence of this exemption.[25]

[25] While this exemption does not require Insurers to acknowledge fiduciary status, Insurers can.by their own conduct, effectively make recommendations and assume fiduciary responsibility for those recommendations. When they do so, they should rely upon PTE 2020–02 for relief, inasmuch as this exemption provides relief only to the Independent Producers. The Department believes that the relief provided by this exemption is appropriately tailored to the Independent Producer distribution channel, but it will monitor performance under the exemption closely to ensure that it meets its protective purposes.

Accordingly, Section VII(c)(1) conditions relief on the actions of the Insurer to establish, maintain, and enforce written policies and procedures for the review of each recommendation made by an Independent Producer before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation. The policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer must prudently review the Independent Producer's recommendations of its products, and this review must be made without regard to the Insurer's own interests.

Section VII(c)(2) further conditions relief on a requirement that the Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the Retirement Investor's interest. In this regard, the Insurer must not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation to the Retirement Investor.

As further explained below, this condition applies an objective standard focused on whether a reasonable person would conclude that the Insurer's actions or incentives were likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. Insurers and Independent Producers must avoid and mitigate conflicts of interest to the extent possible and rely on oversight structures that prevent those conflicts of interest from driving investment recommendations, rather than the financial interests of Retirement Investors.

Under Section VII(c)(3), the Insurer's policies and procedures must also include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors. Specifically, the Insurer must have a prudent process for identifying Independent Producers who have failed to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill to provide investment advice to Retirement Investors. A prudent process includes careful review of objective material, such as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

Discussion of Comments

The Department has made minor edits to the Policies and Procedures requirement in Section II(c) in response to commenters. To ensure Retirement Investors receive the same protections, whether they receive advice under PTE 2020–02 or PTE 84–24, the Department has made the policies and procedures conditions substantively identical, with a few specific obligations tailored to the insurance industry.

Obligation on Insurers

Many commenters expressed concern that the Policies and Procedures requirement would be too difficult to meet for Insurers, who are not fiduciaries under the exemption. Some commenters argued the Policies and Procedures requirement was in conflict with State law. One commenter contrasted the Department's conditions with the NAIC requirements, which the commenter described as specific, actionable, and proportional to the relationship between insurer and agent. Another commenter described the proposed policies and procedures conditions as unworkable and objected to their departure from less demanding State laws, which the commenter said would not require the insurer to directly supervise each Independent Producer. A few commenters urged the Department to adopt the NAIC Model Regulation as a safe harbor.

Other comments focused on practical challenges associated with some interpretations of the exemption's requirements. For example, one commenter argued that use of the term ''ensure'' was unacceptable because Insurers do not control Independent Producers and therefore cannot guarantee their compliance. Another commenter stated that requiring an insurer to review the recommendations of third-party products is an impossible task because they do not know those products and the products are not and

cannot be in their system for review. This commenter further questioned how an insurer can determine whether the recommendation is in the best interest of the Retirement Investor as compared to other products the Independent Producer is authorized to sell, if the Insurer is not required to supervise an Independent Producer's recommendations of other Insurers' products. This same commenter urged the Department to specify in the operative text that supervision does not include an obligation to consider and compare other companies' products. Another commenter also characterized the exemption as requiring Insurers to review all conduct of Independent Producers and stressed the fact that Insurers are not able to control all the actions of Independent Producers to the same degree as, for example, broker-dealers can regulate the conduct of their registered representatives.

Other commenters supported the obligation imposed on Insurers. One commenter pointed to the greater risk that a recommendation in the independent channel will be tainted by conflicts of interest because there is no single institution overseeing each recommendation. To address these conflicts without imposing fiduciary status on all Insurers, each Insurer must exercise oversight over Independent Producers to the extent the Independent Producer is selling the Insurer's own products. To do this, the Insurer must have reasonably designed policies and procedures and must not encourage or reward producers for violating the Impartial Conduct Standards. Another commenter expressed significant concerns with the NAIC Model Regulation. Under the NAIC Model Regulation, insurers and producers are not required to mitigate the compensation-related conflicts of interest that are often responsible when consumers are given bad advice and end up buying annuities that are not suitable for them.

The Department has considered these comments and continues to believe that the policies and procedures requirement is essential to the exemption. The Department is similarly not adopting the NAIC Model Regulation as a safe harbor. If trusted Independent Producers are to recommend insurance products to Retirement Investors, it is important that they are subject to proper oversight by the Insurer whose products they are recommending, and that those Insurers pay careful attention to financial incentives they create or administer that are misaligned with Retirement Investors' interests. Insurers choosing to rely on Independent Producers for distribution of their products should be able to comply with the protective and workable oversight obligations set out in Section VII(c). Moreover, while there are important differences between the requirements in Section VII(c) and the NAIC Model Regulation, as discussed below, the NAIC Model Regulation itself requires a significant level of supervision demonstrating that Insurers can (and already must) supervise producers. The NAIC Model Regulation specifically says, ''An insurer shall establish and maintain a supervision system that is reasonably designed to achieve the insurer's and its producers' compliance with this regulation.'' [26]

Even if Insurers were not already required to supervise Independent Producers under State law, the conditions in Section VII(c) do not place an excessive burden on Insurers. Section VII(c)(1) specifies that the policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The ''prudently designed'' standard does not require perfection with respect to every recommendation by every Independent Producer overseen by the Insurer. The Department recognizes that, even prudent oversight structures will not prevent every instance of inappropriate advice, and use of the word ''ensure'' was not intended to suggest otherwise. When an Independent Producer violates the terms of this exemption, notwithstanding the Insurer's adoption and implementation of a prudent oversight structure, the consequence is that the Independent Producer is responsible for the resulting prohibited transaction, not that the Insurer is disqualified from continuing to act as a supervisory Insurer under the exemption. On the other hand, if the Insurer fails to implement policies and procedures and conflict-management measures consistent with this exemption, Independent Producers could not rely on this exemption for relief from ERISA's prohibited transaction rules.

In response to comments, the Department also confirms that Insurers are not required to police Independent Producers' recommendations of competitors' products. As specified in Section VII(c)(1), ''[a]n Insurer is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer.'' Furthermore, Insurers could choose to comply with the policies and procedures requirement by creating oversight and compliance systems through contracts with insurance intermediaries such as IMOs, FMOs or brokerage general agencies (BGAs). Such intermediaries, for example, could eliminate compensation incentives across all the Insurers that work with the intermediary, review Independent Producers' documentations, and/or use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for their Retirement Investor customers.

The Department acknowledges, however, that this exemption's policies and procedures requirement is significantly more stringent than the standards imposed by the NAIC Model Regulation. This reflects the difference in ERISA's regulatory structure, which is profoundly concerned about the dangers posed by conflicts of interest as expressed in the prohibited transaction provisions of Title I and Title II of ERISA. Under ERISA Section 408(a) and Code section 4975(c)(2), the Department can grant an exemption only if the exemption is in the interest of plans and their participants and beneficiaries and protective of the rights of participants and beneficiaries. The more stringent requirements of this exemption's policies and procedures are necessary for the Department to make these findings, and to ensure uniform protection of Retirement Investors.

In contrast to ERISA's stringent approach to conflicts of interest, the NAIC Model Regulation's requirements regarding mitigation of material conflicts of interest is not as protective as either the Department's approach under ERISA or the SEC's approach under Regulation Best Interest. This is made clear in the NAIC Model Regulation's definition of a ''material conflict of interest'' which expressly carves out all ''cash compensation or non-cash compensation'' from treatment as sources of conflicts of interest.[27] ''Cash compensation'' that is excluded from the definition of a material conflict of interest is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan,

[26] Section 6.C(2). Similarly, Rule 187 Section 224.6 requires ''An insurer shall establish, maintain, and audit a system of supervision that is reasonably designed to achieve the insurer's and producers' compliance.'' While Rule 187 imposes a higher standard of care than the NAIC Model Regulation and contains other provisions that are more protective of consumers than the NAIC Model Regulation, the Department has not identified statements from industry participants or other publicly available information indicating that carriers or distributors are withdrawing from the New York annuity market as a result of Rule 187.

[27] NAIC Model Regulation at section 5.I.(2).

override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer,'' and ''non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.'' [28] The NAIC also expressly disclaimed that its standard creates fiduciary obligations, and the obligations in its NAIC Model Regulation differ in significant respects from those applicable to broker-dealers in the SEC's Regulation Best Interest or to investment advisers pursuant to the Advisers Act's fiduciary duty.[29] For example, in addition to disregarding all forms of compensation as a source of material conflicts of interest, the NAIC Model Regulation's ''best interest'' standard is treated as satisfied if four component obligations are met—the care, disclosure, conflict of interest, and documentation obligations—but these components do not repeat the NAIC Model Regulation's best interest obligation not to put the producer's or insurer's interests before the customer's interest. Instead, they include a requirement ''to have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives . . . .''

Obligation on Independent Producers

Other commenters expressed concern that the obligation for Insurers to establish, maintain and enforce policies and procedures is too much of a burden for the Independent Producers who must comply with those policies and procedures. One commenter asserted that, from a practical perspective, it would be impossible for an Independent Producer to set up a system requiring the producer to follow different policies and procedures from different insurers, stating that it would inevitably lead to the producer's failure to meet the requirements of the Proposed Amendment. Another commenter stated that the obligation to figure out how to operate within different policies and procedures developed by different Insurers would drive many Independent Producers to reduce the number of Insurers for whom they sell and the number of different products they recommend. The commenter warned that this reduction could harm Retirement Investors because it would be based on the Independent Producer's own compliance burden, rather than the needs of Retirement Investors.

The Department acknowledges that there may be variations in the requirements that Insurers impose on Independent Producers or intermediaries as a result of the requirements of this Final Amendment. However, Independent Producers already have the obligation to comport their conduct to the varying contractual arrangements and policies of different Insurers. As a practical matter, Independent Producers, either directly, or indirectly through their relationship with an IMO or other intermediary, must already conform their conduct to the requirements of the potentially varying policies and procedures of the different Insurers whose products they recommend. Similarly, as Independent Producers, they necessarily have to master the intricacies of varying—and often quite complex—annuity products, compensation policies and structures, and contractual requirements provided by multiple insurance companies. The additional burden, if any, of complying with some additional variation in these same Insurers' policies and procedures, all of which are aimed at promoting the uniform goal of ensuring compliance with the Impartial Conduct Standards, is amply justified by Retirement Investors' interest in receiving sound advice from trusted Investment Professionals that is prudent, loyal, and free from misleading statements and excessive compensation.

Incentives

Commenters expressed particular concern about the requirement that Insurers may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. As noted in the preamble to PTE 2020–02, which contains essentially the same obligation, some commenters incorrectly read the Proposed Amendment as conditioning reliance on the exemption on elimination of all differentials in compensation. Other commenters viewed the exemption as prohibiting or limiting the use of Insurer-funded training and educational conferences and programs. For example, some commenters expressed concern that, under the exemption's terms, Insurers would not be able to exclude Independent Producers from training conferences even though they did not make significant sales of the Insurer's products. Several commenters additionally suggested that the Department's approach to conflicts of interest is inconsistent with that of other regulators. These commenters described the preamble to the Proposed Amendment as reflecting a judgment call by the Department that such conflicts cannot be sufficiently mitigated and therefore must be eliminated, and one challenged the Department's authority to impose such anti-conflict policies on Insurers who had not acknowledged fiduciary status or undertaken to act in a fiduciary capacity to the extent the policies exceeded the requirements of State law. One commenter described the Department's requirements as conflicting with the NAIC Model Regulation, which the commenter said only prohibits incentives that are based on sales of specific annuities within a limited period of time.[30]

However, as noted in the preamble to the final amendment to PTE 2020–02, which contains essentially the same requirement as this exemption, the exemption provision neither categorically bans differential compensation, nor prohibits Insurers from funding educational meetings. The exemption merely requires reasonable guardrails for conferences, especially if they involve travel. The exemption applies an objective standard focused on whether a reasonable person would conclude that the Insurer's actions or incentives were likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. The Department recognizes that it is impossible to eliminate all conflicts of interest with respect to the commission-based sale of insurance products, and the Department is not demanding the impossible. Instead, the Department is requiring Insurers and Independent Producers to avoid and mitigate conflicts of interest to the extent possible and to rely on oversight structures that prevent those conflicts of interest from driving investment recommendations, rather than the financial interests of Retirement Investors. The Department further confirms that an Independent Producer may receive reasonable and customary deferred compensation or subsidized health or pension benefit arrangements such as typically provided to a statutory ''employee'' as defined in Code section 3121(d)(3) without, in and of itself,

[28] *Id.* at section 5.B. and J.

[29] Section 6.A.(1)(d) of the NAIC Model Regulation provides, ''[t]he requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation.''

[30] NAIC Model Regulation section 6.C(2)(h).

violating the conditions of this exemption. However, Insurers working with these statutory employees must ensure that their policies and procedures and incentive practices are reasonably and prudently designed as required by Section VII(c).

While the Department acknowledges that the exemption imposes more stringent standards on Independent Producers than many State laws and the NAIC Model Rule, the exemption is fully consistent with the Department's authority and responsibilities under ERISA. The Department has conditioned relief from ERISA's prohibited transaction provisions on compliance with the exemption conditions based on its separate authority under Federal law, which governs Plan and IRA investments and fiduciary investment recommendations, irrespective of the type of investment product recommended, including insurance products and non-insurance products alike.

ERISA imposes an obligation on the Department to safeguard Retirement Investors from conflicts of interest. Under ERISA, in contrast to most State insurance laws, fiduciary advice providers are categorically prohibited from making investment recommendations that result in their receipt of variable compensation, unless permitted by a special exemption granted by statute or the Department. The Department can only grant exemptions that it finds are in the interest of and protective of Retirement Investors.[31]

Moreover, the conflicts of interest that give rise to prohibited transactions under Titles I and II of ERISA, include conflicts of interest associated with compensation, such as commissions and fees that the NAIC Model Regulation expressly excludes from treatment as material conflicts of interest. Specifically, the NAIC Model Regulation's definition of a ''material conflict of interest'' expressly carves out all ''cash compensation or non-cash compensation'' from treatment as sources of material conflicts of interest.[32] This ''cash compensation,'' which is excluded from the definition of a material conflict of interest, is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.[33] ''Non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including but not limited to, health insurance, office rent, office support and retirement benefits.'' [34]

In contrast, the SEC, like the Department of Labor, recognizes that such compensation creates significant conflicts of interest, as recognized in its Regulation Best Interest and under the fiduciary duty of the Investment Advisers Act of 1940. In an FAQ regarding this regulation, SEC staff provided examples of common sources of conflicts of interest for broker-dealers, investment advisers, or financial professionals, and specifically included ''compensation, revenue or other benefits (financial or otherwise).'' [35]

This Final Amendment appropriately follows Federal law, as expressed in ERISA, to protect Plan and IRA investors. The more stringent Federal protections adopted here with respect to Federally regulated retirement investments fully accord with ERISA's requirements and the authority conferred by Congress to the Department in ERISA section 408(a) and Code section 4975(c)(2) to protect Retirement Investors from harmful conflicts of interest.

The Department has specifically granted this Final Amendment to permit Independent Producers to receive compensation that may vary based on their specific investment recommendations, such as sales commissions, that otherwise would be prohibited by ERISA's broad categorical prohibitions on the receipt of such conflicted compensation by fiduciaries. However, in order to receive such compensation when acting as fiduciaries, Independent Producers must recommend products only from Insurers that pay attention to the conflicts that are inherent in their compensation models and take special care to avoid creating or implementing compensation practices that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation of this Final Amendment.

However, as discussed above, because of Insurer concerns about being held responsible as fiduciaries for the conduct of Independent Producers whom they do not hire or control as common law employees, the Department has not conditioned relief on the Insurer's acknowledgement of fiduciary status with respect to the Independent Producer's recommendation of its insurance products. Instead, it simply requires that Independent Producers that receive otherwise prohibited compensation subject to appropriate oversight and incentive structures. Under the Final Amendment, the oversight is conducted by the same Insurers who create the incentive structures for the products in the first place and generally already have oversight responsibility over Independent Producers under State law.

The Department understands that Insurers significantly rely on educational conferences for Independent Producers, as commenters indicated, and that such conferences and training can promote Retirement Investors' interests. Accordingly, the Department stresses that it is not prohibiting such conferences. However, participation in and reimbursement for these conferences must be structured in a manner to ensure they are not likely to cause Independent Producers to make recommendations that violate this exemption's Care Obligation or Loyalty Obligation. In addition, the Department notes that properly designed incentives that are simply aimed at increasing the overall amount of retirement saving and investing, without promoting specific products, would not violate the policies and procedures requirement.

As noted in the preamble to the Final Amendment to PTE 2020–02, the Department also recognizes that it can be proper to tie attendance at conferences to appropriate sales thresholds in certain circumstances (for example, insurance companies could not reasonably be expected to provide training for independent agents who are not recommending their products). On the other hand, parties must take special care to ensure that training conferences held in vacation destinations are not designed to incentivize recommendations that run counter to Retirement Investor interests. Firms should structure training events to ensure that they are consistent with the Care and Loyalty Obligations. Recommendations to Retirement Investors should be driven by the interests of the investor in a secure retirement. Certainly, parties should avoid creating situations where the training is merely incidental to the event, and an imprudent recommendation to a Retirement Investor is the only thing standing between an Investment Professional and a luxury getaway vacation.

[31] ERISA section 408(a)(2), (3); 29 U.S.C. 1108(a)(2), (3); Code section 4975(c)(2)(B), (C).

[32] NAIC Model Regulation at section 5.I.

[33] NAIC Model Regulation at section 5.B.

[34] NAIC Model Regulation at section 5.J.

[35] See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, Q2, available at *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

Reviewing Independent Producers

Some commenters raised specific concerns with the requirement in Section VII(c)(3), which provides that the Insurer whose product is recommended has a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts and to protect the Retirement Investor from Independent Producers who have failed to adhere to the Impartial Conduct Standards or who lack the necessary education, training, or skill. A prudent process would include review of such objective materials as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. Section VII(d)(1) specifies that Insurers may rely in part on sampling to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

Some commenters objected to provisions in this proposed requirement that would have required a prudent process ''for taking action to protect Retirement Investors from Independent Producers who are likely to fail to adhere to the Impartial Conduct Standards,'' and several commenters said they do not know how to predict in advance the likelihood that a producer is ''likely to fail'' in the future. One commenter additionally asked the Department to state that these requirements could be limited to objective criteria such as a criminal background check, license verification, credit history check, and similar data readily available to the Insurer.

In response to these commenters, the Department has not included the phrase ''or are likely to fail'' after ''who have failed'' in the Final Amendment, because it may have been read to require predictive powers, which the Department did not intend. The Department also agrees that a prudent process for reviewing Independent Producers must include a careful review of ''objective material,'' but the Department does not agree that a prudent process can be fully specified in advance by reference to a tightly limited set of objective materials and therefore has not adopted changes requested by commenters to further narrow the requirements of Section VII(c)(3).

Providing Policies and Procedures to the Department

Proposed Section VII(c)(4) would have required Insurers to provide their complete policies and procedures to the Department upon request within 10 business days of the request. The provision is also part of the Policies and Procedures condition in PTE 2020–02 and was subject to comments in connection with that exemption. As described in the preamble to the final amendment to PTE 2020–02, one commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Another commenter strongly urged the Department to eliminate this condition and instead rely on its subpoena authority, if necessary. Another comment requested more time to provide the certification to the Department. In response to this comment, although the Department expects that the policies and procedures should be easily located, the Department also recognizes the possibility of inadvertent non-compliance because of the tight timeline. After considering these comments, the Department has retained Section VII(c)(4) but extended the time for Insurers to provide their complete policies and procedures to the Department from within 10 business days as proposed to within 30 days of request.

Retrospective Review

Under Section VII(d), the Insurer whose product the Independent Producer recommends must have a process for conducting a retrospective review of each Independent Producer at least annually that is reasonably designed to detect and prevent violations of, and achieve compliance with, the exemption's conditions. The retrospective review also includes a review of Independent Producers' documentation of rollover recommendations and required rollover disclosure. As part of this review, the Insurer is expected to prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer must update its policies and procedures as business, regulatory, and legislative changes and events dictate, and ensure that its policies and procedures remain prudently designed, effective, and compliant with Section VII(c). To ensure Retirement Investors receive the same protections, whether they receive advice under PTE 2020–02 or PTE 84–24, the Department has made the retrospective review conditions substantively identical, with a few specific obligations tailored to the insurance industry. In addition, under the Proposed Amendment, the Insurer was expected to give the Independent Producer the methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction the Independent Producer engaged in with respect to investment advice defined under Code section 4975(e)(3)(B), and instruct the Independent Producer to correct those prohibited transactions, report the transactions to the IRS on Form 5330, pay the resulting excise taxes imposed by Code section 4975, and provide the Insurer with a certification that the Independent Producer has filed the Form 5330 within 30 days after the form is due (including extensions).

Under the Proposed Amendment, the methodology and results of the retrospective review had to be reduced to a written report that is provided to a Senior Executive Officer of the Insurer. As proposed, that Senior Executive Officer also had to certify, annually, that:

(A) The officer has reviewed the retrospective review report;

(B) The Insurer has provided Independent Producers with the information required under (d)(2) and has received a certification that the Independent Producer has filed Form 5330 within 30 days after the form is due (including extensions);

(C) The Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and

(D) The Insurer has in place a prudent process to modify such policies and procedures as set forth in Section VII(d)(1).

The review, report, and certification was proposed to be completed no later than six months following the end of the period covered by the retrospective review. The Proposed Amendment would have required the Insurer to retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 10 business days of request.

Some commenters supported the retrospective review condition and

supported having Insurers undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption. However, other commenters raised concerns, viewing the condition as excessive and inefficient. Commenters asserted that it is both impractical and unnecessary for Insurers to review each recommendation and expressed concern about the volume of recommendations. One commenter requested confirmation that testing done as part of the retrospective review could rely on standard sampling and testing techniques. Another commenter pointed to the language in the preamble to the Proposed Amendment acknowledging that insurance companies working with Independent Producers have less direct control over the conduct and compensation of Independent Producers than over their employees. As a result, they stated that Insurers would not have access to the information they would need to effectively ensure that Independent Producers fully complied with the Impartial Conduct Standards and the other exemption conditions. One commenter expressed concern that under the exemption, Independent Producers are not required to provide Insurers with sufficient information for them to be able to conduct the retrospective review. Some commenters argued that the Department should instead rely on the NAIC Model Regulation's written report to senior management which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the insurer's supervision system, the exceptions found, and corrective action taken or recommended, if any.

Some commenters also raised specific concerns with the Senior Executive Officer certification requirement. They noted that other regulators typically require that certifications provide assurance that company systems or procedures are ''reasonably designed to achieve compliance,'' a standard that they asserted was lower than what is required for Independent Producers to achieve compliance with impartial conduct standards. Other commenters stated that the retrospective review should not consider the filing of the IRS Form 5330, arguing this is beyond the Department's regulatory authority. A few commenters raised specific concerns that Insurers were not the appropriate party to file Form 5330 under the Code. Others argued that requiring Insurers to file Form 5300 interfered with State regulation of insurance.

One commenter requested more time to provide the certification to the Department. In response to this comment, although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement to give Insurers 30 days to provide the certification.

The Department is finalizing the retrospective review requirement because of the fundamental importance of a regular review process to ensure that the Policies and Procedures are working and that Independent Producers are complying with the Impartial Conduct Standards. In response to commenters, the Department has added to Section (d)(1) a clarification that Insurers may rely in part on sampling of each Independent Producer's transactions to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

The Department is also making several other changes to specifics of the retrospective review provision. To address concerns from some commenters about having the Insurer file Form 5330, the Department is revising the filing obligation to be the responsibility of the Independent Producer, which is a fiduciary, and thus a ''disqualified person liable for the tax under Code section 4975 for participating in a prohibited transaction.'' [36] However, the Insurer is expected to instruct the Independent Producer to correct those prohibited transactions, report the transactions to the IRS on Form 5330, pay the resulting excise taxes imposed by Code section 4975, and provide the Insurer with a certification that it has filed Form 5330 within 30 days after the form is due (including extensions). The Department is also revising Section VII(d)(3) for consistency with amended PTE 2020–02. The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Insurer. This is essential for Insurers to know that their Independent Producers are actually correcting prohibited transactions.

The Department is also revising the Senior Executive Officer certification to incorporate the amended provisions regarding Form 5330. Under the Final Amendment, the required certification states that the officer has reviewed the retrospective review report, the Insurer has provided Independent Producers with the information required under (d)(2), and the Insurer has received a certification that affected Independent Producers have filed Form 5330 within 30 days after the form is due (including extensions).

Self-Correction

Section VII(e) allows the Independent Producer to correct violations to avoid a non-exempt prohibited transaction in certain circumstances. Self-correction is allowed in cases when either (1) the Independent Producer has refunded any charge to the Retirement Investor; or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. The correction must occur no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; the Independent Producer must notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle; and the violation and correction must be specifically set forth in the written report of the retrospective review required under Section VII(d)(2).

The appropriate remedy for a non-exempt prohibited transaction involving an annuity purchase is rescission, which requires the insurer to cancel the contract and waive surrender charges. The correction must occur no later than 90 days after the Independent Producer learned, or reasonably should have learned, of the violation. Lastly, the Independent Producer must notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction must specifically be set forth in the written retrospective review report.

One commenter stated that it is unclear what is exactly meant by a ''mis-sold'' annuity and what is supposed to happen if an agent and Insurer disagree in that regard. Thus, according to this commenter, it is unclear how the agent or Insurer in the case of retrospective review would even discover any non-exempt prohibited transaction. This same commenter also questioned whether all non-exempt prohibited transactions require rescission or whether there is a materiality threshold. This commenter also stated that the Proposed Amendment did not address the common situation where an Insurer

[36] IRS Form 5330 instructions *https://www.irs.gov/pub/irs-pdf/i5330.pdf.*

rescinds an annuity as a matter of customer service without determining or admitting any violation of laws or, in this case, noncompliance with impartial conduct standards. Finally, this commenter asked how situations would be handled where agents and Insurers disagree on the need for correction under PTE 84–24.

As discussed in the preamble to PTE 2020–02 in response to comments, the Department notes that no one is required to use the self-correction provision. Furthermore, not all violations of the exemption can be corrected under the self-correction provision. In addition, minor disclosure failures can be corrected under Section VII(b)((7), which provides that the Independent Producer will not fail to satisfy the disclosure conditions solely because it makes an error or omission in disclosing the required information while acting in good faith and with reasonable diligence. To avoid a violation of the exemption, the Independent Producer must disclose the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Lastly, the Department notes that merely rescinding an annuity as a matter of customer service is not self-correcting if there was no violation to correct.

While the Insurer may discover violations eligible for self-correction as part of its retrospective review under Section VII(d), it is the Independent Producer's obligation to self-correct under Section VII(e) to avoid the resulting prohibited transaction and imposition of an excise tax. If there is disagreement, the Independent Producer ultimately has the responsibility as a fiduciary to decide whether to take action. Based on what the Insurer learns through the review process, and the specific facts and circumstances, a reasonable Insurer may conclude that it is imprudent to continue authorizing that Independent Producer to sell its annuity contracts and act accordingly. To the extent that the Independent Producer does not or cannot correct the violation, the consequence is that a prohibited transaction has occurred with attendant liability for the excise tax.

As discussed in the proposal to PTE 2020–02, some commenters raised concerns about the lack of a materiality threshold, and the requirement that all mistakes be reported and remediated, no matter how minor or inadvertent. However, the self-correction provisions are measured and proportional to the nature of the injury. They simply require timely correction of the violation of the law and notice to the person responsible for retrospective review of the violation, so that the significance and materiality of the violation can be assessed by the appropriate person responsible for assessing the effectiveness of the firm's compliance oversight. In addition, to address the commenters' concern about the burden associated with the self-correction provision, the Department has deleted the requirement to report each correction to the Department in this Final Amendment. This change should ease the compliance burden. Furthermore, to the extent parties are wary of utilizing the self-correction provision because they would have to report each self-correction to the Department, they should feel more comfortable correcting each violation they find that is eligible for self-correction after this modification. The Department notes that it may request Independent Producers to provide evidence of self-corrections through the recordkeeping provisions in Section IX.

Eligibility

The Proposed Amendment added Section VIII which identifies circumstances under which an Independent Producer would have become ineligible to rely on the exemption for 10 years, and also circumstances when an entity would not have been permitted to serve as an Insurer under this exemption for 10 years. The proposed eligibility provisions were similar to the provisions of Section III of PTE 2020–02 and are intended to promote compliance with the exemption conditions. The Department continues to believe that the eligibility provisions are important to ensure that Independent Producers comply with the obligations of the exemption, subject to oversight by Insurers that take compliance with the exemption's conditions seriously. Therefore, after consideration of the comments, the Department has determined to retain the eligibility provision of Section VIII, but it has made several important modifications that are discussed below.

Under the Final Amendment, an Independent Producer or Insurer can become ineligible as a result of a conviction by: (A) a U.S. Federal or State court as a result of any felony involving abuse or misuse of such person's employee benefit Plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or (B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of ''foreign adversaries'' that is codified in 15 CFR 7.4 as amended).

Independent Producers and Insurers also lose eligibility if they are found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have participated in one or more of the following categories of misconduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

In addition, Independent Producers (but not Insurers) will become ineligible if they are found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited

transactions involving investment advice under Code section 4975(e)(3)(B).

The Final Amendment specifies that an Insurer or Independent Producer that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may apply for an individual prohibited transaction exemption from the Department.

Most of the comments the Department received on eligibility were combined with the comments submitted under PTE 2020–02 and were essentially the same. Those comments directly submitted under PTE 84–24 are also very similar to the comments under PTE 2020–02 regarding eligibility. For additional discussion of the comments received regarding eligibility please see the grant notice for PTE 2020–02 published elsewhere in today's issue of the **Federal Register**. Many commenters variously asserted that the proposed addition of the eligibility provisions to the exemptions exceeded the Department's authority; undermined parties' ability to rely on the exemptions; unduly broadened the conditions for eligibility; and would result in reduced choice and access to advice for Retirement Investors. Generally, these commenters requested that the Department not include the proposed ineligibility sections in the Final Amendment and requested that, if the Department does move forward with these sections, that it apply the provisions prospectively.

Scope of Ineligibility

One commenter claims that the Proposed Amendment would impose unreasonably harsh sets of conditions on both Independent Producers and on Insurers, under which both would be under constant threat of loss of the exemption for a 10-year period and, in the case of Insurers, loss of the exemption could be triggered by events involving other parties over whom the Insurer has no direct involvement. Another commenter expressed concern that the proposed ineligibility provisions applied too broadly to insurance producers, insurance carriers and their foreign and domestic affiliates.

Some commenters objected to the breadth of the provisions' application to ''Affiliates'' and requested that the Final Amendment instead use the term ''controlled group,'' which has a clear and well-defined meaning. Some commenters similarly objected to the scope of conduct treated as disqualifying and asserted that disqualification should not extend to criminal conduct that does not involve the management of retirement assets.

In response to the commenters, the Department has decided to use the term ''Controlled Group'' for purposes of ineligibility of Insurers under Section VIII(b) of the exemption and has revised that Section accordingly. The Final Amendment also adds Section VIII(b)(3), which defines Controlled Group. Under this definition, an entity is in the same Controlled Group as an Insurer if the entity (including any predecessor or successor to the entity) would be considered to be in the same ''controlled group of corporations'' as the Insurer or ''under common control'' with the Insurer as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder). The Department declines, however, to narrow the Final Amendments' definition of crimes to only those crimes that arise out of the provision of investment advice or the management of plan assets. The enumerated crimes in Section VIII reflect egregious misconduct, typically in a financial context, that is clearly relevant to the parties' willingness and commitment to comply with important legal obligations. There is little basis for concluding that Retirement Investors should be sanguine or that the Department should be confident of compliance when the Independent Producer or Insurer engages in serious crimes, such as embezzlement or financial fraud, but the specific victims were non-Retirement Investors. However, to the extent Independent Producers or Insurers have continued need for an exemption notwithstanding such a conviction, they can apply with the Department for an individual prohibited transaction exemption that would include appropriate protective conditions based on the Department's assessment of the particular facts and circumstances, and the remedial actions the parties have taken to ensure a prospective culture of compliance.

Foreign Convictions

Several commenters claimed that the Department has no basis for expanding the ineligibility provisions to include ''substantially equivalent'' foreign crimes committed by foreign affiliates and that the inclusion of foreign affiliates is overbroad and will create unintended consequences, especially when the conduct does not need to relate directly to the provision of investment advice. These commenters stated that such inclusion will result in ineligibility for conduct that is unrelated to the provision of fiduciary investment advice and for conduct in which the fiduciary has not participated and about which it has no knowledge. Another commenter stated ineligibility could be triggered by events involving other parties over which the insurer has no direct involvement, such as the conviction of an affiliate company of any of the specified crimes under the laws of a foreign country.

Several comments regarding PTEs 2020–02 and 84–24 stated that the proposed ineligibility provisions raised serious questions of fairness, national security, and U.S. sovereignty. These commenters claimed that ineligibility could result from the conviction of an affiliate in a foreign court for a violation of foreign law without due process protections or without the same level of due process afforded in the United States. Some commenters state that it is not clear that the Department is equipped to make the ''substantially equivalent'' determination and doing so could result in inconsistency and unfairness. One commenter agreed that investment transactions that include retirement assets are increasingly likely to involve entities that may reside or operate in jurisdictions outside the U.S. and that reliance on the exemptions therefore must appropriately be tailored to address criminal activity, whether occurring in the U.S. or in a foreign jurisdiction, but noted their concerns with the potential lack of due process in foreign jurisdictions.

Other commenters were concerned that some foreign courts could be vehicles for hostile governments to achieve political ends as opposed to dispensing justice and for interference in the retirement marketplace for supposed wrongdoing that is wholly unrelated to managing retirement assets. They further noted concerns that these governments could potentially assert political influence over fiduciary advice providers looking to avoid a foreign criminal conviction.

After considering these comments, the Department is retaining the inclusion of foreign convictions in the Final Amendment. Retirement assets are often involved in transactions that take place in entities that operate in foreign jurisdictions therefore making the criminal conduct of foreign entities relevant to eligibility under PTE 84–24. An ineligibility provision that is limited to U.S. Federal and State convictions would ignore these realities and provide insufficient protection for Retirement Investors. Moreover, foreign crimes call into question an Insurer's and Independent Producer's culture of compliance just as much as domestic crimes, whether prosecuted domestically or in foreign jurisdictions.

The Department does not expect that questions regarding ''substantially equivalent'' will arise frequently, especially given the Final Amendment's use of the term ''Controlled Group'' instead of ''Affiliate,'' as discussed above. But, when these questions do arise, those impacted may contact the Office of Exemption Determinations for guidance, as they have done for many years.[37] As discussed in more detail below, the one-year Transition Period that has been added to the exemption and the ability to apply for an individual exemption, give parties both the time and the opportunity to address any issues about the relevance of any specific foreign conviction and its applicability to ongoing relief pursuant to PTE 84–24. Insurers and Independent Producers should interpret the scope of the eligibility provision broadly with respect to foreign convictions and consistent with the Department's statutorily mandated focus on the protection of Plans in ERISA section 408(a) and Code section 4975(c)(2). In situations where a crime raises particularly unique issues related to the substantial equivalence of the foreign criminal conviction, the Insurers and Independent Producers may seek the Department's views regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. Federal or State crime. However, any Insurer or Independent Producer submitting a request for review should do so promptly, and whenever possible, before a judgment is entered in a foreign conviction.

The exemption for Qualified Professional Asset Managers (QPAMs), PTE 84–14, has a similar disqualification provision and the Department is not aware that any foreign convictions have occurred in foreign nations with respect to the QPAM exemption that are intended to harm U.S.-based financial institutions and believes there is a small likelihood of such occurrences. Further, the types of foreign crimes of which the Department is aware from its experience processing recent PTE 84–14 QPAM individual exemption requests for relief from convictions have consistently related to the subject institution's management of financial transactions and/or culture of compliance. For example, the underlying foreign crimes in those individual exemption requests have included: aiding and abetting tax fraud in France (PTE 2016–10, 81 FR 75147 (October 28, 2016) corrected at 88 FR 85931 (December 11, 2023), and PTE 2016–11, 81 FR 75150 (October 28, 2016) corrected at 89 FR 23612 (April 4, 2024)); attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023–13, 88 FR 26336 (April 28, 2023)); illicit solicitation and money laundering for the purposes aiding tax evasion in France (PTE 2019–01, 84 FR 6163 (February 26, 2019)); and spot/futures-linked market price manipulation in South Korea (PTE 2015–15, 80 FR 53574 (September 4, 2015)).[38]

However, to address the concern expressed in the public comments that convictions have occurred in foreign nations that are intended to harm U.S.-based financial institutions, the Department has revised Section VIII(a)(1)(B) and VIII(b)(1)(B) in the Final Amendment to exclude foreign convictions that occur within foreign jurisdictions that are included on the Department of Commerce's list of ''foreign adversaries.''[39] Therefore, the Department will not consider foreign convictions that occur under the jurisdiction of the listed ''foreign adversaries'' as an ineligibility event and has added the phrase ''excluding convictions and imprisonment that occur within foreign countries that are included on the Department of Commerce's list of ''foreign adversaries'' that is codified in 15 CFR 7.4.

Due Process

The Department also received several comments regarding the proposed ineligibility notice process. The Proposed Amendment would have provided that the Department could issue a written ineligibility notice for (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally violating, or knowingly participating in violations of, the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department in connection with the conditions of the exemption.

Generally, these comments reflected the view that the Department had inappropriately asserted authority to determine ineligibility without external review and without appropriate due process protections. Commenters stressed that disqualification effectively imposed a 10-year ban, and many expressed the view that more procedural protections were necessary for such a significant consequence and that disqualification should be more tightly linked to failure to meet the conditions of the exemption. Some commenters contended that, by leaving too much discretion to the Department, the process would create uncertainty and adversely affect the ability of Retirement Investors to get sound advice. Some commenters expressed concern that the Department's ineligibility process was insufficient because it did not provide a chance for a hearing before an impartial administrative judge or Article III judge, an express right of appeal, and formal procedures for the presentation of evidence.

Some commenters on both PTEs 2020–02 and 84–24 also stated that while the six-month period provided in

[37] PTE 84–14 contains a similar eligibility provision which has long been understood to include foreign convictions. Impacted parties have successfully sought OED guidance regarding this eligibility provision whenever individualized questions or concerns arise. *See, e.g.,* Prohibited Transaction Exemption (PTE) 2023–15, 88 FR 42953 (July 5, 2023); 2023–14, 88 FR 36337 (June 2, 2023); 2023–13, 88 FR 26336 (Apr. 28, 2023); 2023–02, 88 FR 4023 (Jan. 23, 2023); 2023–01, 88 FR 1418 (Jan. 10, 2023); 2022–01, 87 FR 23249 (Apr. 19, 2022); 2021–01, 86 FR 20410 (Apr. 19, 2021); 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE 2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004).

[38] On December 12, 2018, Korea's Seoul High Court for the 7th Criminal Division (the Seoul High Court) reversed the Korean Court's decision and declared the defendants not guilty; subsequently, Korean prosecutors appealed the Seoul High Court's decision to the Supreme Court of Korea, On December 21, 2023, the Supreme Court of Korea affirmed the reversal of the Korean Conviction, and it dismissed all judicial proceedings against DSK.

[39] 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicolás Maduro (Maduro Regime). The Secretary of Commerce's determination is based on multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Sections VIII(a)(1)(B) and VIII(b)(1)(B) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

the exemption may be adequate time to send a notice to Retirement Investors, it is insufficient time for a financial institution to determine an alternative means of complying with ERISA in order to continue to provide advice to Retirement Investors. These commenters requested the Department to revise the exemption to provide for at least 12 months to make the transition away from reliance on PTE 84–24 or to find an alternative means of complying with ERISA following a finding of ineligibility.

After consideration of the comments and to address the due process concerns, the Department has determined to modify Sections VIII(a)(2) and VIII(b)(2) of the ineligibility provisions. While maintaining the types of conduct that can lead to ineligibility, amended Section VIII(a)(2) and VIII(b)(2) of the Final Amendment removes the discretion of the Department from making the determination of whether the conduct has occurred and limits disqualification to court-supervised determinations.

Under the provision as amended, ineligibility under Section VIII(a)(2) will occur as a result of an Independent Producer being found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the Department of Justice, a State insurance regulator, or a State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of this exemption.

Likewise, ineligibility under Section VIII(b)(2) will occur as a result of an Insurer being found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the Department of Justice, a State insurance regulator, or a State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of this exemption.

Ineligibility under Section VIII(a)(2) and (b)(2) will therefore operate in the same manner as ineligibility for a criminal conviction defined in Section VIII(a)(1) and (b)(1), subject to the timing and scope provisions in Section VIII(c). An Insurer or Independent Producer will become ineligible only after a court has found or determined in a final judgment or approved settlement that the conduct listed in Section VIII(a)(2) or (b)(2) has occurred. In response to concerns raised by commenters, the Department has made changes so that any ineligibility occurs only after a conviction, a court's final judgment, or a court approved settlement.

Thus, ineligibility will follow a determination in civil or criminal court proceedings subject to the full array of procedural protections associated with legal proceedings overseen by courts and will include the normal judicial oversight associated with convictions, final judgments, and court approved settlements. In addition to providing sufficient due process, this revised ineligibility provision (*i.e.,* having ineligibility occur only after a conviction, a court's final judgment, or a court approved settlement) gives those facing ineligibility ample notice and time to prepare for ineligibility and the resulting One-Year Transition Period discussed below. An ineligible Insurer or Independent Producer would become eligible to rely on this exemption again if there is a subsequent judgment reversing the conviction or final judgement.

Timing of Ineligibility and One-Year Transition Period

Several commenters to both PTE 2020–02 and PTE 84–24 expressed concern that the eligibility provisions would apply retrospectively and urged the Department to confirm that ineligibility under the exemption would occur only on a prospective basis after finalization of the amendment to the exemption. Additionally, some commenters asserted that the six-month period provided in the Proposed Amendment following ineligibility would be insufficient for Insurers and Independent Producers to prepare for any inability to provide retirement investment advice for a fee, determine an alternative means of complying with ERISA, and to prepare and submit an individual exemption. Another commenter stated that providing a longer 12-month period would enable Insurers and Independent Producers to find alternative compliant means to help retirement investors and would enable retirement investors to continue to receive investment recommendations in their best interest.

One commenter claimed that the sudden real or impending loss of significant numbers of providers, or even a handful of the largest among them, as the result of their disqualification would cause significant disruption as Plans would have no more than six months to find suitable replacements and would impose harm on Retirement Investors who have hired a disqualified firm.

The Department confirms that ineligibility under Section VIII will be prospective such that only convictions, final judgments, or court-approved settlements occurring after the Applicability Date of this Final Amendment will cause ineligibility. In addition, the six-month lag period for eligibility has been replaced with the One-Year Transition Period in Section VIII(c)(2). Accordingly, while Section VIII(c) now provides that a party becomes ineligible upon the date of conviction, final judgment, or court-approved settlement that occurs after the Applicability Date of the exemption, the One-Year Transition period provides Insurers and Independent Producers ample time in which to prepare for the loss of the exemptive relief under PTE 84–24, determine alternative means for compliance, prepare and protect Retirement Investors, and apply for an individual exemption.

The Final Amendment indicates that relief under the exemption during the

Transition Period is available for a maximum period of one year after the Ineligibility Date if the Insurers or Independent Producer, as applicable, submits a notice to the Department at *PTE84-24@dol.gov* within 30 days after ineligibility begins under Section VIII(c). No relief will be available for any transactions (including past transactions) effected during the One-Year Transition Period unless the Insurer or Independent Producer complies with all the conditions of the exemption during such one-year period. The Department notes that it included the One-Year Transition Period in the Final Amendment to reduce the costs and burdens associated with the possibility of ineligibility, and to give Insurers or Independent Producers an opportunity to apply to the Department for individual prohibited transaction exemptions with appropriate protective conditions.

The One-Year Transition Period begins on the date of the conviction, the final judgment (regardless of whether that judgment remains under appeal), or court approved settlement. Insurers or Independent Producers that become ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption, such as ERISA section 408(b)(14) and Code section 4975(d)(17), or separate administrative prohibited transaction exemption if one is available, or may seek an individual prohibited transaction exemption from the Department. In circumstances where the Insurers or Independent Producers become ineligible, the Department believes the interests of Retirement Investors are best protected by the procedural protections, public record, and notice and comment process associated with the individual exemption applications process. When processing individual exemption applications, the Department has unique authority to efficiently gather evidence, consider the issues, and craft protective conditions that meet the statutory standard. If the Department concludes, consistent with the statutory standards set forth in ERISA section 408(a) and Code section 4975(c)(2), that an individual exemption is appropriate, Retirement Investors can make their own independent determinations whether to engage in otherwise prohibited transactions with the Insurers or Independent Producers.

The Department encourages any Insurers or Independent Producers facing allegations that could result in ineligibility to begin the individual exemption application process as soon as possible. If the applicant becomes ineligible and the Department has not granted a final individual exemption, the Department will consider granting retroactive relief, consistent with its policy as set forth in 29 CFR 2570.35(d); the Department cautions that retroactive exemptions may require additional prospective compliance.

Form 5330

The Department received comments that expressed concern over the imposition of ineligibility based on the Independent Producers' failure to make the required Code section 4975 excise tax filing and to comply with IRS Form 5330 filing requirements and excise tax payment obligations. Several commenters stated this provision is unreasonable and that the Department has no statutory or regulatory enforcement authority to base ineligibility on these Code provisions and claimed this was overreach by the Department. These commenters urged the Department to remove this provision from the exemption.

The Department is retaining ineligibility based on failure to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B). The excise tax is the Congressionally imposed sanction for engaging in a non-exempt prohibited transaction and provides a powerful incentive for compliance with the participant-protective terms of this exemption. Insisting on compliance with the statutory obligation to pay the excise tax provides an important safeguard for compliance with the tax obligation when violations occur and focuses the institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction. Moreover, the failure to satisfy this condition calls into question the Independent Producer's commitment to regulatory compliance, as is critical to ensuring adherence to the conditions of this exemption including the Impartial Conduct Standards.

By including this provision in the Final Amendment, the Department does not claim authority to impose taxes under the Code, and leaves responsibility for collecting the excise tax and managing related filings to the IRS. Since an obligation already exists to file Form 5330 when parties engage in non-exempt prohibited transactions, the Department is merely conditioning relief in the exemption on their compliance with existing law. The condition provides important protections to Retirement Investors by enhancing the existing protections of PTE 84–24.

Moreover, as discussed above, ineligibility under Section VIII(a)(2)(C) would only occur following a court finding that an Independent Producer engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975. Imposing ineligibility only after such determinations in connection with court proceedings removes the Department from the determination process and provides ample due process.

Alternative Exemptions

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief. A few commenters also expressed concern that the Alternative Exemptions process was not sufficient. One commenter in particular expressed concern with the length and expense of seeking to obtain an individual exemption, claiming this would result in harm to Plans.

As discussed above, the violations that would trigger ineligibility are serious, call into question the parties' willingness or ability to comply with the obligations of the exemption, and have been determined in court supervised proceedings. In such circumstances, it is important that the parties seek individual relief from the Department if they would like to continue to have the benefit of an exemption that permits them to engage in conduct that would otherwise be illegal. As part of such an on the record process, they can present evidence and arguments on the scope of the compliance issues, the additional conditions necessary to safeguard Retirement Investor interests, and their ability and commitment to comply with protective conditions designed to ensure prudent advice and avoid the harmful

impact of dangerous conflicts of interest.

One commenter also speculated that the loss of the exemption based on ineligibility would effectively require the Insurer to acknowledge fiduciary status in connection with any request for an individual exemption. The Department notes, however, that it would base any decisions on whether to grant such an exemption and the possible conditions it would include in such exemption, including the need for a fiduciary acknowledgment, on the particular facts and circumstances that were presented by an applicant.

Recordkeeping

Section IX provides that Independent Producers and Insurers must maintain for a period of six years from the date of the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, including such employees of the Internal Revenue Service. While the Department had proposed a broader recordkeeping condition affording greater public access to the records, the Department has determined that the recordkeeping provisions for advice under PTE 84–24 should be narrowed consistent with those in PTE 2020–02.

Although the proposed broader recordkeeping condition was consistent with other exemptions, the Department understands commenters' concerns about broader access to the documents and has concern that broad access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Independent Producers. Therefore, the Department has determined this narrower recordkeeping language satisfies ERISA section 408(a) and Code section 4975(c)(2). However, the Department intends to monitor compliance with the exemption closely and may, in the future, expand the recordkeeping requirement if appropriate. Any future amendments would be preceded by notice and an opportunity for public comment.

Executive Order 12866 and 13563 Statement

Executive Orders 12866 [40] and 13563 [41] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[42] entitled ''Modernizing Regulatory Review,'' section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case. It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the amendment's costs, benefits, and transfers, and OMB has reviewed the rulemaking.

[40] 58 FR 51735 (Oct. 4, 1993).

[41] 76 FR 3821 (Jan. 21, 2011).

[42] 88 FR 21879 (Apr. 6, 2023).

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

ICRs are available at *RegInfo.gov* (*https://www.reginfo.gov/public/do/PRAMain*). Requests for copies of the ICR or additional information can be sent to the PRA addressee:

By mail: James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210

By email: ebsa.opr@dol.gov

The OMB will consider all written comments that they receive within 30 days of publication of this notice. Written comments and recommendations for the information collection should be sent to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

As discussed in detail above, PTE 84–24, as amended, will exclude compensation received as a result of the provision of investment advice from the existing relief provided in Section II, which will be redesignated as Section II(a) and add new Sections VI and -XI and redesignate the definitions as Section X, which will provide relief for investment advice limited to the narrow category of transactions in which an independent, insurance-only agent, or Independent Producer, provides investment advice to a Retirement Investor regarding an annuity or insurance contract. Additionally, as amended, the exemption requires the Independent Producers engaging in these transactions to adhere to certain Impartial Conduct Standards, including acting in the best interest of the Plans and IRAs when providing advice.

Financial institutions and investment professionals that engage in all other investment advice transactions, including those involving captive or career insurance agents, will rely on PTE 2020–02 to receive exemptive relief for investment advice transactions. PTE 84–24 will require certain new disclosures, annual retrospective reviews, and compliance with policy and procedure requirements. These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.[43]

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $165.29 for an Independent Producer, $65.99 for clerical personnel, and $165.71 for a legal professional, and $133.24 for a senior executive.[44]

The Department does not have information on how many Retirement Investors, including Plan beneficiaries and participants and IRA owners, receive disclosures electronically from investment advice fiduciaries. For the purposes of this analysis in the Proposed Amendment, the Department assumed that the percent of Retirement Investors receiving disclosures electronically would be similar to the percent of Plan participants receiving disclosures electronically under the Department's 2002 and 2020 electronic disclosure rules, which was 3.9 percent at the time.[45] The Department received comment regarding this assumption presenting anecdotal evidence that the rate would be substantially lower, presumably due to the different characteristics of IRA and annuity consumers compared with actively working Plan participants. Accordingly, the Department revisited and revised the estimate to 71.8 percent of the disclosures sent to Retirement Investors being sent electronically, and the remaining 28.2 percent sent by mail.[46] Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one financial institution to another) will be 100 percent electronic.

The Department assumes any documents sent by mail would be sent by First Class Mail, incurring a postage cost of $0.68 for each piece of mail.[47] Additionally, the Department assumes that documents sent by mail would incur a material cost of $0.05 for each page.

1.2 Costs Associated With Satisfying Conditions for Transactions Described in Section III(a)–(f)

Insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters are expected to continue to take advantage of the exemption for transactions described in Section III(a)–(f). The Department estimates that 3,030 insurance agents and brokers, pension consultants, and insurance companies will continue to take advantage of the exemption for transactions described in Section III(a)–(f). This estimate is based on the following assumptions:

- According to the Insurance Information Institute, in 2022, there were 3,328 captive agents, which are insurance agents who work for only one insurance company.[48] The Insurance Information Institute also found that life and annuity insurers accounted for 47.4 percent of all net premiums for the insurance industry in 2022.[49] Thus, the Department estimates there are 1,577 insurance agents and brokers relying on the existing provisions.[50]
- The Department expects that pension consultants would continue to rely on the existing PTE 84–24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.[51]

In the Department's 2016 Regulatory Impact Analysis, it estimated that 398 insurance companies wrote annuities.[52] The Department requested information on how the number of insurance companies underwriting annuities has changed since then but received no meaningful insight. The Department revisited the estimate and settled on a revised approach to bring the estimate more current. To form a basis for its assumption of insurance companies affected by the rule, the Department looked at the estimate of 398 insurance companies writing annuities used in the 2016 RIA. This assumption was based on data of insurance companies that reported receiving either individual or group annuity considerations in 2014.[53] Comparatively, there were 710 firms in the direct life insurance carrier industry in 2014.[54] By these measures, in 2014, insurance companies writing annuities accounted for 56 percent of the direct life insurance carrier industry.

To gain more insight into annuity underwriting, as it pertains to the life insurance industry, the Department looked to the evolution of premiums. In 2014, annuity premiums accounted for 55 percent of life and annuity insurance

[43] For a more detailed discussion of the marginal costs associated with the Amendments to PTE 84–24, refer to the Regulatory Impact Analysis (RIA) in the Notice of Proposed Rulemaking published elsewhere in today's edition of the **Federal Register**.

[44] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[45] The Department estimates that 58.3 percent of Retirement Investors receive electronic disclosures under the 2002 electronic disclosure safe harbor and that an additional 37.8 percent of Retirement Investors receive electronic disclosures under the 2020 electronic disclosure safe harbor. In total, the Department estimates 96.1 percent (58.3 percent + 37.8 percent) of Retirement Investors receive disclosures electronically.

[46] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration internet Use Survey which indicated that 85.5 percent of adults 65 and over use email on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) × (85.5% are internet fluent) = 71.8% are internet fluent and find electronic delivery acceptable.

[47] United States Post Service, *First-Class Mail,* (2023), *https://www.usps.com/ship/first-class-mail.htm.*

[48] Insurance Information Institute, *A Firm Foundation: How Insurance Supports the Economy—Captives by State, 2021–2022, https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/captives-by-state* (last visited August 25, 2023).

[49] Insurance Information Institute, *Facts + Statistics: Industry Overview—Insurance Industry at-a-Glance, https://www.iii.org/fact-statistic/facts-statistics-industry-overview.*

[50] The number of captive insurance agents is estimated as: 3,328 captive agents × 47.4% = 1,577 captive insurance agents serving the annuity market.

[51] Internal Department of Labor calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C.

[52] This estimate is based on 2014 data from SNL Financial on life insurance companies that reported receiving either individual or group annuity considerations. (*See* Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*)

[53] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 108–109 & 136–137, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[54] United States Census Bureau, *2014 SUSB Annual Data Tables by Establishment Industry,* (December 2016).

premiums.[55] By 2020, annuities had fallen to 48 percent of life and annuity insurance premiums. Between 2020 and 2022, the percentage remained constant around 48 percent.[56]

- While premiums are not directly related to the number of firms, the Department thinks it is reasonable to assume that the percent of life insurance companies underwriting annuities may have declined slightly since 2014. For the purposes of this analysis, the Department assumed that approximately half of life insurance companies underwrite annuities. According to the 2021 Statistics of U.S. Businesses release, the most recent data available, there were 883 firms in the direct life insurance carrier industry.[57] The Department estimates that 442 life insurance companies underwrite annuities and will be affected by the amendments.

In addition, investment company principal underwriters may rely on the exemption. In the Department's experience, investment company principal underwriters almost never use PTE 84–24. Therefore, the Department assumes that 20 investment company principal underwriters will engage in one transaction annually under PTE 84–24, 10 of which are assumed to service Title I Plans and 10 are assumed to service IRAs.

Further, the Department estimates that there are approximately 765,124 ERISA covered pension Plans[58] and approximately 67.8 million IRAs.[59] The Department estimates that 7.5 percent of Plans are new accounts or new financial advice relationships[60] and that 3 percent of Plans will use the exemption for covered transactions.[61] Based on these assumptions, the Department estimates that 1,727 Plans would be affected by the Final Amendments to PTE 84–24.[62]

The Department requested, but did not receive, comments on the assumptions used in the Proposed Amendment regarding annuity contracts affected by the rulemaking. However, in conjunction with updating its estimate of the number of Independent Producers the Department has revised its estimate of annual annuity transactions affected by the amendments to PTE 84–24, increasing the estimate from 52,449 to 500,000.

While there are several sources of information regarding total sales or size of the annuity market that are generally consistent, the same is not true for transaction activity, which can vary dramatically across quarters and between sources. To improve its estimate of annual annuity transactions affected by the amendments to PTE 84–24, the Department tried two approaches which both relied on LIMRA total fixed annuity sales data. 2023 LIMRA data indicates that 34 percent of fixed annuity sales were fixed-indexed annuities.[63] Assuming sales are proportionate to transactions and using data from the Retirement Income Journal which reported roughly 109,863 fixed-indexed annuity products were sold in the fourth quarter of 2021,[64] annualizing this number to 439,452 the Department estimates that roughly 838,000 additional fixed-rate annuities (other than fixed-indexed) were sold over the same period, for a total of 1.3 million fixed annuity transactions in 2021 using this approach.

The Department considered an alternative approach which estimated the number of annual transactions by dividing the total sales data from LIMRA described above by the average contract size as reported by the Retirement Income Journal, which is $147,860. Using the same proportional methodology described above, this approach yields an estimate of roughly 1.9 million transactions.

Using this average of these estimates, the Department then applied the following assumptions to arrive at its final estimate. Using McKinsey data on annuity distribution channels, the Department assumes that third-party distribution channels account for 81 percent of the annuity sales volume.[65] The Department further assumes that 80 percent of these annuities are held in ERISA covered accounts or purchased with ERISA Plan assets[66] and that 49 percent of transactions will rely on investment advice.[67] This results in an estimate of roughly 500,000 ERISA covered fixed annuity transactions involving an Independent Producers providing advice to an investor.[68]

The Final Amendment excludes some entities currently relying on the exemption to receive compensation in connection with the provision of investment advice. As such, the Department acknowledges that the estimates discussed above may overestimate the entities able to rely on the exemption for relief for the transactions described in Section III(a)–(f).

1.2.1 Written Authorization From the Independent Plan Fiduciary

Based on the estimates discussed above, the Department estimates that authorizing fiduciaries for 1,727 Plans and authorizing fiduciaries for 500,000

[55] Insurance Information Institute, *Life/Annuity Insurance Income Statement, 2014–2018, https://www.iii.org/table-archive/222464/file.*

[56] Insurance Information Institute, *Facts + Statistics: Life Insurance,* (2024), *https://www.iii.org/fact-statistic/facts-statistics-life-insurance#Direct%20Premiums%20Written%20By%20Line,%20Life/Annuity%20Insurance,%202020-2022.*

[57] United States Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry,* (December 2023).

[58] Employee Benefits Security Administration, United States Department of Labor, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports,* Table A1 (2023; forthcoming).

[59] Cerulli Associates, *2023 Retirement-End Investor,* Exhibit 5.12. The Cerulli Report, (2023).

[60] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[61] In 2020, 7 percent of traditional IRAs were held by insurance companies. (*See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020,* 27(1) ICI Research Perspective (2021), *https://www.ici.org/system/files/attachments/pdf/per27-01.pdf.*) This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

[62] 765,124 plans × 7.525 percent of plans are new × 3 percent of plans with relationships with insurance agents or pension consultants ≈ 1,727 plans.

[63] LIMRA, Preliminary U.S. Individual Annuity Sales Survey, Fourth Quarter 2023, (2023), *https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q4/4q-annuity-sales.pdf.*

[64] Pechter, K., Moore, S., Fixed Indexed Annuities: What's Changed (or Not) in Ten Years, (June, 2022), *https://retirementincomejournal.com/article/fixed-indexed-annuities-a-retrospective/.*

[65] McKinsey & Company, Redefining the future of life insurance and annuities distribution, (January, 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*

[66] The Department recognized that not all annuities sold are covered by this rulemaking, however data is not available to estimate what portion are covered with any sense of precision. Examples of non-covered transactions include use of non-retirement account funds to purchase an annuity and noncovered public sector plans being rolled into an annuity. The Department views 80% as a reasonable assumption as it includes most transactions while acknowledging that not all transactions are covered under this rulemaking. As a point of reference, each percentage point this assumption is changed results in a 1.25 percentage point change in the resulting estimate of ERISA covered transactions involving an Independent Producer providing advice to an investor.

[67] U.S. Retirement-End Investor 2023: Personalizing the 401(k) Investor Experience Fostering Comprehensive Relationships,'' The Cerulli Report, Exhibit 6.04.

[68] The final estimate is the rounded average of the two approaches described above. The calculations are as follows: [{[(109,863 fixed-indexed contracts written × 4 quarters) ÷ 34% as the percentage of fixed-indexed to all fixed-rate contracts] × 81% sold by Independent Producers × 49% sold using investment advice × 80% ERISA covered transactions} + {[(148,860 avg. contract size ÷95.6 billion in annual fixed-indexed sales) ÷34% as the percentage of fixed-indexed to all fixed-rate contracts] × 81% sold by Independent Producers × 49% sold using investment advice × 80% ERISA covered transactions} ÷2] ≈ 501,013, rounded to 500,000.

IRA transactions will be required to send an advance written authorization to the 3,040 financial institutions for IRAs[69] for exemptive relief for the transactions described in Section III(a)–(f).

In the Plan universe, it is assumed that a legal professional will spend five hours per Plan reviewing the disclosures and preparing an authorization form. In the IRA universe, it is assumed that a legal professional working on behalf of the financial institution for IRAs will spend three hours drafting an authorization form for IRA holders to sign. This results in an hour burden of 17,756 hours with an equivalent cost of $2.9 million.[70]

The Department expects that Plans and IRAs will send the written authorization through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the authorization.

In total, as presented in the table below, the written authorization requirement, under the new conditions of relief, is expected to result in an annual total hour burden of 17,756 hours with an equivalent cost of $2,942,374.

TABLE 1—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	17,756	$2,942,374	17,756	$2,942,374
Total	17,756	2,942,374	17,756	2,942,374

1.2.2 Disclosure

Based on the estimates discussed above, the Department estimates that approximately 3,050 financial institutions[71] will continue to utilize the exemption for exemptive relief for the transactions described in Section III(a)–(f) for each plan and IRA. In total, the Department estimates that 3,040 entities will prepare disclosures for plans and 3,040 entities would prepare disclosures for IRAs. The Department assumes that an in-house attorney will spend one hour of legal staff time drafting the disclosure for plans and one hour of legal staff time drafting the disclosure for IRAs. This results in an hour burden of approximately 6,080 hours with an equivalent cost of $1,007,508.[72]

The Department expects that the disclosures for Plans will be distributed through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the disclosures. The Department lacks information on the proportion of the IRA contracts that will occur via Plan rollovers and therefore assumes all disclosures will be sent directly to the IRA customer. As previously stated, the Department estimates that 71.8 percent of disclosures for IRAs will be sent electronically at no additional burden. The remaining 28.2 percent of authorizations will be mailed. For paper copies, a clerical staff member is assumed to require two minutes to prepare and mail the required information to the IRA customer. This information will be sent to the 122,318 IRA customers plus the 10 investment company principal underwriters for IRAs entering into an agreement with an insurance agent, pension consultant, or mutual fund principal underwriter, and based on the above, the Department estimates that this requirement results in an hour burden of 1,150 hours with an equivalent cost of $75,881.[73]

In total, as presented in the table below, providing the pre-authorization materials is expected to impose an annual total hour burden of 7,230 hours with an equivalent cost of $1,083,388.

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE DISCLOSURE

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	6,080	$1,007,508	6,080	$1,007,508
Clerical	1,150	75,881	1,150	75,881
Total	7,230	1,083,388	7,230	1,083,388

The Department assumes that this information will include seven pages with 71.8 percent of disclosures distributed electronically through traditional electronic methods at no additional burden, and the remaining 28.2 percent of disclosures will be mailed. Accordingly, the Department

[69] This includes 3,030 insurance agents and brokers, pension consultants, and insurance companies and 10 investment company underwriters servicing IRAs.

[70] The burden is estimated as: (1,727 plans × 5 hours) + (3,040 financial institutions × 3 hours) ≈ 17,756 hours. A labor rate of approximately $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(1,727 plans × 5 hours) + (3,040 financial institutions × 3 hours)] × $165.71 per hour ≈ $2,942,374.

[71] This includes 3,030 insurance agents and brokers, pension consultants, and insurance companies and 20 investment company underwriters servicing plans and IRAs.

[72] The burden is estimated as: 3,040 financial institutions × (1 hour for plans + 1 hour for IRAs) ≈ 6,080 hours. A labor rate of approximately $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [3,040 financial institutions × (1 hour for plans + 1 hour for IRAs)] × $165.71 per hour ≈ $1,007,508.

[73] The burden is estimated as: [(122,318 IRAs + 10 investment company principal underwriters for IRAs × 28.2 percent paper) × (2 minutes ÷ 60 minutes)] ≈ 1,150 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [(122,318 IRAs + 10 investment company principal underwriters for IRAs × 28.2 percent paper) × (2 minutes ÷ 60 minutes)] × $65.99 ≈ $75,881.

estimates an annual cost burden of approximately $35,531.[74]

TABLE 3—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE DISCLOSURE

	Year 1		Subsequent years	
	Pages	Equivalent burden cost	Pages	Equivalent burden cost
Material and Postage Cost	7	$35,531	7	$35,531
Total	7	35,531	7	35,531

1.3 Costs Associated With Satisfying Conditions for Transactions Described in Section III(g)

The amendment provides relief for Independent Producers that provide fiduciary investment advice and engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder: (1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and (2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of ''security'' under Federal securities laws. The Department expects that the Insurers covered by this Final Amendment will be insurance companies that directly write annuities.

The amendments outline conditions pertaining to disclosure, policies and procedures, and retrospective reviews that need to be satisfied to rely on the exemption. These conditions are tailored to protect Retirement Investors from the specific conflicts that arise for Independent Producers when providing investment advice to Retirement Investors regarding the purchase of an annuity. The Department received several comments suggesting that its estimate for the number of Independent Producers was too low. While commenters provided estimates that were substantially higher, the commenters did not provide any documentation or basis for their suggestions. In response, the Department analyzed employment data from the March 2023 Current Population Survey to identify the number of self-employed workers in the ''Finance and Insurance'' industry whose occupation was listed as ''Insurance Sales Agents.'' This identified 86,410 self-employed insurance sales agents in the Finance and Insurance industry.[75] While the Department assumes that not all of these independent producers will sell annuities, it utilizes this number while recognizing that it likely reflects an over-estimate.

Insurance companies are primarily regulated by states and no single regulator maintains a nationwide count of insurance companies. Although state regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual state totals, because individual insurance companies often operate in multiple states. As mentioned above, the Department has updated its estimate of the number of insurance companies writing annuities for the 398 presented in the 2016 Regulatory Impact Analysis, to 442 in this rulemaking.

Some of these insurance companies may not sell any annuity contracts to IRAs or plans. Because of these data limitations, the Department includes all 442 insurance companies in its cost estimate, though this likely represents an upper bound.

Insurance companies sell insurance products through (1) captive insurance agents that work for an insurance company as employees or as independent contractors who exclusively sell the insurance company's products and (2) independent agents who sell multiple insurance companies' products. Independent agents may contract directly with an insurance company or through an intermediary. In recent years, the market has seen a shift away from captive distribution toward independent distribution.[76]

The Department does not have strong data on the number of insurance companies using captive agents or Independent Producers. In the Proposed Amendment, the Department assumed that the number of companies selling annuities through captive or independent distribution channels would be proportionate to the sales completed by each respective channel. The Department requested comments on this assumption but did not receive any directly addressing it. In the Proposed Amendment, the Department based its estimate on the percent of sales completed by independent agents and career agents in the individual annuities distribution channel. This resulted in an estimate that approximately 46 percent of sales are done through captive distribution channels and 54 percent of sales are done through independent distribution channels.

One source stated that 81 percent of individual annuities sales are conducted by non-captive, or independent, agents.[77] The Department assumes that the percent of companies selling annuities through an independent distribution channel is proportionate to the percent of sales conducted through an independent distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel.

Also, the Department recognizes that some insurance companies use multiple distribution channels, though the Department did not receive any

[74] The material cost is estimated as: [(122,318 IRA authorizations + 10 investment company principal underwriters for IRAs) × 28.2 percent paper] × [$0.68 + ($0.05 × 7 pages)] = $35,531.

[75] EBSA Tabulations based off the March 2023 Current Population Survey.

[76] Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage,* McKinsey & Company, (June 2022), *https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage;* Sheryl Moore, *The Annuity Model Is Broken,* Wink Intel, (June 2022), *https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/.*

[77] This study considers sales by independent agents, independent broker-dealers, national broker-dealers, and banks to be sales in the independent distribution channel, while sales by career agents and direct means are considered to be in the captive distribution channel. (*See* Ramnath Balasubramanian, Christian Boldan, Matt Leo, David Schiff, & Yves Vontobel, *Redefining the Future of Life Insurance and Annuities Distribution,* McKinsey & Company (January 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*)

comment on how common the use of multiple distribution channels is. Looking at the 10 insurance companies with highest annuity sales in 2022, one relied on captive distribution channels, seven relied on independent distribution channels, and two relied on both.[78] Accordingly, most insurance companies appear to primarily use either captive distribution or independent distribution. However, any entity using a captive insurance channel, or using both captive and independent channels, likely has already incurred most of the costs of this rulemaking under PTE 2020–02. Costs are estimated by assuming that entities using a third-party distribution system, even if they also use captive agents, will incur costs for the first time under amended PTE 84–24. This assumption leads to an overestimation of the cost incurred by insurance companies.

Following from this assumption, the Department estimates that 84 insurance companies distribute annuities through captive channels and will rely on PTE 2020–02 for transactions involving investment advice. Further, the Department estimates that 358 insurance companies distribute annuities through independent channels and will rely on PTE 84–24 for transactions involving investment advice.[79]

The Department estimates that 70 of the 442 insurance companies are large entities.[80] In the Proposed Amendment, the Department requested data on how distribution channels differed by size of insurance company but did not receive any comments. In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 19 percent of large insurance companies (13 insurance companies) sell annuities through captive distribution channels, while the remaining 71 of the 84 insurance companies distributing annuities through captive channels are assumed to be small.[81] Additionally, 81 percent of large insurance companies (57 insurance companies) sell annuities through independent distribution channels, while the remaining 301 of the 358 insurance companies selling annuities through independent distribution channels are assumed to be small.[82]

1.3.1 Disclosures

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 insurance companies. For more generalized disclosures, the Department assumes that insurance companies will prepare and provide disclosures to Independent Producers selling their products. However, some of the disclosures are tailored specifically to the Independent Producer and-or the transaction. The Department assumes that these disclosures will need to be prepared by the Independent Producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures; however, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in commission. The Department expects that this increase in commission will not exceed the cost of preparing the disclosure in house.

1.3.1.1 Written Acknowledgement That the Independent Producer Is a Fiduciary by the Independent Producer

The Department is including a model statement in the preamble to PTE 84–24 that details what should be included in a fiduciary acknowledgment for Independent Producers.[83] The Department assumes that the time associated with preparing the disclosures will be minimal. Further, these disclosures are expected to be uniform in nature. Accordingly, the Department estimates that these disclosures will not take a significant amount of time to prepare.

Due to the nature of Independent Producers, the Department assumes that most Insurers will make draft disclosures available to Independent Producers pertaining to their fiduciary status. However, the Department expects that a small percentage of Independent Producers may draft their own disclosures. The Department assumes that a legal professional for all 358 Insurers and an insurance sales agent for 5 percent of Independent Producers, or 4,320 Independent Producers, will spend 30 minutes to produce a written acknowledgement in the first year. This results in an estimated burden of approximately 2,339 hours with an equivalent cost of $386,657 in the first year.[84]

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	179	$29,630	0	$0
Insurance Sales Agent	2,160	357,026	0	0

[78] Annuity sales are based on LIMRA, *U.S. Individual Fixed Annuity Sales Breakouts, 2022, https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2022/q4/2022-ye--fixed-breakout-results.pdf.* Information on distribution channels is based on review of insurance company websites, SEC filings of publicly held firms, and other publicly available sources.

[79] The number of insurance companies using captive distribution channels is estimated as 442 × 81% ≈ 358 insurance companies. The number of insurance companies using independent distribution channels is estimated as 442–358 ≈ 84 insurance companies.

[80] LIMRA estimates that, in 2016, 70 insurers had more than $38.5 million in sales. *See* LIMRA Secure Retirement Institute, *U.S. Individual Annuity Yearbook: 2016 Data,* (2017).

[81] The number of large insurance companies using a captive distribution channel is estimate as: 70 large insurance companies × 19% ≈ 13 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 84 insurance companies—13 large insurance companies ≈ 71 small insurance companies.

[82] The number of large insurance companies using an independent distribution channel is estimate as: 70 large insurance companies × 81% ≈ 57 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 358 insurance companies—57 large insurance companies ≈ 301 small insurance companies.

[83] 85 FR 82798, 82827 (Dec. 18, 2020). The model statement was also included in Frequently Asked Questions in April 2021, New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions, Q13, (April 2021), *https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf.*

[84] The burden is estimated as: [(358 Insurers + 4,320 Independent Producers) × (30 minutes ÷ 60 minutes)] ≈ 2,339 hours. A labor rate of approximately $165.71 is used for a legal professional and $165.29 is used for an independent producer. The labor rates are applied in the following calculation: [(358 Insurers × (30 minutes ÷ 60 minutes)) × $165.71] + [(4,320 Independent Producers × (30 minutes ÷ 60 minutes)) × $165.71] ≈ $386,657.

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT—Continued

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Total	2,339	386,657	0	0

1.3.1.2 Written Statement of the Care Obligation and Loyalty Obligation

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 Insurers. Due to the nature of Independent Producers, the Department assumes that most Insurers will make draft disclosures available to Independent Producers, pertaining to the annuities they offer. The Department assumes that an in-house attorney for all 358 Insurers and an insurance sales agent for 5 percent of Independent Producers, or 4,320 Independent Producers, will spend 60 minutes to prepare the statement in the first year. This results in a burden of 4,678 hours with an equivalent cost of $773,313 in the first year.[85]

TABLE 5—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN STATEMENT OF THE BEST INTEREST STANDARD OF CARE OWED

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	358	$59,260	0	$0
Insurance Sales Agent	4,320	714,053	0	0
Total	4,678	773,313	0	0

1.3.1.3. Written Description of All Material Facts

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 insurance companies. For disclosures tailored more specifically to an individual Independent Producer, the Department assumes that the disclosure will need to be prepared by the Independent Producer. The Department recognizes that many Independent Producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation will be covered by commission retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost back to the Independent Producer.

Accordingly, the Department assumes that all 86,410 Independent Producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these Independent Producers, an attorney will spend three hours and five hours of legal staff time drafting the written description for small and large entities, respectively. This results in an hour burden of 260,967 hours with an equivalent cost of $43,244,858 in the first year.[86]

TABLE 6—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ALL MATERIAL FACTS

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	260,967	$43,244,858	0	$0
Total	260,967	43,244,858	0	0

[85] The burden is estimated as: (358 Insurers + 4,320 Independent Producers) × 1 hour ≈ 4,678 hours. A labor rate of approximately $165.71 is used for a legal professional and $165.29 for an independent producer. The labor rates are applied in the following calculation: [(358 Insurers × 1 hour × $165.71) + (4,320 Independent Producers × 1 hour × $165.29)] = $773,313.

[86] The burden is estimated as: [(85,451 small independent producers × 3 hours) + (869 large independent producers × 5 hours)] ≈ 260,967 burden hours. Applying the labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(85,451 small independent producers × 3 hours) + (869 large independent producers × 5 hours)] × $165.71 = $43,244,858.

1.3.1.4—Before Recommending an Annuity, Engaging in a Rollover, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan, the Independent Producer Must Document Its Conclusions as to Whether the Recommendation Is in the Investor's Best Interest

The amendment requires an Independent Producer to provide a disclosure to investors that documents their consideration as to whether a recommended annuity or rollover is in the Retirement Investor's best interest. Due to the nature of this disclosure, the Department assumes that the content of the disclosure will need to be prepared by the Independent Producer for each transaction. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may seek external legal support to assist with drafting the disclosures. However, the Department expects that most Independent Producers will prepare the disclosure themselves.

For the purposes of this analysis, and as developed in a preceding section, the Department estimates that 500,000 Retirement Investors will receive documentation on whether the recommended annuity is in their best interest each year.

The Department assumes that, for each of these Retirement Investors, an Independent Producer will spend 30 minutes of their time drafting the documentation. This results in an estimated hour burden of 250,000 hours with an equivalent cost of $41.3 million annually.[87]

TABLE 7—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ROLLOVER DOCUMENTATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Insurance Sales Agent	250,000	$41,322,500	250,000	$41,322,500
Total	250,000	41,322,500	250,000	41,322,500

1.3.1.5 Mailing Cost for Disclosures Sent From Independent Producers to Retirement Investors

As discussed at the beginning of the cost section, the Department assumes that 28.2 percent of disclosures would be mailed. Accordingly, of the estimated 500,000 affected Retirement Investors, 141,000 Retirement Investors are estimated to receive paper disclosures.[88] The Department further estimates that 10% of these Retirement Investors, or 14,100, will request a second, more comprehensive disclosure related to the Independent Producer's compensation. For paper copies, the Independent Producer is assumed to require two minutes to prepare and mail the primary disclosure packet to the Retirement Investors, and 10 minutes to prepare and mail the second compensation disclosure, upon request. This requirement results in an estimated hour burden of 13,503 hours with an equivalent cost of $2,231,966.[89]

TABLE 8—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PREPARING THE DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Insurance Sales Agent	13,503	$2,231,966	13,503	$2,231,966
Total	13,503	2,231,966	13,503	2,231,966

The Department assumes that this information will include seven pages, and that a second, optional compensation disclosure will be two pages, resulting in an annual cost burden for material and paper costs of $156,228.[90]

TABLE 9—MATERIAL COST ASSOCIATED WITH THE GENERAL DISCLOSURES

Activity	Year 1		Subsequent years	
	Pages	Equivalent burden cost	Pages	Equivalent burden cost
General Disclosures	7	$145,230	7	$145,230
Compensation Disclosure	2	10,998	2	10,998

[87] The burden is estimated as: 500,000 rollovers × (30 minutes ÷ 60 minutes) = 250,000 hours. A labor rate of approximately $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [500,000 rollovers × (30 minutes ÷ 60 minutes)] × $165.29 = $41,322,500.

[88] This is estimated as: (500,000 Retirement Investors × 28.2%) = 141,000 paper disclosures.

[89] This is estimated as: [141,000 paper disclosures × (2 minutes ÷ 60 minutes)] + [14,100 paper disclosures × (10 minutes) ÷ 60 minutes)] = 13,503 hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [141,000 paper disclosures × (2 minutes ÷ 60 minutes)] + [14,100 paper disclosures × (10 minutes ÷ 60 minutes)] × $165.29= $2,231,966.

[90] This is estimated as: {141,000 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 7 pages)]} + {14,100 secondary disclosures × [$0.68 postage + ($0.05 per page × 2 pages)]} = $156,228.

TABLE 9—MATERIAL COST ASSOCIATED WITH THE GENERAL DISCLOSURES—Continued

Activity	Year 1		Subsequent years	
	Pages	Equivalent burden cost	Pages	Equivalent burden cost
Total	9	156,228	9	156,228

Additionally, Independent Producers will be required to send the documentation to the Insurer. The Department expects that such documentation will be sent electronically and result in a de minimis burden.

1.3.2 Policies and Procedures

1.3.2.1 Insurers Must Establish, Maintain, and Enforce Written Policies and Procedures for the Review of Each Recommendation Before an Annuity Is Issued to a Retirement Investor, and the Insurer Review Its Policies and Procedures at Least Annually

As discussed above, the Department estimates that 358 Insurers will need to meet this requirement, of which 301 are estimated to be small and 57 are estimated to be large.[91] The Department assumes that, for each large insurance company, an in-house attorney will spend 40 hours of legal staff time drafting the written description, and for each small insurance company, an in-house attorney will spend 20 hours of legal staff time. This results in an hour burden of 8,286 hours with an equivalent cost of $1,373,123 in the first year.[92]

In the following years, the Department assumes for each insurance company, an in-house attorney will spend five hours of legal staff time reviewing the policies and procedures. This results in an hour burden of 1,788 hours with an equivalent cost of $296,302 in subsequent years.[93]

The Final Amendment also requires Insurers to provide their complete policies and procedures to the Department upon request. Based upon prior experience, the Department estimates that it will request three policies and procedures in the first year and one in subsequent years for entities relying on PTE 84–24.[94] The resulting cost is estimated at $49 in the first year, and $17 in subsequent years for a clerical worker to prepare and fulfil the request.[95]

Insurers will also be required to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. This requirement is consistent with the language in NAIC's 2010 model regulation 275, Suitability in Annuity Transactions,[96] and the 2020 revisions to NAIC Model Regulation 275, which expanded the suitability standard to a best interest standard.[97] Most states have adopted some form of the NAIC Model Regulation 275.[98] Accordingly, the Department expects that Insurers will be prepared to undergo this review and approval process. The Department assumes that it will take a financial manager, with a labor rate of $198.25, an average of 30 minutes to review and provide a decision to the Independent Producer on rollover recommendations. Therefore, the Department estimates that this will have an equivalent cost of $49.6 million annually.[99] The combined estimated burden associated with policies and procedures is presented below in Table 10.

TABLE 10—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	8,286	$1,373,123	1,788	$296,302
Clerical	0.75	49	0.25	17
Financial Manager	250,000	49,562,500	250,000	49,562,500
Total	258,287	50,935,672	251,788	49,858,818

[91] The number of large insurance companies using an independent distribution channel is estimated as: (70 large insurance companies x 81%) ≈ 57 insurance companies. The number of small insurance companies using an independent distribution channel is estimated as: (358 insurance companies—57 large insurance companies) ≈ 301 small insurance companies.

[92] This is estimated as: [(301 small insurance companies × 20 hours) + (57 large insurance companies × 40 hours)] ≈ 8,286 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(301 small insurance companies × 20 hours) + (57 large insurance companies × 40 hours)] × $165.71 ≈ $1,373,123.

[93] This is estimated as: 358 insurance companies × 5 hours ≈ 1,788 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (358 insurance companies × 5 hours) × $165.71 ≈ $296,302.

[94] The number of requests in the first year is estimated as: 358 Insurers × (165 requests in PTE 2020–02 ÷18,632 Financial Institutions in PTE 2020–02) ≈ 3 requests. The number of requests in subsequent years is estimated as: 358 insurance companies × (50 requests in PTE 2020–02 ÷18,632 Financial Institutions in PTE 2020–02) ≈ 1 request.

[95] The burden in the first year is estimated as: 3 requests × (15 minutes ÷ 60 minutes) = 0.75 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: 3 requests × (15 minutes ÷ 60 minutes) × $65.99 = $49.49. The burden in subsequent years is estimated as: 1 request × (15 minutes ÷ 60 minutes) = 0.25 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: 1 request × (15 minutes ÷ 60 minutes) × $65.99 = $16.50.

[96] NAIC Model Suitability Regulations, § 6(F)(1)(d) (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.*

[97] NAIC Model Suitability Regulations, § 6(C)(1)(d) (2020), *https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.*

[98] As of October of 2021, only three states had not adopted some form of NAIC Model Regulation 275. (*See* A.D. Banker & Company, *Annuity Best Interest State Map and FAQs,* (October 2021), *https://blog.adbanker.com/annuity-best-interest-state-map-and-faqs*).

[99] The burden is calculated as: 500,000 transactions × (30 minutes ÷ 60 minutes) ≈ 250,000 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: [500,000 transactions × (30 minutes ÷ 60 minutes)] × $198.25 ≈ $49,562,500.

1.3.3 Retrospective Review

The Final Amendment requires Insurers to conduct a retrospective review at least annually. The review will be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review will be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Insurers will also be required to provide the Independent Producer with the underlying methodology and results of the retrospective review. For the Final Amendment, the Department has stated that Insurers may use sampling in their review of an Independent Producer's transactions so long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

1.3.3.1 The Insurance Company Must Conduct a Retrospective Review, at Least Annually, for Each Independent Producer That Sells the Insurance Company's Annuity Contracts

The Department estimates that 358 Insurers will need to meet this requirement. For this requirement the information collection is documenting the findings of the retrospective review. The Department lacks data on, for a given insurance company, how many Independent Producers, on average, sell their annuities. For the purposes of this analysis, the Department assumes that, on average, each Independent Producer sells the products of three Insurers. From each of these Insurers, they may sell multiple products. As such, the Department assumes that each year, insurance companies would need to prepare a total of 259,230 retrospective reviews,[100] or on average, each insurance company will need to prepare approximately 725 retrospective reviews.[101] The Department assumes that, for each Independent Producer selling an insurance company's products, a legal professional at the insurance company would spend one hour time, on average, drafting the retrospective review. This results in an estimated hour burden of 259,230 hours with an equivalent cost of $43.0 million.[102]

TABLE 11—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	259,230	$42,957,003	259,230	$42,957,003
Total	259,230	42,957,003	259,230	42,957,003

1.3.3.2 Certification by the Senior Executive Officer of the Insurance Company

The Department assumes it will take a Senior Executive Officer four hours to review and certify a report which details the retrospective review. This results in an annual hour burden of 1,430 hours with an equivalent cost of $190,594.[103]

TABLE 12—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE CERTIFICATION BY THE SENIOR EXECUTIVE OFFICER

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Senior Executive Officer	1,430	$190,594	1,430	$190,594
Total	1,430	190,594	1,430	190,594

1.3.3.3 The Insurance Company Provides to the Independent Producer the Methodology and Results of the Retrospective Review

The Department assumes that the insurance company would provide the methodology and results electronically. The Department estimates that it would take clerical staff five minutes to prepare and send each of the estimated 259,230 retrospective reviews. This results in an annual hour burden of approximately 21,603 hours with an equivalent cost of $1,425,549 [104] The Department expects that the results would be provided electronically and thus does not expect there to be any material costs with providing Independent Producers with the retrospective review.

[100] This is estimated as: 86,410 Independent Producers × 3 insurance companies covered ≈ 259,230 retrospective reviews.

[101] This is estimated as: 259,230 retrospective reviews ÷ 358 entities ≈ 725 retrospective reviews, on average.

[102] This is estimated as: 259,230 retrospective reviews × 1 hour ≈ 259,230 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (259,230 retrospective reviews × 1 hour) × $165.71 ≈ $42,957,003.

[103] This is estimated as: 358 insurance companies × 4 hours ≈ 1,430 hours. A labor rate of $133.24 is used for a Senior Executive Officer. The labor rate is applied in the following calculation: (358 insurance companies × 4 hours) × $133.24 ≈ $190,594.

[104] This is estimated as: 259,230 retrospective reviews × (5 minutes ÷ 60 minutes) ≈ 21,603 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [259,230 retrospective reviews × (5 minutes ÷ 60 minutes)] × $65.99 ≈ $1,425,549.

TABLE 13—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE PROVISION OF THE RESULTS OF THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	21,603	$1,425,549	21,603	$1,425,549
Total	21,603	1,425,549	21,603	1,425,549

1.3.4 Self-Correction

The amendment requires an Independent Producer that chooses to use the self-correction provision of the exemption to notify the Insurer of any corrective actions taken. As discussed above, the Insurer must discuss corrective actions in the retrospective review. The Department does not have sufficient information to estimate how often violations will occur, or on how often Independent Producers will choose to use the self-correction provisions of the amendment. However, the Department expects that such violations and corrections will be rare. For illustration, the Department assumes that one percent of transactions will result in self-correction, this would result in 5,000 notifications of self-correction being sent by Independent Producers to Insurers. The Department estimates that it will take an Independent Producer 30 minutes, on average, to draft and send a notification to the Insurer, resulting in an estimated burden of 2,500 hours and an annual cost of $413,225.[105]

The self-correction provisions of this rulemaking allow entities to correct violations of the exemption in certain circumstances, when either (1) the Independent Producer has refunded any charge to the Retirement Investor or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. Without the self-correction provisions, an Independent Producer would be required to report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

TABLE 14—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH SELF-CORRECTION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	2,500	$413,225	2,500	$413,225
Total	2,500	413,225	2,500	413,225

1.3.5 Recordkeeping Requirement

The Final Amendment incorporates a new provision in PTE 84–24 that is similar to the recordkeeping provision in PTE 2020–02. In the Proposed Amendment, the Department proposed a broader recordkeeping requirement.

For this analysis, the Department considers the cost for Insurers and Independent Producers complying with the recordkeeping requirements. The Department estimates that the additional time needed to maintain records to be consistent with the exemption would take two hours for an Independent Producer and two hours for a legal professional at an insurer, resulting in an hour burden of 173,535 hours and an equivalent cost of $28.7 million.[106]

TABLE 14—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RECORDKEEPING REQUIREMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	173,535	$28,683,939	173,535	$28,683,939
Total	173,535	28,683,939	173,535	28,683,939

[105] The burden is estimated as: [500,000 transaction × 1% of transactions resulting in self-correction × (30 minutes ÷ 60 minutes)] ≈ 2,500 hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [500,000 transaction × 1% of transactions resulting in self-correction × (30 minutes ÷ 60 minutes)] × $165.29 ≈ $413,225.

[106] This is estimated as: (86,410 Independent Producers + 358 insurance companies) × 2 hours ≈ 173,535 hours. A labor rate of $165.29 is used for an Independent Producer and a rate of $165.71 for an insurance company legal professional. The labor rate is applied in the following calculation: [(86,410 Independent Producers × 2 hours × $165.29) + (358 insurance companies × 2 hours × $165.71)] ≈ $28,683,939.

1.4 Overall Summary

These paperwork burden estimates are summarized as follows:

Type of Review: Revision of an Existing Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

OMB Control Number: 1210–0158.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 89,818.

Estimated Number of Annual Responses: 1,498,615.

Frequency of Response: Initially, annually, when engaging in exempted transaction.

Estimated Total Annual Burden Hours: 1,093,403 hours.

Estimated Total Annual Burden Cost: $191,759.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[107] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[108] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995[109] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this amended exemption does not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and previously in this preamble,[110] there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that ''ERISA leaves room for complementary or dual federal or state regulation'' of insurance.[111] The Department designed the final Regulation and exemptions to complement State insurance laws.[112]

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this class exemption has federalism implications because it has no 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.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and/or Code section 4975(c)(2) does not relieve a fiduciary, or other Party in Interest with respect to a Plan or IRA, from certain other provisions of ERISA and the Code, including but not limited to any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge their duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirements of Code section 401(a), including that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries;

(2) In accordance with ERISA section 408(a) and Code section 4975(c)(2), and based on the entire record, the Department finds that this exemption is administratively feasible, in the interests of Plans, their participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners;

(3) The Final Amendment is applicable to a particular transaction only if the transaction satisfies the

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[107] 5 U.S.C. 601 *et seq.*

[108] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

[109] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

[110] *See* ''The Department's Role Related to the Sale of Insurance Products to Retirement Investors,'' supra.

[111] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[112] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to ''impair'' a State law is to hinder its operation or ''frustrate [a] goal of that law.'' *Humana Inc. V. Forsyth,* 525 U.S. 299, 308 (1999).

conditions specified in the exemption; and

(4) The Final Amendment is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is granting the following amendments to the class exemption on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[113]

Amendment to PTE 84–24

Section I—Retroactive Application

The restrictions of ERISA sections 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975 do not apply to any of the transactions described in section III of this exemption in connection with purchases made before November 1, 1977, if the conditions set forth in section IV are met.

Section II—Prospective Application

(a) Except for the receipt of reasonable compensation and/or the sale of any property as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder, the restrictions of ERISA sections 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975 do not apply to any of the transactions described in section III(a)–(f) of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in sections IV and V are met.

(b) Effective on the date that is September 23, 2024, the restrictions of ERISA sections 406(a)(1)(A), (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(A), (D), (E) and (F) do not apply to Independent Producers that provide fiduciary investment advice and engage in the transactions described in Section III(g), in accordance with the conditions set forth in Sections VI, VII, are satisfied, and the Independent Producer and Insurer are not ineligible under Section VIII, and subject to the definitional terms and recordkeeping requirements in Sections IX and X.

Section III—Transactions

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract, if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(b) The receipt of a sales commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the Plan solely by reason of the sponsorship of a Pre-approved Plan if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2); and the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(g) An Independent Producer may engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and

(2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of ''security'' under Federal securities laws.

Section IV—Conditions With Respect to Transactions Described in Section III(a)–(f)

The following conditions apply to a transaction described in Section III(a)–(f):

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be.

(c) The combined total of all fees, commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter:

(1) For the provision of services to the plan; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of ''reasonable compensation'' within the contemplation of section 408(b)(2) and 408(c)(2) of ERISA and section 4975(d)(2) and 4975(d)(10) of the Code.

[113] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, subpart B (89 FR 4662 (January 24, 2024)).

If such total is in excess of ''reasonable compensation,'' the ''amount involved'' for purposes of the civil penalties of section 502(i) of ERISA and the excise taxes imposed by section 4975(a) and (b) of the Code is the amount of compensation in excess of ''reasonable compensation.''

Section V—Conditions for Transactions Described in Section III (a) Through (d)

The following conditions apply to a transaction described in subsections (a), (b), (c) or (d) of section III:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not:

(1) a trustee of the plan (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan),

(2) a plan administrator (within the meaning of section 3(16)(A) of ERISA and section 414(g) of the Code),

(3) a fiduciary who is authorized to manage, acquire, or dispose of the plan's assets on a discretionary basis, or

(4) for transactions described in sections III (a) through (d) entered into after December 31, 1978, an employer any of whose employees are covered by the plan.

Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is affiliated with a trustee or an investment manager (within the meaning of section VI(b)) with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with plan assets of an insurance or annuity contract or the receipt of a sales commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary or IRA owner with respect to the plan prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an affiliate of the insurance company, or if the ability of such agent, broker or consultant is limited by any agreement with such insurance company, the nature of such affiliation, limitation, or relationship;

(B) The sales commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the contract; and

(C) For purchases made after June 30, 1979, a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the contract in connection with the purchase, holding, exchange, termination or sale of such contract.

(2) Following the receipt of the information required to be disclosed in subsection (b)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner acknowledges in writing receipt of such information and approves the transaction on behalf of the plan. Such fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. Such fiduciary may not receive, directly or indirectly (*e.g.,* through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a sales commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an Independent fiduciary or IRA owner with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) the nature of the relationship between the Principal Underwriter and the investment company issuing the securities and any limitation placed upon the Principal Underwriter by the investment company;

(B) The sales commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the Principal Underwriter in connection with the purchase of the securities issued by the investment company; and

(C) For purchases made after December 31, 1978, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the securities in connection with the purchase, holding, exchange, termination or sale of such securities.

(2) Following the receipt of the information required to be disclosed in subsection (c)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, such approval may be presumed if the fiduciary or IRA owner permits the transaction to proceed after receipt of the written disclosure. Such fiduciary may be an employer of employees covered by the plan, but may not be a Principal Underwriter involved in the transaction. Such fiduciary may not receive, directly or indirectly (*e.g.,* through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written disclosure required under subsections (b) and (c) of this section V need not be repeated, unless—

(1) More than three years have passed since such disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being purchased or the commission with respect thereto is materially different from that for which the approval described in subsections (b) and (c) of this section was obtained.

(e)(1) In the case of any transaction described in Section III(a), (b), or (c) of this exemption, the insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), pension consultant or investment company Principal Underwriter must retain or cause to be retained for a period of six years from the date of such transaction, the following:

(A) The information disclosed pursuant to paragraphs (b), (c), and (d) of this section V;

(B) Any additional information or documents provided to the fiduciary described in paragraphs (b) and (c) of this section V with respect to such transaction; and

(C) The written acknowledgement described in paragraph (b) of this section.

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the insurance agent or broker, pension consultant, or Principal Underwriter,

such records are lost or destroyed prior to the end of such six-year period.

(3) Notwithstanding anything to the contrary in ERISA section 504(a)(2) and (b), such records must be made unconditionally available for examination during normal business hours by duly authorized employees or representatives of the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization whose members are covered by the plan.

Section VI—Conditions for Transactions Described in Section III(g)

The following conditions apply to transactions described in Section III(g):

(a) The Independent Producer is authorized to sell annuities from two or more unrelated Insurers.

(b) The Independent Producer and the Insurer satisfy the applicable conditions in Sections VII and IX and are not ineligible under Section VIII. The Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with this exemption's conditions.

(c) Exclusions. The relief in Section III(g) is not available if:

(1) The Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided however that a named fiduciary or administrator or their Affiliate may rely on the exemption if it is selected to provide investment advice by a fiduciary who:

(i) is not the Insurer, Independent Producer, or an Affiliate;

(ii) does not have a relationship to or an interest in the Insurer, Independent Producer, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by the exemption;

(iii) does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for their own account from the Insurer, Independent Producer, or an Affiliate in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year; or

(iv) is not the IRA owner or beneficiary; or

(2) The transaction involves the Independent Producer acting in a fiduciary capacity other than as an investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

Section VII—Investment Advice Arrangement

Section VII(a) requires Independent Producers to comply with Impartial Conduct Standards, including a Care Obligation and Loyalty Obligation, when providing fiduciary investment advice to Retirement Investors. Section VII(b) requires Independent Producers to acknowledge fiduciary status under Title I of ERISA and/or the Code, and provide Retirement Investors with a written statement of the Care Obligation and Loyalty Obligation, a written description of the services they will provide and the products they are licensed and authorized to sell, and all material facts relating to Conflicts of Interest that are associated with their recommendations. In addition, before the sale of a recommended annuity, Independent Producers must consider and document their conclusions as to whether the recommended annuity meets the Care Obligation and Loyalty Obligation. Independent Producers recommending a rollover must also provide additional disclosure as set forth in subsection (b) below. Section VII(c) requires Insurers to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section VII(d) requires the Insurer to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section VII(e) allows Independent Producers to correct certain violations of the exemption conditions and continue to rely on the exemption for relief. In complying with this Section VII, the Independent Producer may reasonably rely on factual representations from the Insurer, and Insurers may rely on factual representations from the Independent Producer, as long as they do not have knowledge that such factual representations are incomplete or inaccurate.

(a) Impartial Conduct Standards

The Independent Producer must comply with the following ''Impartial Conduct Standards'':

(1) Investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. As defined in Section X(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section X(g), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the Retirement Investor's interests, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers, whose products the Independent Producer is authorized to sell on a commission basis, it is not permissible for the Independent Producer to recommend a product that is worse for the Retirement Investor, but better or more profitable for the Independent Producer or the Insurer;

(2) The compensation received, directly or indirectly, by the Independent Producer does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(3) The Independent Producer's statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time statements are made. For purposes of this paragraph, the term ''materially misleading'' includes omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.

(b) Disclosure

At or before the time a transaction described in Section III(g) occurs, the Independent Producer provides, in writing, the disclosures set forth in paragraphs (1)–(5) below to the Retirement Investor. For purposes of the disclosures required by Section VII(b)(1)–(4), the Independent Producer is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Independent Producer becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

(1) A written acknowledgment that the Independent Producer is providing fiduciary investment advice to the Retirement Investor and is a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) A written statement of the Care Obligation and Loyalty Obligation, described in Section VII(a) that is owed by the Independent Producer to the Retirement Investor;

(3) All material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(A) (i) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts,

(ii) A notice of the Retirement Investor's right to request additional information regarding cash compensation;

(iii) Upon request of the Retirement Investor in Section VII(b)(3)(A)(ii), the Independent Producer shall disclose: (I) A reasonable estimate of the amount of cash compensation to be received by the Independent Producer, which may be stated as a range of amounts or percentages; and (II) Whether the cash compensation will be provided through a one-time payment or through multiple payments, the frequency and amount of the payments, which may also be stated as a range of amounts or percentages.

(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to the Retirement Investor; this description must include the products the Independent Producer is licensed and authorized to sell, inform the Retirement Investor in writing of any limits on the range of insurance products recommended, and identify the specific Insurers and specific insurance products available to Independent Producer for recommendation to the Retirement Investor; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

(5) Before the sale of a recommended annuity, the Independent Producer considers and documents the basis for the determination to recommend the annuity to the Retirement Investor and provides that documentation to both the Retirement Investor and to the Insurer;

(6) *Rollover disclosure.* Before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA, the Independent Producer must consider and document the bases for its recommendation to engage in the rollover, and must provide that documentation to both the Retirement Investor and to the Insurer. Relevant factors to consider must include to the extent applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the fees and expenses associated with the Plan and the recommended investment;

(C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and

(D) the different levels of fiduciary protection, services, and investments available.

(7) The Independent Producer will not fail to satisfy the conditions in Section VII(b) solely because it makes an error or omission in disclosing the required information while acting in good faith and with reasonable diligence, provided that the Independent Producer discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

(8) Independent Producers and Insurers may rely in good faith on information and assurances from each other and from other entities that are not Affiliates as long as they do not know or have a reason to know that such information is incomplete or inaccurate.

(9) The Independent Producer is not required to disclose information pursuant to this Section VII(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures

(1) The Insurer establishes, maintains, and enforces written policies and procedures for the review of each recommendation, before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation, that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer's prudent review of the Independent Producer's specific recommendations must be made without regard to the Insurer's own interests. An Insurer is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer.

(2) The Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Insurer may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

(3) The Insurer's policies and procedures include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill. A prudent process includes careful review of objective material, such as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

(4) Insurers must provide their complete policies and procedures to the Department upon request within 30 days of request.

(d) Retrospective Review

(1) The Insurer conducts a retrospective review of each Independent Producer, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any. The retrospective review also includes a review of Independent Producers' rollover recommendations and the required rollover disclosure. As part of this review, the Insurer prudently determines whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer updates the policies and procedures as business, regulatory, and legislative changes and

events dictate, to ensure that the policies and procedures remain prudently designed, effective, and compliant with Section VII(c). Insurers may rely in part on sampling of each Independent Producer's transactions to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

(2) The Insurer provides to each Independent Producer the methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction the Independent Producer engaged in with respect to investment advice defined under Code section 4975(e)(3)(B), and instructs the Independent Producer to:

(A) correct those prohibited transactions;

(B) report the transactions to the IRS on Form 5330;

(C) pay the resulting excise taxes imposed by Code section 4975; and,

(D) provide the Insurer with a copy of filed Form 5330 within 30 days after the form is due (including extensions);

(3) The methodology and results of the retrospective review are reduced to a written report that is provided to a Senior Executive Officer of the Insurer.

(4) The Senior Executive Officer must certify, annually, that:

(A) The Senior Executive Officer has reviewed the report of the retrospective review report;

(B) The Insurer has provided Independent Producers with the information required under (d)(2) and has received a certification that the Independent Producer has filed Form 5330 within 30 days after the form is due (including extensions);

(C) The Insurer has established written policies and procedures that meet the requirements of Section VII(c)(1); and

(D) The Insurer has a prudent process in place to modify such policies and procedures as set forth in Section II(d)(1).

(5) The review, report, and certification are completed no later than six months following the end of the period covered by the review.

(6) The Insurer retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 30 days of request, to the extent permitted by law.

(e) Self-Correction

A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:

(1) Either the Independent Producer has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, cancelled the contract and waived the surrender charges;

(2) The correction occurs no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; and

(3) The Independent Producer notifies the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under Section VII(d)(3).

Section VIII—Eligibility

(a) Independent Producer

Subject to the timing and scope of ineligibility provisions set forth in subsection (c), an Independent Producer will become ineligible to rely on the relief for transactions described in Section III(g), if, on or after September 23, 2024, the Independent Producer has been:

(1) Convicted by either:

(A) a U.S. Federal or State court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of ''foreign adversaries'' that is codified in 15 CFR 7.4 as amended); or

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

(A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or

(D) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

(b) Insurers

Subject to the timing and scope of ineligibility provisions set forth in subsection (c), an entity will be ineligible to serve as an Insurer if, on or after September 23, 2024, the Insurer or an entity in the same Controlled Group as the Insurer has been:

(1) Convicted by either:

(A) a U.S. Federal or State court of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an

offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of ''foreign adversaries'' that is codified in 15 CFR 7.4 as amended); or

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general to have participated in in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

(A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or

(C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

(3) Controlled Group. An entity is in the same Controlled Group as an Insurer if the entity (including any predecessor or successor to the entity) would be considered to be in the same ''controlled group of corporations'' as the Insurer or ''under common control'' with the Insurer as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder),

(c) Timing and Scope of Ineligibility

(1) Ineligibility shall begin upon either:

(A) the date of conviction, which shall be the date of conviction by a U.S. Federal or State trial court described in Section VIII(a)(1) or VIII(b)(1) (or the date of the conviction of any trial court in a foreign jurisdiction that is the equivalent of a U.S. Federal or State trial court) that occurs on or after September 23, 2024 regardless of whether the conviction remains under appeal; or

(B) the date of a final judgment (regardless of whether the judgment remains under appeal) or a court-approved settlement described in Section VIII(a)(2) or VIII(b)(2) that occurs on or after September 23, 2024.

(2) One-Year Transition Period. An Independent Producer or Insurer that becomes ineligible under subsection VIII(a) or VIII(b) may continue to rely on this exemption or serve as an Insurer for up to 12 months after its ineligibility begins as determined under subsection (c)(1) if the Independent Producer or Insurer, as applicable, provides notice to the Department at *PTE84-24@dol.gov* within 30 days after ineligibility begins.

(3) An Independent Producer will become eligible to rely on this exemption and an Insurer will become eligible to serve as an Insurer again only upon the earliest of the following occurs:

(A) the date of a subsequent judgment reversing such person's conviction or other court decision described in Section VIII(a) or VIII(b);

(B) 10 years after the person became ineligible as determined under subsection (c)(1) or if later, 10 years after the person was released from imprisonment as a result of a crime described in Section VIII(a)(1) or Section VIII(b)(1); or

(C) the effective date an individual exemption granted by the Department, (under which the Department may impose additional conditions) permitting the person to continue its reliance on this exemption.

(d) Alternative Exemptions

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief.

Section IX—Recordkeeping

The Independent Producer and Insurer must maintain for a period of six years records demonstrating compliance with this exemption and makes such records available, to the extent permitted by law, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

Section X—Definitions

For purposes of this exemption, the terms ''insurance agent or broker,'' ''pension consultant,'' ''insurance company,'' ''investment company,'' and ''Principal Underwriter'' mean such persons and any Affiliates thereof. In addition, for purposes of this exemption:

(a) ''Affiliate'' means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person (For this purpose, ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the person; and

(3) Any corporation or partnership of which the person is an officer, director, or partner.

(b) Advice meets the ''Care Obligation'' if, with respect to the Retirement Investor, such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

(c) A ''Conflict of Interest'' is an interest that might incline an Independent Producer—consciously or unconsciously—to make a recommendation that is not disinterested.

(d) ''Independent Producer'' means a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies, and

(1) is not an employee of an insurance company (including a statutory employee as defined under Code section 3121(d)(3)); or

(2) is a statutory employee of an insurance company that has no financial interest in the covered transaction.

(e) ''Individual Retirement Account'' or ''IRA'' means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(f) ''Insurer'' means an insurance company qualified to do business under the laws of a State, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary State which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary State) by the State's

insurance commissioner within the preceding five years, (C) is domiciled in a State whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority; (D) is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization and the Department under Section VIII of this exemption), that retains the Independent Producer as an independent contractor, agent or registered representative.

(g) Advice meets the ''Loyalty Obligation'' if, with respect to the Retirement Investor, such advice does not place the financial or other interests of the Independent Producer, Insurer, or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer, or any Affiliate, Related Entity, or other party.

(h) The term ''Nondiscretionary Trust Services'' means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1).

(i) The term ''Nondiscretionary Trustee'' of a plan means a trustee whose powers and duties with respect to the plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Pre-Approved Plan, the power to amend such plan.

(j) ''Plan'' means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(k) The term ''Pre-Approved Plan'' means a plan which is approved by the Internal Revenue Service pursuant to the procedure described in Rev. Proc. 2017–41, 2017–29 I.R.B. 92, or its successors.

(l) A ''Principal Underwriter'' means a principal underwriter as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)).

(m) A ''Related Entity'' means any party that is not an Affiliate, and (i) has an interest in an Independent Producer that may affect the exercise of the fiduciary's best judgment as a fiduciary, or (ii) in which the Independent Producer has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary.

(n) ''Retirement Investor'' means a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

(o) A ''Senior Executive Officer'' is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Insurer.

Section XI—Phase-In Period

During the one-year period beginning September 23, 2024, Independent Producers may receive compensation under Section II(b) of this exemption if the Independent Producer complies with the Impartial Conduct Standards set forth in Section VII(a) and the fiduciary acknowledgment set forth in Section VII(b)(1).

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

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Part VII

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2550

Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12094]

ZRIN 1210–ZA34

Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128

AGENCY: Employee Benefits Security Administration (EBSA), U.S. Department of Labor.

ACTION: Amendments to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128.

SUMMARY: This document contains a notice of amendments to Prohibited Transaction Exemptions (PTEs) 75–1, 77–4, 80–83, 83–1, and 86–128, which are class exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendments (collectively, the Mass Amendment) affect participants and beneficiaries of plans, individual retirement account (IRA) owners, and certain fiduciaries of plans and IRAs.

DATES: The Mass Amendment is effective September 23, 2024.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, telephone (202) 693–8540, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

As described elsewhere in this edition of the **Federal Register**, the Department of Labor (Department) is amending the regulation defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a ''fiduciary'' in section ERISA 3(21)(A)(ii) of ERISA and in Code section 4975(e)(3)(B) (the ''Regulation''). The Department also is amending PTE 2020–02 to provide additional clarity for advice fiduciaries and protections for retirement investors and PTE 84–24 to address specific issues that insurance companies face in complying with the conditions of PTE 2020–02 when distributing annuities through independent agents, elsewhere in this edition of the **Federal Register**.

On October 31, 2023, the Department released the proposed amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 described below and invited all interested persons to submit written comments.[1] The Department received written comments on the proposed amendments, and on December 12 and 13, 2023, held a public hearing at which witnesses presented testimony. After careful consideration of the comments and testimony on the proposed amendments, the Department is granting the Mass Amendment with the modifications discussed herein.

The amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 remove relief in those exemptions for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

After this amendment is effective, investment advice fiduciaries must meet the conditions of PTE 2020–02 or PTE 84–24 for administrative relief when they receive otherwise prohibited compensation as a result of their provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder to Retirement Investors (defined as plans, plan participants or beneficiaries, IRAs, IRA owners and beneficiaries, plan fiduciaries within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciaries within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA).

As described in more detail below, the Department also is amending PTE 75–1 by: (1) expanding the extension of credit provision in Part V; and (2) adding a definition of the term ''IRA'' in Part V. The Department also is amending PTE 86–128 by: (1) revising the exemption's ''Recapture of Profits'' exception; and (2) making certain technical corrections and editorial changes.

The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and IRAs from engaging in self-dealing in connection with transactions involving plans and IRAs. The Department is granting these amendments pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2).[2]

Other Advice Exemptions

As discussed elsewhere in this edition of the **Federal Register**, the Department is amending investment advice exemptions to ensure consistent and protective standards apply to investment advice. After considering the comments it received, the Department made significant changes to both PTEs 2020–02 and 84–24 to ensure that there is an investment advice exemption available that applies to an appropriately wide range of situations. Many comments raised issues, or discussed concerns, with the Department's proposed amendments collectively (rather than proposal by proposal). In this same vein, the Department considered these comments holistically. For example, one commenter expressed concern that it would no longer be able to rely on PTE 77–4 for investment advice if the proposed amendments were finalized and was also concerned about whether it could use PTE 2020–02. After consideration of the comments, the Department determined it would make changes to PTE 2020–02 to revise certain conditions and broaden its scope rather than make changes to the Mass Amendment proposal. Although the changes to PTEs 2020–02 [3] and 84–24 [4] are discussed more completely in the respective documents, the changes in the three exemption documents reflect the full scope of comments received. The conditions to those exemptions, as finalized, emphasize long-standing principles of loyalty and prudence, require careful management of conflicts of interest, and are workable across different compensation structures and business models related to the provision

[1] The proposed amendments were released on October 31, 2023, and were published in the **Federal Register** on November 3, 2023. 88 FR 76032.

[2] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

[3] PTE 2020–02 requires financial institutions and investment professionals relying on the exemption to: (i) acknowledge their fiduciary status in writing; (ii) disclose their services and material conflicts of interest; and adhere to impartial conduct standards; (iii) adopt policies and procedures prudently designed to ensure compliance with the impartial conduct standards and mitigate conflicts of interest that could otherwise cause violations of those standards; (iv) document and disclose the specific reasons that any rollover recommendations from Title I plans to IRAs are in the retirement investor's best interest; (v) and conduct an annual retrospective compliance review.

[4] PTE 84–24 covers transactions with independent insurance agents, and requires them to comply with conditions similar to the amended PTE 2020–02.

of investment advice to Retirement Investors.

The Department has concluded that PTE 2020–02 and PTE 84–24 provide a uniform and workable framework for the definition of fiduciary under ERISA with respect to the provision of investment advice, and that the protections now afforded by those exemptions should be available to Retirement Investors generally when they receive recommendations from trusted advisers. For all the reasons described in the preambles to the amendments to PTE 84–24 and PTE 2020–02, published elsewhere today in this edition of the **Federal Register**, as well as the associated Regulatory Impact Analysis, the Department has determined to condition relief from the prohibited transaction rules for fiduciary advice on the terms of PTE 84–24 and PTE 2020–02. Retirement Investors will be best served by a uniform protective standard focused on the Impartial Conduct Standards, and associated policies and procedures, as set forth in the preambles and text of those exemptions. In the Department's judgment, there is no reason in law or policy to deprive Retirement Investors who receive advice that was formerly covered by the exemptions affected by these Mass Amendment of the protections now provided to all Retirement Investors under PTE 84–24 and PTE 2020–02.

Summary of Proposed Amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128

The proposed Mass Amendment was primarily aimed to ensure that all parties relying on the exemptive relief for the provision of investment advice are held to level standards and consistent criteria. In order to accomplish this goal, the Department proposed to amend PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 by removing exemptive relief for the provision of fiduciary investment advice. Specifically, the proposal would have added the following statement to each exemption: ''*Exception.* No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.''

This proposed amendment was intended to ensure that retirement investors would receive consistent and appropriate protections when receiving fiduciary investment advice. The Department proposed to accomplish this by removing relief for fiduciary investment advice from class exemptions except for PTE 2020–02 and PTE 84–24. The proposed amendment was intended to ensure that Retirement Investors received fiduciary investment advice that reflected an appropriate level of care and loyalty and financial professionals could rely on a single framework regardless of the business model or the compensation structure. The Department's intention was to create a level regulatory playing field that would apply to all of the investment products that fiduciary investment providers may recommend to Retirement Investors. Under the proposed amendments, retirement investors could expect to receive substantially the same strong protections with respect to fiduciary investment recommendations, irrespective of the type of investment product that was recommended, and advice providers would compete for retirement investor's business under a common standard focused on the investor's best interest.

Discussion of the Comments to the Mass Amendment in General

Commenters stated that the Regulation and all the proposed amendments, taken together, have internal contradictions. These commenters were concerned with perceived inconsistencies, costly conditions, and inefficient duplication (including with respect to remedies). According to these commenters, the Department's proposed changes would result in uncertainties, unintended consequences, counterproductive effects, and needless litigation. Commenters also expressed concern about the comment period and the proposed effective date. These general comments, and comments about the interaction between the Department's proposals are discussed both here and in other final amendments, published elsewhere in today's edition of the **Federal Register**.

Those commenters who focused on the proposed Mass Amendment tied their concerns to PTE 2020–02, and what they characterized as the Department's approach of requiring all fiduciary investment advice relief into PTE 2020–02. In particular, one commenter focused on certain transactions that would have been permitted by the class exemptions affected by the Mass Amendment, but which would have been excluded from PTE 2020–02, as proposed.[5] At least one commenter stated that the preamble to the proposal failed to identify the transactions being excluded from relief or explain the Department's rationale for excluding such transactions, some of which fiduciaries have been permitted to engage in since ERISA was passed. One of these commenters further opined that the Department's cost analysis in these regards was insufficient, and that the Administrative Procedure Act (the APA) and Executive Orders 12866 and 13563 preclude this kind of ''sleight-of-hand rulemaking.'' Other commenters cited the APA as well, and some also stated that the Mass Amendment exceeds the Department's authority, including under ERISA Section 408(a).[6]

Commenters expressed concern regarding the proposed Mass Amendment in light of the decision by the U.S. Court of Appeals for the Fifth Circuit, vacating the Department's 2016 rulemaking with respect to fiduciary advice.[7] Other commenters stated the proposed Mass Amendment would constitute improper regulation of IRAs.

Many of the commenters on the proposed Mass Amendment criticized the Department's approach as costly and said the Department had not adequately accounted for the costs to affected parties. For example, one commenter stated that, in their view, the majority of the changes proposed by the Department will be disruptive and unhelpful. Another commenter stated that the costs to the industry of changing their reliance on all of these

[5] One commenter stated that all of the following investments could not be traded in the dealer market under PTE 2020–02 as it currently exists: equities (U.S. and foreign), asset-backed trusts, U.S. bonds of entities other than corporations, certain structured notes issued by U.S. corporations and subject to registration requirements under the Securities Act of 1933, currency, foreign corporate bonds, foreign government bonds, Rule 144A securities, privately issued real estate securities, closed-end funds, equity IPOs, and debt IPOs. As noted elsewhere, the amended exemptions are not intended to limit the scope of the current exemptions except with respect to the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. In addition, as discussed in the preamble to today's amendments to PTE 2020–02, and in its text, PTE 2020–02 has been broadly amended to encompass compensation for advice irrespective of the product recommended.

[6] ERISA section 408(a) and Code section 4975(c)(2), expressly permit the Department (through the Reorganization Plan No. 4 of 1978) to grant ''a conditional or unconditional exemption'' as long as the exemption is ''(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan.''

[7] *See generally Chamber of Commerce* v. *U.S. Dep't of Lab.,* 885 F.3d 360 (5th Cir. 2018).

exemptions would be high and was insufficiently unanalyzed by the Department. According to these commenters, financial institutions have established their policies, procedures, compliance routines, risk assessments, training and supervision structures to accommodate the exemptions each has chosen to use and requiring all of those institutions to revamp their systems and processes will be expensive and time consuming. This commenter was concerned that these costs were not fully reflected in the Department's cost assessment or effective date of the exemption. This commenter raised threats of litigation and cautioned that to the extent these changes are ultimately invalidated, the industry and the plans they serve will suffer unnecessary costs and investment in ultimately vacated rules. In the view of this commenter, low and middle-income families would be disproportionately harmed by these changes, because it is the commenter's view that some firms and financial professionals would no longer provide fiduciary investment advice to low and middle-income families. One commenter disagreed that any changes were appropriate because the Department did not identify any harm. Other commenters called the proposed amendment ''arbitrary and capricious.''

Some of the commenters on these amendments focused specifically on concerns about an anticipated loss of efficiency. These commenters described PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 as designed to cover specific types of transactions that financial services firms commonly undertake for plan or IRA investors. The conditions built into those class exemptions were specifically tailored to protect investors, while allowing for efficient conduct of ordinary and necessary plan transactions. If the proposed Mass Amendment is granted, these commenters argued that the efficiencies associated with the affected class exemptions would be lost, resulting in higher costs and fewer benefits to investors, and perhaps other unintended consequences. Another commenter stated that the insurance industry's suitability standards far exceed any other regulatory agency protections for protecting retirement accounts.

Other commenters focused specifically on the amendment to PTE 77–4. One commenter stated that eliminating the availability of PTE 77–4 for fiduciary investment advice would be highly disruptive and would create material new costs which would ultimately be borne by plans and participants. According to the commenter, PTE 77–4 already provides robust protections for plans and participants and these changes would lead to increased costs that the Department has failed to properly identify, analyze, and account for, and the costs of the disruption alone far outweigh any theoretical benefit to plans and participants. The commenter stated that the outsized burden of complying with the disclosure, documentation, reporting, and recordkeeping requirements of PTE 2020–02 may be too great for it to be viewed as a viable alternative to PTE 77–4 in many cases. The commenter added that the potential result of this is that financial firms are likely to no longer offer certain services to plans if doing so would require them to rely on PTE 2020–02.

Another commenter offered similar views, adding that for over 45 years financial institutions have relied on PTE 77–4 for both investment advice and discretionary programs. According to the commenter, the proposed amendment would require firms to fully inventory every product and service to identify every use of PTE 77–4 and determine whether the exemption can continue to be used and, if not, whether there are any viable alternatives. Other commenters expressed concern that the proposed amendments would result in increased compliance costs, including by having to rely on two class exemptions when previously only one was relied on. For example, a fiduciary would have to comply with PTE 2020–02 to recommend a particular program but would have to comply with PTE 77–4 to manage those assets.

One commenter cited several of the reasons above to support the view that the Mass Amendment is impermissible under ERISA Section 408(a), adding that many plans and participants would be harmed by the Mass Amendment.

Commenters focused on the impact of removing investment advice from PTE 86–128. According to one commenter, the proposed changes do not address situations where an adviser may have limited discretion over the purchase and sale of certain securities within an advisory account, such as mutual funds and exchange-traded funds (ETFs), but acts on a non-discretionary basis with respect to other securities within that same account, such as fee-based variable annuities or private placements. The commenter urged the Department to look more closely at the conditions of the exemption in light of the fact that PTE 86–128 deals only with agency transactions in securities, a field that the commenter characterized as fully regulated by the SEC that requires substantial transaction-based reporting. Other commenters stated that costs to retirement investors would increase if the proposal is adopted, because the material cost savings PTE 86–128 provides for investors would be lost if its relief is transferred to PTE 2020–02. One of these commenters stated that, in its members' view, PTE 86–128 provided a significant economic benefit to retirement investors when it is used, because the investor effectively receives two investment services for the price of one.

At least one commenter cited the difficulty small businesses face in complying with complex regulations, and one of these commenters stated that the Department's class exemptions appear in ''piecemeal'' form on its website. The commenter recommended that the Department update its class exemptions on its website to facilitate the review of the current exemption text (*i.e.,* with all amendments incorporated).

Numerous commenters expressed strong support for the proposed Mass Amendment, and the Department's proposal to move coverage of fiduciary investment advice to PTEs 2020–02 and 84–24 to ensure consistency for all types and forms of fiduciary investment advice. One commenter argued that the proposed changes were important and would provide vulnerable retirement investors with needed protection against bad actors. Another commenter emphasized the importance of a baseline of protection for American workers against predatory practices. One commenter raised concerns with the lack of transparency in the current system and indicated that a single set of standards would help increase accountability for financial advisors and would be an important step for restoring public trust in the work that financial advisors do. This same commenter also stated that the care and loyalty obligations proposed by the Department in PTE 2020–02 and PTE 84–24 were essential to ensure that investment advice fiduciaries were acting in the best interest of their clients and not for their own financial gain. According to this commenter, it would be problematic for the Department to offer exemptions that didn't have these same requirements.

Another commenter expressed surprise that investment advisers did not already have a uniform fiduciary responsibility to put the interests of their clients first and expressed approval of the Department's proposal. A commenter stated the ''the best interest of the client should be the advisor's sole concern, with no

secondary concern even coming into deliberation.'' Another commenter discussed how investment funds are vital to consumers, that the investment funds deserve appropriate fiduciary restrictions, and that such restrictions were present in the Department's proposed changes. One commenter viewed it as the government's responsibility to take steps to ensure that people who need money in their ''old age'' could trust their adviser. This commenter emphasized that the government should take action to ensure investment advisers worked to help retirement investors save money on fees while allowing savings to keep pace with inflation. Another commenter argued that it was imperative that financial advisers have a fiduciary duty to the retirement investor and no one else. In the commenter's view, this was accomplished through the Department's proposal. One commenter asked that the proposals be finalized as proposed, *i.e.,* setting up PTEs 2020–02 and 84–24 for all fiduciary investment advice, stating that it would provide increased protection for investors and would result in advisers providing honest information to retirement investors.

One commenter stated that retirement investors should receive fair, unbiased financial recommendations and that the recommendations should not be influenced by how much the adviser stands to make on the recommendation. This commenter also noted that, in their view, requiring advisers to satisfy a fiduciary obligation to their clients should be the baseline minimum requirement. This same commenter expressed approval of the disclosure and recordkeeping requirements in PTEs 2020–02 and PTE 84–24, stating that these requirements allow the recommendations to be audited and verified after the fact. In the view of this commenter, this is necessary to ensure that advisers can be held accountable for irresponsible and illegal advice.

After reviewing the comments, the Department has determined to finalize its proposal to remove fiduciary investment advice as covered transactions from the exemptions herein. Following consideration of the different issues raised by commenters, the Department continues to believe that fiduciary investment advice is best covered through a single set of standards, as set forth in PTEs 2020–02 and 84–24. The Department agrees with those commenters who raised concerns that certain transactions would have been unable to rely on PTE 2020–02 as originally proposed. As described more fully in the preamble to the final amendment to PTE 2020–02, the Department is making changes to broaden the scope of that exemption in response to the commenters.

The Department agrees with those commenters who emphasized the importance of consistent standards and practices for all investment advice for Retirement Investors. The Department also agrees with those commenters who argued in favor of imposing consistent care and loyalty obligations on all fiduciary investment advisers, regardless of the advice given or the compensation received. In the Department's view, this is best accomplished by reliance on a single set of standards for all fiduciary investment advice. As discussed in greater detail in the preambles to the amendments to PTE 2020–02 and PTE 84–24, published elsewhere today in this edition of the **Federal Register**, the Department has worked to ensure that this single set of standards works for a wide range of business practices. Additionally, this set of standards was specifically crafted to build upon long-standing principles found throughout ERISA and trust law. The care obligation and loyalty obligation, along with the required disclosures, policies and procedures, and retrospective review will ensure that Retirement Investors are appropriately protected.

It remains the Department's intent, however, to exclude from these amended exemptions only the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. After reviewing comments that indicated its intent was unclear, the Department has revised the final amendment to reflect this intent more clearly. Therefore, this final amendment clarifies that relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is not available for the receipt of compensation as the result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Regarding comments that the proposed transactions are already the subject of different regulatory schemes, the Department notes that this has been the case since the passage of ERISA. The fact that regulators with responsibility for other state or Federal statutes and who have different areas of authority have imposed different conditions on the entities subject to the amended class exemptions does not foreclose the Department from meeting its responsibility to ensure that the interest of plans and Retirement Investors are protected as required under ERISA section 408(a) and Code section 4975(c)(2).

In addition, the Department has revised its cost analysis for the prohibited transactions, particularly for PTE 2020–02 since more entities will be relying on that exemption. Costs associated with the proposed Mass Amendment are discussed below. After reviewing the entire record, the Department maintains its position that the enhanced protections afforded to plans and IRAs, and the uniformity of the regulatory environment, will provide stability and savings to plans and IRAs that outweighs the cost concerns raised by commenters. The Department also believes that the imposition of a common set of protective standards for a wide range of advice transactions in PTE 84–24 and PTE 2020–02 promotes efficiency and clarity, inasmuch as one need only look to the terms of these two exemptions, which are materially similar, for relief from advice transactions, rather than a complex patchwork of exemptions covering different transactions.

Regarding comments expressing concern about the Mass Amendment in light of the decision by the U.S. Court of Appeals for the Fifth Circuit referenced above, the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Regarding comments expressing concern that the Mass Amendment constitute improper regulation of IRAs, the Department notes this rulemaking does not alter the existing framework for bringing suits under State law against IRA fiduciaries and does not aim to do so.

With respect to the comments above regarding inconsistencies, alleged duplicities, uncertainties, and contradictions the Department has strived herein and in the amendments published elsewhere in today's edition of the **Federal Register** to address the concerns and issues raised by commenters. The Department encourages parties to contact the Department's Office of Exemption Determinations should any further issues of ambiguity remain.

Regarding comments about the Mass Amendment's comment period and effective date, the robust comment period is described above and in the preamble to the Regulation, and the effective date of the Mass Amendment is now 150 days following publication

of the Mass Amendment in the **Federal Register**.

Regarding comments expressing concern that the Department has not made its findings under ERISA Section 408(a), after considering the entire record, the Department has determined that the Mass Amendment will provide important benefits that are in the interest of affected plans and IRAs. The Mass Amendment's protective conditions support a finding that the Mass Amendment is protective of affected plans and IRAs. The Department believes that Mass Amendment's conditions also support a finding that the Mass Amendment is administratively feasible. For a detailed discussion of the rationale, reasons, and responses to comments about the application of the exemption to advice transactions, the Department refers readers to the preambles to the amendments to PTE 84–24 and PTE 2020–02, published elsewhere today in this edition of the **Federal Register**.

The Department appreciates the comment regarding its class exemption website, and will strive to ensure its exemptions, including amendments thereto, are easily accessible.

Summary of Additional Proposed Amendments to PTE 75–1 [8]

Proposed Amendments to PTE 75–1, Part I, paragraphs (b) and (c): The Department proposed to revoke PTE 75–1, Part I, paragraphs (b) and (c), which has provided exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. As noted in the proposal, the Department proposed to revoke the relief provided in Parts I(b) and I(c) of PTE 75–1, because it duplicates the relief available under the statutory exemptions under Code section 4975(d)(2) and ERISA section 408(b)(2) and regulations thereunder.

Proposed Revocation of Part II(2) of PTE 75–1: The Department proposed to revoke Part II(2) of PTE 75–1 and requested comment regarding whether fiduciaries providing discretionary investment management services in connection with the purchase or sale of a mutual fund security in a principal transaction need the relief that is provided by PTE 75–1, Part II(2), and, if so, what conditions would be appropriate.

Proposed Amendment to PTE 75–1, Part II(f): The Department also proposed to revise the recordkeeping provisions of PTE 75–1, Part II(f) to place the responsibility for maintaining such records on the broker-dealer, reporting dealer, or bank engaging in the transaction with such plan or IRA rather than on the plan or IRA. The proposed amendment also would have required the broker-dealer to make the records reasonably available at their customary location for examination during normal business hours by: (A) Any duly authorized employee or representative of the Department or the Internal Revenue Service; (B) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary; (C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or (D) Any participant or beneficiary of the plan or the authorized representative of such participant or beneficiary. In so doing, the proposal expanded the list of entities and persons eligible to receive these records, by adding the persons described in (B), the authorized representatives of the entities in (C), and the authorized representatives of the persons in (D).

None of the persons described in subparagraph (1)(B)–(D) above would have been authorized to examine privileged trade secrets or privileged commercial or financial information of such fiduciary, nor are they authorized to examine records regarding a plan or IRA other than the plan or IRA with which they are the fiduciary, contributing employer, employee organization, participant, beneficiary or IRA owner.[9]

Proposed Amendments to 75–1, Part V: The Department proposed to amend PTE 75–1, Part V, which permits a broker-dealer to extend credit to a plan or IRA in connection with the purchase or sale of securities. In the past, relief under PTE 75–1, Part V, has been limited in that the broker-dealer extending credit was not permitted to have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, nor render investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to those plan assets, unless no interest or other consideration was received by the broker-dealer or any affiliate of the broker-dealer in connection with the extension of credit.

The Department was informed that relief was needed for broker-dealers to extend credit to plans and IRAs to avoid failed securities transactions, and to receive compensation in return. For example, the Department understands that broker-dealers can be required, as part of their relationships with clearinghouses, to complete securities transactions entered into by the broker-dealer's customers, even if a particular customer does not perform on its obligations. If a broker-dealer is required to advance funds to settle a trade entered into by a plan or IRA, or purchase a security for delivery on behalf of a plan or IRA as a result of a failed security transaction, the result can potentially be viewed as a loan of money or other extension of credit to the plan or IRA. Further, in the event a broker-dealer steps into a plan's or IRA's shoes in any particular transaction, it may charge interest or other fees to the plan or IRA. These transactions potentially violate ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) and (D).

In the Department's view, the extension of credit to avoid a failed securities transaction currently falls within the contours of the existing relief provided by PTE 75–1, Part V, for extensions of credit ''[i]n connection with the purchase or sale of securities.'' Accordingly, broker-dealers that are not investment advice fiduciaries, *e.g.,* those who execute transactions but do not provide advice, were permitted to receive compensation for extending credit to avoid a failed securities transaction under the exemption as originally granted. Under the proposed amendment, the Department would have extended such relief to investment advice fiduciaries.

Specifically, under the proposed amendment to PTE 75–1, Part V(c), an investment advice fiduciary could have received reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA. In conjunction with the expanded relief in the amended exemption, Proposed Section (c) would have imposed several conditions. First, the potential failure of the purchase or sale of the securities could not have been caused by the

[8] The Department made the Proposed Amendments to PTE 75–1 discussed below as part of its 2016 rulemaking that was overturned by the U.S. Court of Appeals for the Fifth Circuit. *See generally Chamber of Commerce* v. *U.S. Dep't of Lab.,* 885 F.3d 360 (5th Cir. 2018).

[9] The proposed amendment provided that if such plan fiduciary refused to disclose information on the basis that such information is exempt from disclosure, the plan fiduciary would have been required to provide a written notice by the close of the thirtieth (30th) day following the request advising the requestor of the reasons for the refusal and that the Department may request such information. Finally, the proposed amendment would have provided that failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It would not have affected the relief for other transactions.

broker-dealer or any affiliate. Additionally, the terms of the extension of credit would have to be at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Finally, the plan or IRA must have received written disclosure of certain terms before the extension of credit. This disclosure would not have needed to be made on a transaction by transaction basis, and could have been part of an account opening agreement or a master agreement. The disclosure would have been required to include the rate of interest or other fees that will be charged on such extension of credit, and the method of determining the balance upon which interest will be charged.

The plan or IRA must additionally have been provided with prior written disclosure of any changes to these terms. The required disclosures were intended to be consistent with the requirements of Securities and Exchange Act Rule 10b–16, which governs broker-dealers' disclosure of credit terms in margin transactions.[10]

The Department also proposed to make the same revisions to the recordkeeping provisions of PTE 75–1, Part V that were made to the recordkeeping provisions of PTE 75–1, Part II(f) that are described above. This included expanding the persons and entities eligible to receive certain documents from a broker-dealer in the same manner described above in the PTE 75–1, Part II(f) discussion.

Finally, the Department proposed to add a definition of the term ''IRA'' to PTE 75–1, Part V. Under the proposed definition the term IRA would have meant any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in Code section 408(a) and a health savings account described in Code section 223(d).

Discussion of Comments on Additional Proposed Amendments to PTE 75–1

Proposed Amendment to Part I(b) and (c). One commenter asserted that although Part I(b) and (c) transactions are covered by 408(b)(2), the industry still relies on Part I because: (1) it covers the actual transaction, as well as clearance, settlement or custodial functions incidental thereto; and (2) it provides clarification and relief regarding the provision of research, analysis, availability of securities and reports concerning issuers, industries, securities or other property economic factors or trends, portfolio strategy and performance ''under circumstances which do not make such party in interest or disqualified person a fiduciary with respect to such plan.''

After considering the comment, that Department has determined not to delete Part I(b) and (c) as was proposed.

Proposed Amendment to Part II. A commenter opposed the Department's proposed revocation of Part II(2), stating that the Department did not provide adequate grounds to revoke this exemption. According to this commenter, this exemption remains the bedrock of institutional dealer sales of securities and there would be significant cost and disruption if the Department did revoke this relief.

More than one commenter expressed concern that the proposed recordkeeping amendment, which would require broker-dealers, reporting dealers and/or banks to provide certain records to persons and entities that include beneficiaries and employee organizations, among others, may open the door to privacy concerns, fishing expeditions, abuse, and unnecessary risk.

After considering the comments, the Department has determined not to finalize the revocation of PTE 75–1, Part II(2) as was proposed. The Department also is not finalizing: (1) the proposed amendment that would have required the broker-dealer, reporting dealer, or bank engaging in the covered transaction to satisfy the recordkeeping requirement in Part II(e) of the exemption; nor (2) the proposed expansion of Part II(f) that would have permitted additional parties to review the records described in Part II(e). Therefore, only the parties that are entitled to examine the records described in Part II(e) of the current exemption may do so.

Proposed Amendment to Parts III and IV. The Department proposed to amend PTEs 75–1 Parts III and IV, by adding the following statement to each exemption: ''Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.''

One commenter stated that ''the very thing covered by these parts is not permitted at all under PTE 2020–02. Plans and retirement investors will lose opportunities and trading efficiencies they currently enjoy with no alternative avenue open to them. Amazingly, the cost analysis does not mention the cost to plans or the market.''

As described in the preamble to the final amendment to PTE 2020–02, the Department is expanding the scope of that exemption to cover recommendations of any investment product, as long as the recommendation meets the conditions of PTE 2020–02. Therefore, all recommendations will be subject to the same protective conditions. Accordingly, the Department is clarifying the language in the proposed amendment to provide that: ''No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.'' Fiduciary advice providers should look to amended PTE 2020–02 for relief.

Proposed Amendments to Part V. A commenter stated that it is appropriate to put the responsibility for recordkeeping on the financial firm. However, the commenter characterized the proposed condition in the extension of credit proposed amendment which would have provided that the failure of the purchase or sale of the securities was not caused by the fiduciary or its affiliate as a ''mistake.'' According to the commenter, generally, when there is a failure in the market, it is extremely hard to tell the exact cause, so the relief should not be conditioned on finger pointing, which could create unnecessary delays.

More than one commenter expressed concern that the proposed expansion of the recordkeeping amendment, which would have required broker-dealers to provide access to certain records for examination by more persons and entities than the current exemption may, among other consequences, open the door to privacy concerns, fishing expeditions, abuse, and unnecessary risk.

After considering the comments, the Department has determined not to finalize the proposed condition that would have required the investment advice fiduciary not to have caused the potential failure of the purchase or sale of the securities in the extension of credit amendment. The Department has determined that fiduciaries should be able to extend credit in order to avoid a failed securities transaction. The Department did not receive any

[10] The Department understands that it is the practice of many broker-dealers to provide such disclosures to all customers, regardless of whether the customer is presently opening a margin account. To the extent such disclosure is provided, the disclosure terms of the exemption are satisfied.

substantive comments on the IRA definition, which it is finalizing to read as follows: ''Individual Retirement Account'' or ''IRA'' means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F). This language is consistent with the IRA definition in PTE 2020–02. After considering the comments, the Department also is not amending the recordkeeping provision in PTE 75–1 Part V.

Summary of Additional Proposed Amendments to PTE 86–128

The Department proposed certain administrative changes to PTE 86–128, which are not directly related to the provision of fiduciary investment advice. The Department proposed to delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs, to increase the safeguards available to these Retirement Investors. Therefore, under the proposed amendment, fiduciaries that exercise full discretionary authority or control with respect to IRAs could have continued to rely on PTE 86–128 but would have had to meet the protective conditions of this exemption for IRAs as well as for Title I plans.

The Department also proposed certain technical changes to the exemption, including deleting subsection IV(b)(1), and redesignating remaining sections as needed. The language currently in Section IV(b)(1) excludes fiduciary investment advice providers; however, under the proposed amendment, fiduciary investment advice providers would have been excluded from the exemption as a whole; therefore, the exclusion does not need to be repeated in Section IV. As a result of the deletion of Section IV(a) and IV(b)(1), the Department proposed to redesignate subsections IV(b)(2) and (3) as subsections IV(a)(1) and (2), respectively, Section IV(c) as Section IV(b), and Section IV(d) as Section IV(c).

Redesignated Section IV(b) of the proposed amendment would have provided that certain conditions in Section III do not apply in any case where the person who is engaging in a covered transaction returns or credits to the plan all profits earned by that person and any related entity in connection with the securities transactions associated with the covered transaction. This provision is referred to as the ''Recapture of Profits'' exception. The Department provided an exception from the conditions in Section III for the recapture of profits due to the benefits plans and IRAs would derive from such arrangements.

Discretionary trustees were first permitted to rely on PTE 86–128 without meeting the Recapture of Profits provision pursuant to an amendment in 2002 (the 2002 Amendment). Before the 2002 Amendment, Section III(a) provided that ''[t]he person engaging in the covered transaction [may not be] a trustee (other than a nondiscretionary trustee), or an administrator of the plan, or an employer any of whose employees are covered by the plan.'' Under the 2002 Amendment, the reference to ''trustee (other than a nondiscretionary trustee)'' was deleted from Section III(a); therefore, discretionary trustees had to satisfy additional conditions set forth in Section III(h) and (i) to rely on the exemption.[11]

The Department understands that after the 2002 Amendment, practitioners questioned whether discretionary trustees were permitted to rely on the Recapture of Profits exception, which allows persons identified in Section III(a) to engage in the covered transactions if they return or credit to the plan or IRA all profits, as an alternative to complying with Sections III(h) and (i). By deleting the reference to discretionary trustees from Section III(a), the Department understands that the 2002 Amendment inadvertently may have prevented discretionary trustees of plans or IRAs from using the Recapture of Profits exception from the conditions imposed by Section III of the exemption, and instead, may have limited the relief provided in the exemption to discretionary trustees that satisfy that additional conditions in Section III(h) and (i). This result was not intended; therefore, the Department proposed to modify the exemption to permit all discretionary trustees to utilize the recapture of profits exception as they originally were permitted to before the 2002 Amendment.

In order to achieve this result, the Department proposed to amend redesignated section IV(b) to provide that Sections III(a), III(h), and III(i) do not apply in any case where the person engaging in the covered transaction returns or credits to the plan or IRA all profits earned by that person in connection with the securities transaction associated with the covered transaction. In addition, the Department proposed to reinsert a reference to trustees (other than nondiscretionary trustees) in Section III(a) along with the existing references to plan administrators and employers. Finally, the Department proposed to add a sentence to the end of Section III(a) stating that: ''Notwithstanding the foregoing, this condition does not apply to a trustee (other than a nondiscretionary trustee) that satisfies Section III(h) and (i), and to all persons identified in this paragraph that satisfy the Recapture of Profits exception in Section IV(b)).''

The purpose of these proposed amendments was to clarify that discretionary trustees may engage in covered transactions if they satisfy Section III(h) and (i) of the exemption. Moreover, the proposed amendment would have clarified that all parties identified in Section III(a)—discretionary trustees, plan administrators, or employers who have any employees covered by the plan—can engage in a transaction covered under PTE 86–128 if they satisfy the Recapture of Profits exception.

Lastly, the Department proposed to add a new Section VII to PTE 86–128 that would have required the fiduciary engaging in a covered transaction to maintain records necessary to enable certain persons (described in proposed Section VII(b)) to determine whether the conditions of this exemption have been met.

Discussion of Comments to Additional Proposed Amendments to PTE 86–128

Proposed Amendment to IV(a). At least one commenter stated that the Department did not consider the disruption that would be caused by eliminating the exclusion from the exemption conditions for covered transaction engaged in on behalf of IRAs. Another commenter stated that the Department did not explain how a retail investor would benefit from, or understand, complex and potentially confusing disclosures they would have been required to receive under the proposed amendment, which are intended for institutional, sophisticated plan fiduciaries. The commenter stated also that the proposed amendment does not provide any guidance on how persons engaging in covered transactions under the exemption can comply with the proposed amendment.

After considering these comments, the Department has determined not to eliminate the exclusion from the current exemption conditions of PTE 86–128 for covered transactions engaged in on behalf of IRAs. The Department's objective for amending PTE 86–128 and other affected exemptions is to ensure that consistent and protective standards apply to investment advice. The Department does not intend to impose

[11] Section III(h) provides that discretionary trustees may engage in the covered transactions only with plans or IRAs with total net assets of at least $50 million, and Section III(i) requires discretionary trustees to provide additional disclosures.

any additional obligations on entities relying on PTE 86–128 at this time. The Department notes, however, that it may revisit the scope and content of PTE 86–128 as part of future notice and comment rulemaking.

Proposed Amendment to Part VII. Some commenters raised concerns with the proposed new recordkeeping provision. One commenter stated that absent such explanation or public policy rationale, it is not necessary to make the fiduciary's records available to the participants and beneficiaries (and their authorized representatives). The commenter recommended that the Department delete the proposed language that would allow retirement investors and their authorized representatives direct access to the records of fiduciaries relying on PTE 86–128.

Another commenter also expressed concerns about the proposed recordkeeping condition. Among other things, the commenter objected to unions being allowed to have any record of the plan. The commenter asserted that this provision undermines the careful balance of labor relations in this country and argued that it is preempted by the National Labor Relations Act.

After consideration of the comments, the Department has deleted the proposed recordkeeping requirements applicable to Section VII of PTE 86–128. However, as with PTE 2020–02, the Department intends to monitor compliance with the exemption closely and may revisit whether expanding the recordkeeping requirement is appropriate in the future. Any future amendments would be preceded by notice and an opportunity for public comment.

Other Proposed Change to PTE 86–128. The Department did not receive comments on the proposed technical changes discussed above, or the proposed modification that permits discretionary trustees to utilize the Recapture of Profits exception in Section IV(d) of PTE 86–128 as was permitted when the Department originally issued PTE 86–128. Therefore, the Department has finalized these technical changes as proposed.

Executive Orders

Executive Orders 12866 [12] and 13563 [13] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[14] entitled ''Modernizing Regulatory Review,'' section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4)raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the amendment's costs, benefits, and transfers, and OMB has reviewed the rulemaking.

Paperwork Reduction Act Statements

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

ICRs are available at *RegInfo.gov* (*https://www.reginfo.gov/public/do/PRAMain*). Requests for copies of the ICR or additional information can be sent to the PRA addressee:

By mail James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210

By email ebsa.opr@dol.gov

Preliminary Assumptions

The Department assumes that several types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $65.99 for clerical personnel, $165.71 for a legal professional, $198.25 for a financial manager.[15]

In the proposal, the Department received several comments on the Department's labor cost estimate, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.

Removal of Investment Advice and PTE 2020–02

The Department is amending PTE 77–4, PTE 75–1, PTE 80–83, PTE 83–1, and PTE 86–128, to remove relief in those exemptions for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section

[12] 58 FR 51735 (Oct. 4, 1993).

[13] 76 FR 3821 (Jan. 21, 2011).

[14] 88 FR 21879 (Apr. 6, 2023).

[15] Internal DOL calculation based on 2023 labor cost data and adjusted for inflation to reflect 2024 wages. For a description of the Department's methodology for calculating wage rates, *see:* Employee Benefits Security Administration, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* Employee Benefits Security Administration, *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

4975(e)(3)(B) and regulations thereunder. Investment advice providers will instead have to rely on the amended PTE 2020–02 or PTE 84–24 for exemptive relief covering investment advice transactions. For an estimate of the costs incurred by entities now reliant on PTE 2020–02, refer to the discussion of the amendments to PTE 2020–02 and PTE 84–24 published in this issue of today' **Federal Register**.

In the proposal, the Department received several comments that the Mass Amendments would be costly and disruptive. Some of the commenters expressed concern that the exemptions are tailored to specific types of transactions and moving all investment advice transactions to PTE 2020–02 and PTE 84–24 would be burdensome. Several commenters on the proposal expressed concern about the cost burden associated this change, with many stating that the Department had not considered the cost associated with moving to PTE 2020–02. In consideration of these comments, the Department has increased its cost estimates for entities newly relying on PTE 2020–02 and PTE 84–24. The increases include significant increases in the cost estimates to review and implement the rule and to establish policies and procedures. For a complete discussion of the cost estimates, refer to the Paperwork Reduction Act sections for PTE 2020–02 and PTE 84–24 or the regulatory impact analysis in Retirement Security Rule: Definition of an Investment Advice Fiduciary, also published in today's **Federal Register**.

Amendments to PTE 75–1

Affected Entities

Broker-dealers registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), reporting dealers, and banks are eligible to rely on the exemption. According to the SEC, approximately 3,490 broker-dealers were SEC-registered as of December 2022.[16] Not all broker-dealers perform services for employee benefit plans. In 2022, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[17] Assuming the percentage of broker-dealers providing advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department estimates 55 percent, or 1,919 broker-dealers, would be affected by PTE 75–1.

According to the Federal Deposit Insurance Corporation, there are 4,049 commercial banks as of September 30, 2023.[18] If one-half of these banks (about 2,025) and 55 percent of broker-dealers (about 1,919 broker-dealers) relied on this exemption, there would be approximately 3,944 respondents.[19]

Disclosure Requirements

Under Part V(c) of PTE 75–1, when a fiduciary extends credit to avoid a failed purchase or sale of securities, the plan or IRA must receive written disclosure of the rate of interest (or other fees) that will apply and the method of determining the balance upon which interest will be charged, as well as prior written disclosure of any changes to these terms. The plan or IRA must also be provided with prior written disclosure of any changes to these terms.

The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with disclosure distribution regulations mandated by the Securities and Exchange Commission (SEC). The Department believes that this new disclosure requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b–16(1) for margin transactions. Therefore, the Department concludes that this requirement produces no additional burden to the public.

Recordkeeping Requirements

In the proposal, the Department proposed to amended PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRA owners to financial institutions. In the final rulemaking, the Department has decided to keep the recordkeeping requirement unchanged from the existing exemption.

The Department has assumed that financial service providers that transact with employee benefit plans will maintain these records on behalf of their client plans. Because of the sophisticated nature of financial service providers and the regulation of the securities industry by State and Federal government, and by self-regulatory organizations, the Department has assumed that the records required by this class exemption are the same records kept in the normal course of business, or in compliance with other requirements.

The Department has estimated that the time needed to maintain records for the financial institutions to be consistent with the exemption will be four hours per entity annually at a wage rate of $198.25 per hour.[20] Thus, the Department estimates it would take 15,778 hours at an equivalent cost of $3,127,949 to maintain the records and make the records available for inspection.[21]

TABLE 1—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH RECORDKEEPING

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Manager	15,778	$3,127,949	15,778	$3,127,949
Total	15,778	3,127,949	15,778	3,127,949

[16] Estimates based on SEC's FOCUS filings and SEC's Form ADV filings.

[17] Cerulli Associates, *U.S. RIA Marketplace 2023,* Exhibit 5.10, Part 1, The Cerulli Report.

[18] Federal Insurance Deposit Corporation, *Quarterly Banking Profile,* Statistics at a Glance- as of September 30, 2023, *https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023sep/industry.pdf.*

[19] Reporting dealers covered by the exemption are not accounted for separately because they are banks and security brokerages that trade in U.S. Government Securities; thus, reporting dealers are already accounted for in the number of broker-dealer firms and banks. The New York Federal Reserve Bank reported 21 primary dealers on March 21, 2013. *http://www.newyorkfed.org/markets/pridealers_current.html.*

[20] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[21] The burden is estimated as follows: 3,944 financial institutions × 4 hours = 15,778 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: (3,944 financial institutions × 4 hours) × $198.25 = $3,127,949.

Summary

In sum, the Department estimates the total burden for the amended PTE 1975–1 is 15,778 hours at a total equivalent burden cost of $3,127,949. The total cost burden is estimated to be de minimis. The Department assumes that required records are maintained by the relevant affected entities, the broker-dealers and banks. Thus, there are no additional tasks performed outside of those performed by the brokerage firms and banks.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75–1 (Security Transactions with Broker-Dealers, Reporting Dealers and Banks).

OMB Control Number: 1210–0092.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 3,944.

Estimated Number of Annual Responses: 3,944.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 15,778 hours.

Estimated Total Annual Burden Cost: $0.

Amendments to PTE 86–128

Affected Entities

Using data from 2021 Form 5500, the Department estimates that 1,257 unique plans hired service providers denoting on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 also reported that they provided investment management services or received investment management fees paid directly or indirectly by the plan.[22] Based on these values, the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate.

In the proposal, a few commenters expressed concern that disruption would be caused by the amendments. One commenter expressed concern that the removal of investment advice would increase costs to retirement investors, as entities would need to comply with PTE 2020–02. The Department did not receive comments specifically addressing the Department's estimates of the number of entities that would continue to rely on PTE 86–128 under the proposed amendments and did not receive any which directly discussed plan reliance on PTE 86–128.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.[23] Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 1986–128.[24]

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department believes that in trying to capture financial entities engaging in cross trades with discretionary control, the number of dual-registered broker-dealers that render services to retirement plans provides an accurate estimate. As of December 2022, there were approximately 456 broker-dealers registered as SEC- or state-registered investment advisers.[25] Consistent with the assumptions made about broker-dealers affected by the amendments to PTE 2020–02, the Department estimates that 55 percent, or 251 broker-dealers will be affected by the amendments.

The Department requested comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data. The Department did not receive any comments.

Written Authorizations, Evaluations, Forms, Reports, and Statements

Written Authorization From the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of new plans entering into a relationship with a transacting fiduciary are required to provide the transacting fiduciary with an advance written authorization to perform transactions for the plan. The Department estimates that there are approximately 75 plans that are new or that enter new arrangements each year.[26] Therefore, the Department estimates that approximately 75 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per plan reviewing the disclosures and preparing an authorization form. This results in a burden of 19 hours with an equivalent cost of $3,107.[27]

To produce and distribute the authorization, the Department assumes that 100 percent of plans will use traditional electronic methods at no additional burden. The Department assumes that clerical staff will spend five minutes preparing and sending the authorization, resulting in a burden of approximately 6 hours with an equivalent cost of $412.[28]

In total, the written authorization requirement is expected to result in a total burden of 25 hours with an equivalent cost of $3,520.

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[22] Estimates based on 2021 Form 5500 data.

[23] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[24] The number of new plans is estimated as: 1,000 plans × 7.5 percent of plans are new ≈ 75 new plans.

[25] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[26] 75 plans that are new or that enter new arrangements each year.

[27] The burden is estimated as follows: 75 plans × (15 minutes per plan ÷ 60 minutes) ≈ 19 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [75 plans × (15 minutes per plan ÷ 60 minutes)] × $165.71 per hour ≈ $3,107.

[28] The burden is estimated as follows: 75 plans × (5 minutes per plan ÷ 60 minutes) ≈ 6 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [75 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $412.

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	19	$3,107	19	$3,107
Clerical	6	412	6	412
Total	25	3,520	25	3,520

Note: The total value may not sum due to rounding.

Provision of Materials for Evaluation of Authorization of Transaction

Prior to a written authorization being made, the authorizing fiduciary must be provided by the financial institution with a copy of the exemption, a form for termination of authorization, a description of broker's placement practices, and any other reasonably available information. This information is assumed to be readily available.

To produce and distribute the materials, the Department assumes that 100 percent of financial institutions will use traditional electronic methods at no additional burden. The Department estimates that a clerical staff member will spend five minutes to prepare and distribute the required information to the authorizing fiduciary. This information will be sent to the 75 plans entering into an agreement with a financial institution, and based on the above, the Department estimates that this requirement results in a burden of 6 hours with an equivalent cost of $412.[29]

TABLE 3—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVISION OF MATERIALS FOR TRANSACTION AUTHORIZATION

Activity	Year 1		Subsequent Years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	6	$412	6	$412
Total	6	412	6	412

Provision of an Annual Termination Form

Each authorizing fiduciary must be supplied annually with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the 251 affected transacting fiduciaries will spend on average 15 minutes preparing the termination forms, which results in a burden of 63 hours with an equivalent cost of $10,390.[30]

To produce and distribute the termination form to the 1,000 plans, the Department assumes that 100 percent of financial institutions will use traditional electronic methods at no additional burden. The Department estimates that clerical staff will spend five minutes per plan preparing and distributing the termination forms resulting in a burden of 83 hours with an equivalent cost of $5,499.[31]

In total, providing the annual termination form is expected to impose a burden of 146 hours with an equivalent cost of $15,889.

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVISION OF THE ANNUAL TERMINATION FORM

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	63	$10,390	63	$10,390
Clerical	83	5,499	83	5,499
Total	146	15,889	146	15,889

Transaction Reporting

The transacting fiduciary engaging in a covered transaction must furnish the authorizing fiduciary with either a conformation slip for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation already is required under

[29] The burden is estimated as follows: 75 plans × (5 minutes per plan ÷ 60 minutes) ≈ 6 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [75 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $412.

[30] The burden is estimated as follows: [251 transacting fiduciaries × (15 minutes per financial institution ÷ 60 minutes)] ≈ 63 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [251 transacting fiduciaries × (15 minutes per financial institution ÷ 60 minutes)] × $165.71 per hour ≈ $10,390.

[31] The burden is estimated as follows: 1,000 plans × (5 minutes per plan ÷ 60 minutes) ≈ 83 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [1,000 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $5,499.

SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending conformation slips, no additional hour and cost burden will occur.

Annual Statement

In addition to the transaction reporting requirement, transacting fiduciaries are required to send an annual report to each of the 1,000 authorizing fiduciaries [32] containing the same information as the quarterly report and also containing all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio.

In addition, it is assumed that the information that must be sent annually could be sent together; therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement. Therefore, no additional hour or equivalent cost burden has been reported.

Report of Commissions Paid

A discretionary trustee must provide an authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis. The collecting and generation of the information for the quarterly report is reported as a cost burden. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually.

A financial institution who is a discretionary trustee must provide each of the 1,000 authorizing fiduciaries with an annual report showing commissions paid to affiliated and non-affiliated brokers, on both a total dollar and a cents-per-share basis. As the report is sent annually, it is assumed that it could be sent with the transaction report. The Department estimates that 100 percent of financial institutions will use traditional electronic methods at no additional burden.

Financial institutions are required to report specific transaction fees and information to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the financial institution $3.30 per plan to track this information.[33] With approximately 1,000 affected plans, this results in a cost burden of approximately $3,300 annually.[34]

In total, providing the report is expected to impose a total cost burden of $3,300.

TABLE 5—HOUR BURDEN AND COST ASSOCIATED WITH REPORT OF COMMISSIONS PAID

Activity	Year 1		Subsequent years	
	Burden hours	Cost burden	Burden hours	Cost burden
Clerical	0	$3,300	0	$3,300
Total	0	3,300	0	3,300

Summary

In total, the conditions of this exemption will result in the production of 44,821 disclosures.[35] The Department assumes that 100 percent of plans and financial institutions will use electronic methods to distribute the required information, at de minimis burden. Production and distribution of disclosures will result in an overall hour burden of 177 hours with an equivalent cost of $19,821 and an overall cost burden of $3,300.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision to an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86–128 (Securities Broker-Dealers).

OMB Control Number: 1210–0059.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 326.

Estimated Number of Annual Responses: 4,150.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 177 hours.

Estimated Total Annual Burden Cost: $3,300.

Amendments to PTE 77–4, 80–83 and PTE 83–1

The Department has determined that PTE 77–4 and PTE 80–83 do not have information collections impacted by the removal of advice from the exemption. There is no paperwork burden related to PTE 83–1.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [36] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[37] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [38] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year

[32] 1,000 plans.

[33] This estimate is based on information from a Request for Information and from industry sources.

[34] 1,000 plans × $3.30 = $3,300.

[35] The total number of disclosures is calculated in the following manner: (75 Written authorization disclosures) + (75 Provision of materials for evaluation of authorization of transaction) + (1,000 Annual termination form) + (1,000 Annual Statement) + (1,000 Report of Commissions Paid) + (1,000 Information and fee tracking) = 4,150 disclosures.

[36] 5 U.S.C. 601 *et seq.*

[37] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

[38] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, these amended exemptions do not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and in the preamble to PTE 84–24, there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that ''ERISA leaves room for complementary or dual federal or state regulation'' of insurance.[39] The Department designed the final Regulation and exemptions to complement State insurance laws.[40]

The Department does not intend for these amendments to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe these amendments have federalism implications because they have no 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.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and/or Code section 4975(c)(2) does not relieve a fiduciary, or other party in interest with respect to a plan or IRA, from certain other provisions of ERISA and the Code, including but not limited to any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge their duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirements of Code section 401(a), including that the plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries;

(2) In accordance with ERISA section 408(a) and Code section 4975(c)(2), and based on the entire record, the Department finds that this final amendment to class exemptions is administratively feasible, in the interests of plans, their participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the plan and IRA owners;

(3) The final amendment to the class exemptions is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The final amendment to the class exemptions is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is granting the following amendments to class exemptions on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[41]

Amendments to Class Exemptions

Prohibited Transaction Exemption 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

The Department amends Prohibited Transaction Exemption 75–1 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

I. Part III, *Underwritings,* is amended by inserting a new section III(h) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

II. Part IV, Market-making, is amended by inserting a new section IV(g) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

[39] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[40] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to ''impair'' a State law is to hinder its operation or ''frustrate [a] goal of that law.'' *Humana Inc.* v. *Forsyth,* 525 U.S. 299, 308 (1999).

[41] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, subpart B (89 FR 4662 (January 24, 2024)).

III. Part V, Extension of Credit, is amended by adding new Section (c) as follows and redesignating Sections (c) and (d) as Sections (d) and (e), respectively:

(c) Notwithstanding section (a)(2), a fiduciary under ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if:

(1) The terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties;

(2) Prior to the extension of credit, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This section (c)(2) will be considered satisfied if the plan or IRA receives the disclosure described in Securities Exchange Act Rule 10b–16;[42]

For purposes of this exemption, the terms ''party in interest,'' ''disqualified person'' and ''fiduciary'' shall include such party in interest, disqualified person, or fiduciary, and any affiliates thereof, and the term ''affiliate'' shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21 and 26 CFR 54.4975–9. Also, for the purposes of this exemption, the term ''IRA'' means any account or annuity described in Code section 4975(e)(1)(B) through (F).

Prohibited Transaction Exemption 77–4, Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans

The Department amends Prohibited Transaction Exemption 77–4 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

A new section II(g) is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code 4975(e)(3)(B) and regulations thereunder.

Prohibited Transaction Exemption 80–83, Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds To Reduce or Retire Indebtedness to Parties in Interest

The Department amends Prohibited Transaction Exemption 80–83 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Transaction Exemption 83–1, Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts

The Department amends Prohibited Transaction Exemption 83–1 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Prohibited Transaction Exemption 86–128, Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers

The Department amends Prohibited Transaction Exemption 86–128 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

I. New sections II(d) is inserted as follows:

(d) *Exception.* No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

II. Section III(a) is amended to read as follows:

''The person engaging in the covered transaction is not a trustee (other than a nondiscretionary trustee) or an administrator of the plan, or an employer any of whose employees are covered by the plan. Notwithstanding the foregoing, this condition does not apply to a trustee (other than a nondiscretionary trustee) that satisfies Section III(h) and (i) of this exemption.''

III. Section IV(b)(1) is deleted, and Sections IV(b)(2) and (3) are redesignated as Sections IV(b)(1) and (2).

IV. Section IV(c) is amended to read as follows:

(c) Recapture of profits. Sections III(a), III(h), and III(i) of this exemption do not apply in any case where the person engaging in a covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction.

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

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[42] 17 CFR 240.10b–16.

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